

PUBLIC CONTRACTS REVIEW BOARD

Case 1180 — Gozo Channel (Operations) Ltd - Preliminary Market Consultation – Fast Ferry Services

The publication date of the preliminary market consultation document was the 2nd February 2018 whilst the deadline for submission of responses was the 23rd February 2018. The parties were advised of the outcome of the process on 13th April 2018.

Virtu Holdings Ltd filed an appeal on 20th April 2018 against Gozo Channel (Operations) Ltd following the rejection of its offer which was considered to be ‘not the most financially competitive offer’

On 25th 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:

Appellants – Virtu Holdings Ltd

Dr Adrian Mallia	Legal Representative
Dr Ann Fenech	Legal Representative
Mr Matthew Portelli	Representative
Mr Francis Portelli	Representative
Mr Henry Saliba	Representative
Mr John Portelli	Representative

Recommended Bidder – Island Ferry Network Ltd

Dr Alessandro Lia	Legal Representative
Mr Edward Zammit Tabona	Representative
Mr Antoine Portelli	Representative

Contracting Authority – Gozo Channel (Operations) Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr George Bugeja	Legal Representative
Dr Simon Schembri	Legal Representative
Mr Joe Cordina	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board welcomed the parties and asked for submissions to be made.

Dr Antoine Cremona, Legal Representative for Gozo Channel (Operations) Ltd (herein after referred to as Gozo Channel) stated that prior to the start of the submission he wished to make a preliminary point regarding the further appeal made by Virtu Holdings Ltd (herein after referred to as Virtu) which was intrinsically tied to this appeal and he requested that both appeals should be heard together.

The Chairman said that the Board had discussed this matter and decided to hold separate hearings as the second appeal depends on the outcome of today's hearing.

Dr Alessandro Lia, Legal Representative of Island Ferry Networks Ltd (herein after referred to as Island Ferry) pointed out that as an interested third party in this appeal he had not been notified of the latest procedure.

The Chairman mentioned that it is being claimed that a contract had been signed between Gozo Channel and Island Ferry, and if this was so the Board wanted to see proof of this.

Dr Adrian Mallia, Legal Representative for Virtu, by way of background information, stated that the Ministry for Transport issued a Request for Proposals to seek an operator to provide a conventional ferry and fast ferry service for passengers and vehicles between Malta and Gozo. Gozo Channel decided to issue, in May 2017, a preliminary market consultation (pmc) seeking partners to provide a fast ferry service. Virtu applied and was chosen as the best offer. At this stage the tender deadline (originally 31 July 2017) was extended to the end of January 2018. Subsequently the Ministry issued a new Request for Proposals and the first PSO tender was cancelled. The new PSO was similar to the first but additional services on other routes from additional points were included, but not mandatory. Gozo Channel issued a new pmc and on the 13th April advised Virtu that they had not been selected. The selection by Gozo Channel was not correct and was not based on merit.

Dr Mallia continued by stating that Gozo Channel gave three reasons why the Board should not interfere or scrutinise their decision – firstly that this was a pmc and therefore Virtu could not seek a remedy through the PCR; secondly a market consultation does not lead to a choice of partner and thirdly Gozo Channel claimed it is merely a process leading to a tender. Dr Mallia contended that if this was a real and genuine market consultation then Gozo Channel would be right and there would be no remedy before the PCR. According to Public Procurement Regulations 47 (i) it clearly states that before launching a public procurement process a contracting authority may conduct a market consultation. He tabled Contracts Circular 19/2016 of the new PPR giving guidance from the Director of Contracts on public procurement and market consultations. The real object of a market consultation was to test the market, to allow an authority to seek advice and in planning but the crucial point is that it does not include selection.

In this case before the Board there was selection and therefore it was not a market consultation. The claim by the Contracting Authority that this was not procurement and thus the PCRБ could not be involved was not sustainable. Gozo Channel's own website lists the market consultation as procurement. The Government e-tender website lists the pmc as a procurement type service and was give a CPV code in the Government lists classifying it as a contract. The charter party agreement to hire a vessel for a period of time as concluded by Gozo Channel is a contract and the latter's claim that it is conditional upon winning the tender bears no logic. A pmc does not lead to selection and one cannot call it a pmc if it does lead to selection. This is merely sophistry to avoid getting caught in public procurement regulations. There is no doubt that Gozo Channel is a contracting authority as they are listed in the schedule, and thus since this is a tender Virtu are perfectly entitled to object on the legality of the process.

Dr Ann Fenech, Legal Representative for Virtu, said that in a pmc the stress was on the word consultation and one cannot select. Gozo Channel selected a charter party therefore this is not a consultation. Here was a selection of a partner by Gozo Channel with whom they entered into a charter party for money using the pmc to circumvent the PPR. The pmc was used to find a partner to supply the fast ferry service and there will be no tender for that because the tender is a 'fait accompli'. If Gozo Channel were to win a subsequent tender it will be on the back of the selected fast ferry service provider – for the fast ferry service there will be no tender and therefore the selected party will not be liable to be scrutinised.

Dr Antoine Cremona, Legal Representative of Gozo Channel, said that if the principles of PPR were taken 'in vacuo' as the other side has done then they would be absolutely correct – however this is not what happened – it is a question of substance over form. The PCRБ can if it wishes reclassify what happens in reality to its real form. In this case there is no procurement, there is no purchasing taking place nor services given – only that event give rise to and creates a tender, and where PPR apply it is the purchasing aspect that leads to a tender. The point in time when purchasing through public funds takes place is the stage when a PSO is awarded. PPR only comes into force when a transfer of funds takes place from the State to a private sector: this is the only exercise covered by these regulations. In this exercise before the Board no transfer of public funds is taking place – Gozo Channel is merely selecting a partner with whom to participate to win the bid. They did not need to go through this process as Government entities can bid for public tenders, but within the time frame of the public procurement process if the choice of partner had gone to tender it would 'have missed the bus'. There is no guarantee that the eventual choice of a partner by Gozo Channel will not be subject to recourse before or after selection.

Dr Cremona made an analysis of how six European jurisdictions regulated the choice of partner before tender quoting for example Belgium (where there are no guidelines), Germany (choice of partner is uncharted territory) Britain and Ireland (similar). Gozo Channel both internationally and locally sought a partner openly and was consistently correct in the process followed. The process is not caught by PPR as it is simply the selection of a partner and there is no form of procurement. In this appeal we are dealing only with the 2018 selection as after all it was the

Government, not Gozo Channel who changed the process, and if the Board wishes to independently analyse the differences between the 2017 and 2108 tenders then it will become clear that in both cases the principal object was to choose a partner to win the bid.

Dr Alessandro Lia, Legal Representative of Island Ferries stated that there is a need to highlight the three points already made that this process is not a tender. The Contracting Authority is a prospective bidder to participate in the PSO, not in a tender; Gozo Channel is not purchasing any service – the public contract in this case does not exist until it materialises if and when the PSO is awarded.

At this stage the Chairman pointed out to the parties that according to section 87 (d) and (e) of the PPR it is the duty of the Board to hear and determine cases even if a call does not involve procurement.

Dr Cremona said that the witness about to be heard who was an evaluator in the first process should only deal with the second process in his testimony.

Dr Fenech replied that since Gozo Channel dealt with the first process in at least six paragraphs of their submissions she was entitled to ask questions regarding that first process.

The Chairman ruled that the Board wished to hear all submissions to get a full picture.

Engineer Paul Cardona (536249M) testified on oath that he had been an engineer in the maritime sphere for 52 years. He was asked by Gozo Channel Board to assist in the selection of the high speed ferry offer. The original seven companies who had offered bids was shortlisted down to three and when a German firm withdrew it left Virtu and Island Ferry as the sole contenders. After going through the requirements and the financial information specified by the operating company, and several clarifications asked by Gozo Channel one bid was more financially attractive than the other.

Questioned by Dr Fenech witness stated that after examining various details submitted by the two parties the Adjudication Board was unanimous in their decision. Witness explained that the ISM (International Safety Management) Certificate was implemented by the IMO (International Maritime Organisation) to moderate the many casualties at sea. It required the appointment of a person to liaise with management to ensure safety in each particular type of craft – so a high speed craft needed an expert in that craft. Witness confirmed that he was not even aware of the 2018 process until he came across it in the media.

Engineer Kurt Gutteridge (499880M) testified under oath that he was a surveyor of Maltese ships since 2004 and was responsible for the certification of Maltese vessels.

Referring to various parts of the Gozo Channel prospectus when questioned by Dr Fenech, witness stated that the requirement was for a high speed ferry which would take 300 to 350 passengers, operating throughout summer and winter in the open seas with a long range notation of 90 miles. When questioned if Fortina Investments Ltd had experience of fast ferry services, witness replied that no reference to ferries was made in the presentation they received.

Witness, when questioned by the Chairman, if the Evaluation Committee had considered Fortina Investments fast ferry to be technically compliant, witness replied in the affirmative.

Further questioned by Dr Fenech, witness stated that his role was to write a report on the recommendation of the Committee which had only considered the proposal on how to put Gozo Channel in the best possible position to win the eventual PSO.

At this stage the witness was requested to withdraw (and not to confer with other witnesses) for the Board to deliberate on the objection by Dr Cremona on the validity of the questions witness was being asked.

The Chairman pointed out that the Board could have used a different procedure to deal with this case, but it had to fulfil its duty to listen to the disclosure of all the facts due to the publicity that this process had received.

Dr Cremona insisted that the questions witness was being asked would be valid if this were a tender document. There was a commercial point to consider – the tender was still open and there was a risk of the competition using information disclosed.

Engineer Gutteridge resumed giving evidence. Questioned by Dr Fenech he said that there was no reference to fast ferries in the technical criteria of Island Ferry. Witness was shown a copy of a tabled DOC (Document of Compliance) and referred to in Annex 5 para 3 of the tender document regarding the requirements of fast ferries. Witness held the view that a DOC was not required for vessel to operate in national waters.

The Chairman referred witness to Annex 2 which detailed the minimum specifications of each vessel and asked if these had been taken into consideration in reaching a decision. Witness replied that they had been taken into account.

Further questioned by the Chairman, witness confirmed that the preferred client was 100% compliant on all points required under Annex 2 and 5 but they had not considered the matter of the ISM Certificates.

Witness failed to reply to a question by Dr Fenech asking if Island Ferry had a DOC for high speed craft as demanded in Annex 5 para 3, whereupon she requested that the failure to reply by witness should be recorded in the minutes.

Dr Cremona requested that his objection to this question should also be recorded as follows:

“I object to the question on the basis that it is based on an incorrect interpretation of the provisions of Annex 5 page 42. The vessel documents for high speed passenger craft required of applicants are exhaustively listed in point 2 Annex 5. Point 3 refers to completely different requirements. In addition the information requested is of highly sensitive commercial nature and can prejudice Gozo Channel’s offer in response to the PSO tender.”

Dr Lia also wanted to object to the question in the following terms:

“Island Ferries Network Ltd adheres to Gozo Channel’s objections and further underlines that the question requested by Virtu Ferries has already been asked directly to the witness by the Board and witness has already replied positively and unconditionally to this question”.

Dr Fenech commented that in all probability Island Ferry did not have a DOC otherwise they would have exhibited it. It was a cardinal point as to whether the preferred partner had a DOC, and this point has obviously not been dealt with by the witness.

The Chairman said that the Board does not have a proper Evaluation Report – there are documents missing and therefore it is deficient. However it is clear that the chosen party had to amend certain things in their submissions, therefore they are not totally compliant. A DOC is not included in the submissions and could not have been seen by Gozo Channel. Also it is noted that the unsuccessful party too had to amend certain things in their submissions.

Witness agreed that both submissions needed amendments.

Dr Cremona said that this was not a tender but a pmc and both parties had to rectify their offers. The remit of the Evaluation Committee was to find the best partner to win the PSO and in meeting the requirements of clause 9.5.9 of the tender document only Gozo Channel could be compliant.

In reply to further questions witness said that the financial aspect was given a higher priority than the technical side in the evaluation process, to which Dr Fenech asked how it was possible to conclude that Island Ferry had the best offer if they were deficient in experience, resources and financial backing.

Mr Simon Azzopardi (107268M) testified on oath that his profession was banking, and his current employment was as an executive in the office of the Chairman of the Bank of Valletta. He had no expertise in maritime affairs and during the evaluation the technical side had been in the hands of an engineer. Witness explained that throughout the process they sought the best way to assist Gozo Channel to find the preferred partner. The evaluation was based on the guidelines given to them by the Chairman of Gozo Channel, and they had not gone into the details of the PSO.

At this stage witness was asked to withdraw while legal submissions were made.

Dr Mallia mentioned that Gozo Channel was claiming that this is not a procurement process but they were simply seeking a partner. In reality what they had done was to seek a sub-contracting partnership with a charter party who is to be paid for their services – that is pure procurement.

Dr Cremona said that the choice of a charterer does not fit with PPR at this stage. There was no use of public funds involved – that is the only criterion whether it was public procurement or not.

Dr Fenech disagreed and pointed out that the question to be considered by the Board was that if as a result of the market consultation Gozo Channel was successful, it is going to be bound by the present process. There will be no further tender to select a fast ferry provider, but one for both services, therefore when Gozo Channel wins it will be with this fast ferry operator and there can be no scrutiny.

Dr Cremona said that there is no provision under PPR for the issue of a double tender - at this stage Gozo Channel is merely choosing a partner, and they had no obligation to go public.

The Chairman pointed out that under section 47 of the PPR the authorities may, prior to issuing procurement procedures, conduct a market preliminary consultation with a view to preparing plans and requirements by the operator.

Dr Clement Mifsud Bonnici, Legal Representative of Gozo Channel, said that his clients had met the Director of Contracts who had vetted the draft of the pmc and approved it as a market consultation exercise.

Dr Fenech said that the pmc approved by the Director of Contracts, specifies that any interested party has to have the competences to meet the requirements of the tender – these are the minimum criteria required, and what she was trying to establish from the witness is whether these criteria were met.

Mr Azzopardi was recalled to resume his testimony. Referred to page 115 section (d) (b1) (b2) and (b3) of the tender criteria witness stated that these had not been taken into consideration in the evaluation. He re-iterated that the terms of reference set by Gozo Channel was to put them in the best position to choose a partner. The Evaluation Committee only considered the Gozo Channel point of view, and they had not considered the profitability of the competing parties.

When asked by Dr Fenech to examine the Memorandum and Articles of Association of Fortina Development Ltd and Fortina Contracting Ltd witness read out that the Directors in both companies were Mr Edward Zammit Tabona, Mr Antoine Portelli and Mr Deo Scerri.

Dr Lia objected to this line of question, which he considered to be an unusual implication since Mr Deo Scerri had resigned all directorships once appointed Chairman of Bank of Valletta.

Dr Fenech said that there were no implications – she was merely trying to examine the facts. Mr Deo Scerri had been a director of the Fortina Companies till the 4th October 2017.

The Chairman said that he would not allow persons to be named in the wrong context.

The next witness called was Mr Joe Cordina (55762G) who testified on oath that he was the Chairman of Gozo Channel. He stated that the Evaluation Board selected one party as being the best for Gozo Channel to win the tender and they had followed the Committees' recommendation. Asked to confirm if Gozo Channel had signed a contract for a time charter he confirmed that they were looking for someone to operate a fast ferry under a charter agreement. Island Ferry and Gozo Channel were to operate this service, and under the contract the former would receive the rate of charter hire.

Mr Matthew Portelli (541684M) testified on oath that he was a Director of Virtu Holdings and Virtu Ferries. He tabled a history of the Companies including financial and commercial figures and confirmed that Virtu were an interested party in the Pre-Contract Remedy case. Virtu had informed Gozo Channel that if they were chosen in the joint venture they would not participate in the PSO and their offer was based on that premise. Virtu had been interested in being involved in the Gozo route since 1990 either with Gozo Channel or directly with others. He stated that Virtu is presently pursuing two options – either to bid with Gozo Channel or independently.

Dr Cremona commented that Virtu was following a procedure to lengthen the process, and this had now been confirmed under oath. The minute witness confirmed that Virtu was bidding solely for the PSO they lost all juridical interest in this case.

Gaetano Mallia (163469M) testified on oath that he was a Captain, Master Mariner Class 1 and Fleet Marine Superintendent and Safety Officer for Virtu Ferries. He explained that the DPA (Designated Person Ashore) was the link between management and the vessel in matters regarding safety. The DOC was a requirement for vessels after their systems had been audited by a recognised organisation, and the systems comply with ISM requirements. The DOC applies to high speed craft, which is regulated by the IMO according to the Safety at Sea Convention (SOLAS) code which regulates construction, safety etc. There are no different specifications for DOCs between local and international waters – all high speed craft has to have them. (Copy of DOC tabled).

Dr Mallia tabled details from the Registry of Companies showing that Island Ferries Network Ltd, Magro Brothers Investments and Fortina Investments Ltd had only been very recently registered.

Mr Joseph Cuschieri (202868M) stated on oath that he was the CEO of the MFSA and was the Chairman of the Evaluation Committee, which consisted of three members. Engineer Guttridge was responsible for the technical aspect and Mr Simon Azzopardi for the financial analysis. The Committee met the bidders on two occasions when they were asked for presentations and to elaborate on their submissions. There were also a number of clarifications sought. Both offers were good but Island Ferry was superior on the financial side – the weighting in the evaluation process was 25% technical and 75% financial.

Questioned by Dr Fenech, witness did not recall if there were any discussions on the details and criteria in the PSO documentation or on the requirements of a DOC. They had evaluated on the technical and financial criteria they had in hand, and the Committee considered that all the requirements of the tender had been met.

Next to testify was Dr Simon Schembri (304676M) who was exempted from professional secrecy restrictions and testified on oath. He said that he wanted to explain clarification 14 in the PSO documentation. Witness stated that he was asked by Gozo Channel to attend, together with two of their representatives, a clarification meeting held at the Ministry for Transport on 23rd March 2018. The clarification centred on who was obliged to complete Bid Form 3 and the decision was that whoever was bidding as a joint venture or sole bidder had to fill in Form 3, but that sub-contractors were exempt and had to fill a different form as stipulated in PSO section 9.5.23.

Dr Mallia requested the Chairman to allow written rather than oral submissions to enable the Board to better study such submissions. In reply Dr Cremona said he would abide by the Board's decision but this would create a precedent.

Dr Mallia then went on to say that the Board should consider the context of this appeal which was about a tender issued by the Ministry for Transport for a long-established service and a new service that Gozo Channel had no experience in. Gozo Channel issued a pmc to find a partner for their bid – this, however, was not a pmc. The chosen candidate does not have the necessary requirements, and according to the company registration documents the successful company had only been registered on 10th April 2018 – three days before Virtu was notified that they had not been selected. The issued share capital of this new company was only € 10,000 and of the two shareholders Magro Bros were mainly involved in foodstuffs, while Fortina Investments Ltd had only been formed a few months ago. There was a vast difference between the resources of the contesting bidders with Virtu having a long successful track record. Gozo Channel was seeking the experience they did not have in fast ferry operations. No evidence has been produced that Island Ferry had any experience in operating fast ferries or that they had the technical expertise. Engineer Kurt Guttridge had testified that no DOC was necessary in this case – totally contradicted by the evidence of Captain Gaetano Mallia who stated that a certificate was essential to operate a fast ferry, and it is surprising that the Contracting Authority did not seek assurance on this point. The selection of Island Ferry was not justified and no proof had been

produced to justify the selection made and no defence provided for the choice. The other parties' argument had been to ask Virtu to 'prove it' but this reasoning was lopsided as they had given no reason for the choice made and no attempt had been made to justify the choice on merit. As regard the issue of procurement it is evident that Gozo Channel is a Contracting Authority, who themselves had twice referred to 'tender' or 'procurement' on their own website; Mr Simon Azzopardi in his testimony had stated 'we commissioned this service' which as soon as he realised what he had said had changed it to 'we chose him as a partner'. Although this procedure was characterised as a choice of partner in reality it was an exercise in choosing a sub-contractor for a charter party to procure a service, and this had been confirmed by witnesses.

The Chairman at this stage mentioned that the Board would accept submissions in writing.

Dr Cremona said that he was still trying to understand the basis of this appeal. The chosen party was expected to commit solely to Gozo Channel and was not to submit an own bid. It is now certain that Virtu are building a bid for the PSO – they have therefore lost all juridical interests as they are in breach of the terms and cannot carry on with their appeal. If in their decision on this case the PCRB were to establish that to find a partner you have to issue a tender they would kill completely any tendering by public bodies – the issue at best is unregulated or a grey area. This pmc was published widely, locally and internationally, and went through all the necessary motions including the Director of Contracts. What was published in reality as detailed in the Gozo Channel specifications referred to the eventual tenderers not to the present pmc and if the other party does not agree it does not mean that this view is not correct. The PSO is clear on what is required of the tenderer and it cannot be decided on the facts heard today.

The Chairman commented that today's case deals with the principles involved in which case depending on the outcome the other could fall.

Dr Lia expressed appreciation that the Board had allowed the hearing to proceed. This was not a case of procurement – Gozo Channel was not acting as a Contracting Authority – it did not want to give anything to anyone but to be tied up with someone. Regulation 78 (f) was not dealing with procurement procedure and made no reference of appeals to PCRB. The testimony of Matthew Portelli showed that Virtu are interested in both processes – they are choosing two routes – if one fails they will use the other. The juridical interests of Virtu ceased when they submitted or declared that they would submit a bid. The PLC document referred to four points on the fast ferry service and witness had stated that, after adjustments, submissions were in order and his clients expect to give 35/40 years service in ferrying people.

Dr Mallia said that the issue of juridical interest was not proof or defence on the merits of the case. Asking for a precontractual remedy does not mean that that party means to bid. Virtu did not bid and there was therefore no infringement.

Dr Fenech pointed out that Matthew Portelli did not say that Virtu did bid – he said that they had followed the correct procedure when in their letter of the 23rd February when negotiating with Gozo Channel they had stated if they were chosen as sub-contractors it would be exclusive but the situation may alter in future.

The Chairman in closing the hearing said that as agreed all parties were to exchange submissions in writing simultaneously by the 2nd July at midday.

He then thanked the parties for their submissions and declared the hearing closed.

Submissions in writing were subsequently sent by Gozo Channel, Virtu and Island Ferry and are attached to these minutes as Addenda A (Virtu Ferries) B (Island Ferry Network Ltd) and C (Gozo Channel (Operations) Ltd

This Board,

having noted this Objection filed by Virtu’ Holdings Limited, (hereinafter referred to as the Appellants), on 20 April 2018, refers to the contentions made by the same Appellants with regards to the “*Preliminary Market Consultation – Fast Ferry Services,*” issued by Gozo Channel (Operations) Limited and listed as Case No 1180 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Adrian Mallia

Dr Ann Fenech

Appearing for Gozo Channel (Operations) Limited: Dr Antoine Cremona

**Dr Clement Mifsud
Bonnici
Dr Simon Schembri**

Whereby the Appellants contend that:

- a) On a preliminary basis, they informed this Board that they had filed a complaint to the Director of Contracts to sanction the action taken by Gozo Channel (Operations Limited), for having failed to abide by the provisions of the Public Procurement Regulations and in this regard Virtu' Holdings Limited are requesting that the decision of this Board, on this Appeal, should be suspended until the Director of Contracts decides on the complaint so submitted by them.**

- b) Without prejudice to the above, the Appellants' main grievances are:**
 - i) That the chosen partner by Gozo Channel (Operations) Limited, (Gozo Channel), do not possess the necessary capabilities to operate a *“fast ferry service”*.**

ii) Same chosen partner does not have the necessary experience to meet the requirements in operating a “fast ferry service”;

iii) That the chosen partner does not have the required economic standing to achieve the desired objective.

This Board has also considered Gozo Channel (Operations) Limited’s “Reasoned Letter of Reply” dated 27 April 2018 and its verbal submissions during the Public Hearing held on 25 June 2018, in that:

a) On a preliminary basis, Gozo Channel (Operations) Limited insists that:

i) The remedies provided in the Public Procurement Regulations do not apply to “Preliminary Market Consultations.”

ii) The objective of the “Preliminary Market Consultations” does not, in any way, involve a form of Public Procurement;

iii) In this specific case, Gozo Channel (Operations) Limited cannot be considered as the Authority for a Public Procurement, but rather as a prospective bidder for the second PSO Tender;

iv) Without prejudice to the above, the Appellants maintain that their grievances, brought forward in this Appeal, were never contested by the same and in fact, Virtu Holdings (Limited) submitted their offer, in the first place.

This same Board also noted the lengthy testimony of the following witnesses namely:

- 1) Ing Paul Cardona duly summoned by Virtu' Holdings Limited;**
- 2) Ing Kurt Gutteridge duly summoned by Virtu' Holdings Limited;**
- 3) Mr Simon Azzopardi duly summoned by Virtu' Holdings Limited;**
- 4) Mr Joe Cordina duly summoned by Virtu' Holdings Limited;**
- 5) Mr Matthew Portelli duly summoned by Virtu' Holdings Limited;**

6) Capt Gaetano Mallia duly summoned by Virtu' Holdings Limited;

7) Mr Joseph Cuschieri duly summoned by Gozo Channel (Operations) Limited;

8) Dr Simon Schembri duly summoned by Gozo Channel (Operations) Limited.

This Board has also taken note of the following documents submitted by Virtu' Holdings Limited, namely:

1) Tender Document 018-0026/18;

2) Document of Compliance for Virtu' Ferries Limited;

3) Background information regarding the Virtu' Group;

4) Memorandum and Articles of Association of Fortina Developments Limited;

- 5) **Company Information extracted from the Registry of Companies regarding Islands Ferry Network Limited;**
- 6) **Company Information extracted from the Registry of Companies regarding Magro Brothers Investments Limited;**
- 7) **Company Information extracted from the Registry of Companies regarding Fortina Investments Limited;**
- 8) **Circular 19/2016 issued by the Department of Contracts on 3 November 2016.**

This Board would respectfully point out that it had decided to hear all the issues raised by the Appellants so as to establish and determine the nature of this “*Preliminary Market Consultation*” and whether such an invitation constitutes a Public Procurement which is regulated by the Public Procurement Regulations.

- i) **With regards to Virtu’ Holdings Limited’s preliminary plea whereby the latter requested that the decision of this Board is not delivered**

pending the reply to their letter to the Director of Contracts, this Board does not find any justifiable reason to comply with such request as a possible reply from the Director of Contracts will not affect the issues and their outcome which are being considered by this Board;

- ii) On a preliminary basis, Gozo Channel (Operations) Limited is insisting that this appeal cannot be considered as a remedy, simply due to the fact that the remedies available in the Public Procurement Regulations do not apply to the “*Preliminary Market Consultations.*” In this regard, prior to entering into the merits of such a plea, this Board would establish what constitutes a “*Preliminary Market Consultation.*”

Prior market consultations are particularly relevant for complex procurements that require significant preparation, such as framework agreements and procurements of innovative solutions. In particular, the Contracting Authority may need to assess whether the Procurement it is planning, is feasible from a technical, financial and operations point of view. In terms of market structure, the consultations may assess whether there is sufficient number of participants in the market to guarantee effective competition. From the input and feedback received, the Contracting Authority can apply more accurate and practical

specifications and such consultations will also enable the latter to obtain a more effective feel of the market. At this stage of consideration, this Board would point out that it is the Contracting Authority who conducts the preliminary market consultation

This Board is aware that the sole objective of this “*Preliminary Market Consultation*” is for Gozo Channel (Operations) Limited to be able to submit its offer for conventional and fast ferry service concession issued by the Ministry for Transport and Infrastructure. At this point in time, this Board opines that Gozo Channel (Operations) Limited cannot be considered as the Contracting Authority but rather a prospective Bidder for the concession. At the same instance, it is a known fact that Gozo Channel (Operations) Limited does not have the necessary resources and experience to operate a fast ferry service, so that the latter, the prospective Bidder, is purely seeking a partner for the fast ferry service operation, so as to submit its offer for the concession issued by the Ministry for Transport and Infrastructure. In this regard, this Board opines that the invitation issued by Gozo Channel (Operations) Limited should have been designated as a “*Call for Interest*” to participate and not as a “*Preliminary Market Consultation*”, the latter of which caused a confusion of interpretation of the action taken by the

same in seeking a partner for fast ferry service. This Board would respectfully emphasize the fact that, under normal circumstances, a *“Preliminary Market Consultation”* is issued by a Contracting Authority and this Board has established that Gozo Channel (Operations) Limited cannot be regarded as the Contracting Authority but only as a Prospective Bidder to the concession.

iii) This Board would also point out that its jurisdiction is clearly laid out in Regulation 87 of the Public Procurement Regulations as follows:

“It shall be the function of the Review Board to address in particular:

a) concerns or complaints raised before the closure of a submission of a tender by candidates or persons having an interest in obtaining a particular public contract;

b) complaints raised by tenderers or candidates relating to exclusions, non-compliant offers, contract award decisions or cancellations of a procurement procedure after the closing date and time set for the submission of the said call;

c) requests for the ineffectiveness of a public contract as established in these regulations;

d) to hear and determine any cases assigned to it under these regulations or any other law; and

e) to hear and determine any cases assigned to it in a public call for tenders or quotations, even if such call does not involve procurement.

From the above provisions stipulated in the Public Procurement Regulations, this Board’s jurisdiction is to hear and treat any requests, complaints, appeals etc but only concerning public calls for tenders or quotations. In this regard and in this particular case, this Board could not credibly establish that the “*Preliminary Market Consultation*” issued by Gozo Channel could be possibly interpreted to mean a tender or a quotation, even less to include an indicative form of a public procurement.

iv) With respect to what constitute a “*Public Contract*”, this Board would refer to the definition as dictated in the Public Procurement Regulations, as follows:

“Public Contract means contracts for pecuniary interest concluded in writing between one or more Economic Operators and one or more Contracting Authorities and having as their object the execution of works, the supply of products or the provision of services.”

This definition deserves an in-depth interpretation as it mentions three important elements that constitute a “*Public Contract*”, as follows:

- **There must be a contract – In this particular case, there is a call for interest from one Economic Operator to another Operator to participate in partnership for the sole objective to submit an offer for a Public Service Obligation Tender;**
- **There must be pecuniary interest – In this particular case, there exists no financial element in seeking a partner for the submission of an offer to a Tender;**
- **There must be two parties to the contract namely, the Contracting Authority or Authorities and the Economic Operator or Operators – In this instance, there is no Contracting Authority involved, but two**

prospective Bidders namely, Gozo Channel (Operations) Limited and Virtu' Holdings Limited to the Public Service Obligation. In this regard, this Board does not find any credible justification to establish the identity of a Contracting Authority nor can it detect evidence that there was pecuniary interest involved in this call for a “*Preliminary Market Consultation*”, which, in this Board’s opinion was inappropriately designated as such.

In view of the above, this Board,

- i) does not uphold Virtu Holdings Limited’s preliminary plea to suspend this Board’s decision to this appeal, pending the reply to the letter sent to the Director of Contracts by the Appellants;**

- ii) Upholds Gozo Channel (Operations) Limited’s preliminary pleas, in that:**
 - Gozo Channel (Operations) Limited is not the Contracting Authority in this appeal;**

- The **“*Preliminary Market Consultation*”** issued by Gozo Channel (Operations) Limited to seek a partner, does not constitute any form of public procurement;
- The Public Procurement Regulations do not provide remedies to be heard by this Board in respect of **“*Preliminary Market Consultations*”**;
- Concludes that the sole objective for the issue of the **“*Preliminary Market Consultations*”** by Gozo Channel (Operations) Limited. This does not constitute a direct objective to represent a call for a tender or a call for concession.

Dr Anthony Cassar
Chairman
31st August 2018

Dr Charles Cassar
Member

Mr Carmel Esposito
Member