

PUBLIC CONTRACTS REVIEW BOARD

Case 1180/1 – Gozo Channel (Operations) Ltd – Preliminary Market Consultation – Fast Ferry Service – Appeal Court Decison 290/2018

The publication date of the call of the preliminary market consultation document was the 2nd February 2018. The parties were advised of the outcome of the process on the 13th April 2018.

Following a decision of the Public Contracts Review Board on the 31st August 2018 Virtu Holding Ltd appealed the decision and on the 11th March 2019 the Appeal Court decided to send the case back to the PCRB to decide thereon.

On 30th July 2019 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:

Virtu Holdings Ltd

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

Gozo Channel (Operations) Ltd

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

Islands Ferry Network Ltd

Dr Alessandro Lia	Legal Representative
Dr Paul Lia	Legal Representative
Mr Antoine Portelli	Representative

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and prior to inviting submissions stated that this case has been going on long enough and the Board

wishes to decide it by the 31st August. It will also deal with the matter of the affidavits since presented.

Dr Alessandro Lia Legal Representative of Islands Ferry Networks Ltd (hereinafter referred to as Islands Ferry) said that the Board should ignore the affidavits. They have been available since January 2019 yet were only presented three days before this hearing. There was a need to cross-examine the individuals who had sworn the affidavits – it was highly irregular that Mr Paul Cardona, a member of the first evaluation committee should be now testifying in favour of one of the parties involved in this Case.

Dr Ann Fenech Legal Representative of Virtu Holdings Ltd (hereinafter referred to as Virtu) said that the affidavits were to hand after the PCRB had heard the Case. The allegations made against Mr Paul Cardona's affidavit were totally unfounded. It was Gozo Channel who directly involved him in their submissions and therefore there was nothing wrong with seeking his explanation of events. It was impossible to examine the two persons resident in the UK at short notice but a short deferment would enable them to appear before the Board. If the Board accepts the affidavits it will enable it to come to a conclusion with all the facts laid out. Virtu had no interest, as alleged, to lengthen the proceedings – on the other hand they wanted to press on with the Case as they had suffered enough injustices through the many delays and she requested that the affidavits be accepted.

Dr Antoine Cremona Legal Representative of Gozo Channel (Operations) Ltd (hereinafter referred to as Gozo Channel) said that the criteria to be considered is what Virtu is trying to prove by the affidavits on facts that are already known to them. The submissions were closed at the previous hearing and cannot now be re-opened. He requested that the contents of the affidavits be ignored as if they never existed.

Dr Lia said that he objects strongly to the inclusion of these fresh documents after all submissions have been completed

The Chairman proposed a short recess to enable the Board to consider the points made.

On resumption of the hearing the Chairman stated that the Board had considered the request to accept the affidavits but was of the opinion that they had to be ignored as submissions had been concluded. It would now proceed with the actual hearing of the Case.

Dr Adrian Mallia Legal Representative of Virtu (Holdings) Ltd said that the legal issues in this matter had principally been sorted out by the Court of Appeal, and therefore what the Board now needed to do was to decide on the merits of the Case. Gozo Channel wanted to find a partner to meet their requirements. Clause 10.2.5 in the PSO states that whoever wins the tender must provide conventional and fast ferry service of the highest level – with use of words like skilled, trained, prudence, ability etc. Gozo Channel had to meet those standards for the conventional service and by a chosen partner for the fast ferry service. The question that arises is that their choice of Islands Ferry to provide this service would not meet those criteria and contractual requirements. Written

and other submissions indicated clearly that Islands Ferry did not meet these standards – quoting, as examples, the lack of experience, a new company with no financial background, the lack of International Safety Management (ISM) Certificate and Document of Compliance (DoC). On the question of merit it is clear that the party chosen should not have been selected as it fails the set tests.

Dr Mallia drew the Board's attention to Regulation 90 subsection 3 of the Public Procurement Regulations (PPR) which gives the Board the power to cancel a tender process even if not requested to do so. The procedure adopted by Gozo Channel was irregular and not in line with the PPR.

Dr Ann Fenech stated that what was before the Board in June 2018 was a device by Gozo Channel which was not a public procurement and was not within the remit of the PCRB, and consequently the Board did not fully go into the merits of the Case precisely because it was not procurement. The Court of Appeal changed all that when it decided that this was a case of pure procurement of a service.

Examining the original material of the market consultation document shows clearly that Gozo Channel were looking for a partner for its fast ferry service with the necessary expertise and resources to provide this service - that was their only requirement. It stands to reason that if Gozo Channel had this expertise and necessary resources it would not have sought a partner. It makes no sense for Gozo Channel to engage someone with no expertise, as it would have left them in the same position as before, and therefore they expected a partner who had all the attributes asked for. The point that Virtu are making is that all the technical and financial requirement set out were totally ignored as if they never existed and instead Gozo Channel appointed an entity which was completely unsuitable. The surprise is how Islands Ferry were even ever considered let alone how they were ever selected as the ideal partners. Engineer Guttridge, in his testimony, said that there was no reference to fast ferries in the technical criteria of Islands Ferry, that no DoC was required and that the preferred client was 100% compliant on all points required under Annexes 2 and 5 but they had not considered the matter of the ISM certificates. In fact, witness confirmed that Annex 5 had been totally ignored and the Board themselves had requested direct confirmation that no DoC existed in the submissions made. Regarding the requirement that the vessel had to have a notation of 90 nautical miles witness under oath had stated that the criteria in the tender had not even been considered and claimed that the evaluation committee's only concern was that Gozo Channel would win the tender. Witness confirmed that Islands Ferry did not meet any of the criteria set out in the technical specifications.

Dr Fenech continued saying that Islands Ferry also did not meet one single point of the financial criteria. When this was pointed out to witness, Mr Simon Azzopardi, his answer was that according to his assessment he did not take the criteria into consideration. He also repeated the point made by Engineer Guttridge that their brief was to give Gozo Channel the best chance of winning the tender. Dr Fenech concluded by saying that when considering the merits of the case the PCRB had

to start from scratch and examine closely all the evidence. Islands Ferry should have been disqualified from the start.

Dr Clement Mifsud Bonnici Legal Representative of Gozo Channel (Operations) Ltd referring to Regulation 38 of the PPR said that the procurement document must be clear and unambiguous. Gozo Channel claim that the claimed requisites were not requested in the tender. So long as the bidder satisfies the requirements expected in the scheduled ferry services, which Gozo Channel fulfil with their many years experience, then the subcontractor does not have to meet the tender criteria as Gozo Channel satisfy these on their own – the only condition requested from the subcontractor was performance not experience. The reference to the DoC in Annex 5 is covered by the DoC of the conventional ferry owner under the principle of self limitation – Gozo Channel does not have to rely on someone else.

Dr Simon Schembri Legal Representative of Gozo Channel (Operations) Ltd referred to Bid Form 3 (Pages 109 to 135) and to a clarification meeting held on the 28th March 2018 with the Ministry for Transport when it was made clear that the tenderers were expected to have five years experience of operating scheduled ferry services. Details of subcontractors had to be provided according to clause 9.5.2.3 giving any relevant experience in ferry operations. All Gozo Channel was looking for was a subcontractor not a partner. Bid Form 3 did not apply to Islands Ferry or Virtu as the requisites were minimal and all Gozo Channel was interested in was Annex 2 of the tender and Islands Ferry was better placed to meet the latter's requirements in regard to the PSO.

Dr Alessandro Lia said that the Court of Appeal had declared that the Board is dealing with procurement and hence the Gozo Channel document is the tender. Apart from Annex 2 requirement to meet the requisites there is also a clause regarding the inability to contest against Gozo Channel – this automatically disqualifies Virtu who admitted, under oath, that they were interested in bidding. All three evaluators were comprehensively in favour of selecting Islands Ferry. When Engineer Guttridge stated that certain documents were not required he was referring to the exclusion of local sea areas and domestic voyages as detailed in tabled Docs 1, 2 and 3 in Regulation 336/2006 of the European Parliament and Council Directive 98/18. Islands Ferry satisfies all the criteria in Annex 2 and have the requisite experience in ferry services.

Dr Adrian Mallia said that Gozo Channel are now claiming that on their own they meet the tender conditions. One is therefore bound to request the Board to look into why they are then looking for a partner. The answer is that Gozo Channel does not have the capability to meet the tender requisites on its own, and they have provided no single proof that they can meet the fast ferry service requirement on their own. With reference to the claim that Virtu was disqualified from competing against Gozo Channel Dr Mallia referred to paragraph 18 of the decision of the Court of Appeal which clarified this point.

Dr Ann Fenech said that the Board is not looking at a conventional or fast ferry service but at a high speed ferry service, which is a sector where operations are very strictly regulated unlike the simple carriage of passengers. Annex 2 and Annex 5 cannot be ignored or ridiculed – Annex 2 is

applicable to all European operations of high speed craft which brings with it the DoC requirements and one must be careful not to ignore these strict international regulations. Annex 5 is a list of statutory certificates and company documents, and the one that stands out is the DoC under the ISM code. It is impossible to see how Gozo Channel can meet the fast ferry service criteria mentioned in Annex 2.

Dr Simon Schembri said that the only requisite required by Gozo Channel was that stated in Annex 2 Document 2 and which was included from the very start of the process and if one could not meet it one could not bid. Bid Form 3 did not have to be satisfied by subcontractors.

Dr Clement Mifsud Bonnici said that after the decision of the Court of Appeal the preliminary market consultation became the tender document and all the parties have to abide by its terms and the evaluation has to be based on it.

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

Following a decision by the Hon Court of Appeal of reference 290/18 dated 11 March 2019, which states that:

“47. Din il-qorti ga osservat⁶ illi ma hijiex qieghda tghid illi l-oggezzjoni li Virtu ressqet quddiem il-Board ta’ Revizjoni ghandha tintlaqa’, izda biss illi dak il-bord ghandu gurdizzjoni biex iqisha u jiddeciedi dwarha. Il-kwistjoni mqanqla f’ din is-silta mit-twegiba ta’ Islands Ferry ghalhekk ghadha mitlufha u ma hijiex il-mertu tal-proceduri quddiem din il-qorti izda ghandha titqies mill-Board ta’ Revizjoni issa li gie stabilit illi dan il-bord ghandu gurdizzjoni biex jisma’ l-oggezzjoni li ressqet Virtu.

48. Ghal dawn ir-ragunijiet il-qorti wara li tichad l-eccessjonijiet preliminary mressqa minn Islands Ferry Network Ltd tilqa’ l-appel ta’ Virtu u ghalhekk thassar

id-decizjoni tal-Bord ta' Revizjoni u tibghat l-atti lura lill-istess bord biex iqis l-oggezzjoni mressqa quddiemu minn Virtu u jiddeciedi dwarha."

This Board held a hearing on 30 July 2019, to discuss the merits of the case.

- 1. On a preliminary note, this Board was presented with ‘affidavits’ pertaining to Mr Paul Cardona a member of the first Evaluation Committee, Mr Simon Pollard, a Naval Architect and Mr Stephen Phillips, a Director of Sea Speed Marine Consulting Limited and in this respect, this Board considered the relevance of such submissions, at this stage of the hearing. Having noted that all submissions to this appeal have been exhausted, this Board directs that such affidavits are to be disregarded.**
- 2. This Board would, first and foremost, point out that, following the Court of Appeal’s decision, the PMC published by Gozo Channel (Operations) Ltd, is to be regarded as a tender document, whilst at the same instance, GCO is to be deemed as the Contracting Authority.**
- 3. The Authority (Gozo Channel (Operations)) issued a ‘Preliminary Market Consultation’ (PMC), looking for a partner with whom, it could**

submit its offer for the tendered services, as requested by the Ministry for Transport and Infrastructure and Capital Projects. The Authority itself, had all the necessary experience and knowhow in the provision of conventional ferry service and since the tender, issued by the Ministry, requested as well, the provision of a fast ferry service, GCO had to acquire the knowhow and operational activity of the latter maritime activity, to be legible to submit its offer.

- 4. At the same instance, this Board would point out that the PMC issued by Gozo Channel (Operations), specifically referred to the fact that, the prospective partner must have the necessary experience, expertise and resources to provide the services (Fast Ferry Service) as duly requested in the ‘Request for Proposals’ (RFP) issued by the Ministry for Transport, Infrastructure and Capital Projects.**

- 5. Having established the above-mentioned facts, this Board deems that the Authority does not have the experience, resources and knowledge to run a fast ferry service, so that, the prospective partner must satisfy all the conditions, as laid out in the RFP issued by the Ministry, as duly referred to by Gozo Channel (Operations), in their Preliminary Market**

Consultation and, in this respect, special reference to the conditions and specifications as dictated in the RFP, had to be strictly adhered to by prospective partners.

- 6. On the 13 April 2018, GCO signed a charter agreement with Islands Ferry Network Limited (IFN), the latter party to provide fast ferry service to Gozo Channel pursuant to the RFP. In this regard and at this stage of consideration, this Board would confirm that the agreement does not pertain to a form of partnership, as was duly requested by Gozo Channel (Operations), in their ‘Preliminary Market Consultation’, which clearly stated that:**

“Gozo Channel is looking for a partner with whom to submit the bid for the Tender (the ‘Partner’) which has the necessary experience expertise or resources to provide fast ferry services (and the Concessionaire Additional Services). Any interested party is expected to prove to Gozo Channel that it is in a position to meet the applicable specifications requirements and criteria applicable to the fast ferry services as required by the Tender.”

but truly consisted of a subcontracting agreement whereby, through a charter party agreement, Islands Ferries would provide a fast ferry service to Gozo Channel (Operations) so that GCO could submit its offer to the RFP, issued by the Ministry.

7. This Board noted and confirms the Court's decision, in this regard, wherein it was decided that:

“
Virtu Holdings Ltd v Gozo Channel (Operations) Ltd et
40. *Fil-kaz tallum dak li ghamlet Gozo Channel ma kienx shubija bejna u Islands Ferry biex jaghtu servizz flimkien, jew holqien ta' operator ekonomiku gdid bejniethom b'kontribut ta' kapital miz-zewg partijiet; li sar huwa dak li effettivament sejjer ikun sub-kuntratt biex Gozo Channel tkun tista' taghti servizz li jkun irid il-kuntratt eventwali mal-Ministeru.*”

This Board would respectfully point out that the processing of the offer of Islands Ferry by Gozo Channel consisted of two main deficiencies and these are:

- **Signing of the contract prior to the decision of the Public Contracts Review Board in respect of application filed by Virtu Ferries, in breach of regulation 277 (3) (a) and**
- **The Authority requested a partnership whilst the offer submitted by Islands Ferry constituted a subcontracting arrangement.**

Hence, a change of goal posts at the very start of the evaluation process.

8. This Board, after having established the procedure adopted by GCO in their ‘Call for Partnership’ and the treatment of the submissions received, would opine that the acceptance of a subcontracting offer, changed the whole concept of the intended objective of the PMC, issued by GCO (the Contracting Authority), hence a change of ‘Goal Posts’, at the initial stages of the tendering process. The same Board has considered the essence of the testimony of the witnesses duly summoned, which testimony have elaborated the conclusions reached by the Evaluation Committee, in its deliberations on the technical merit of the offers. These are being summarised, as follows:

Witness

Essence of testimony

Ing Kurt Gutteridge

Evaluator

(i) The witness stressed the fact that, in their deliberations the Evaluation Committee, emphasized more on the financial than the technical aspect of the offers received,

(ii) with regards to the technical assessment of Islands Ferry offer, witness did not reply and did not confirm that Island Ferry were in possession of the mandatory ISM certification.

Mr Simon Azzopardi

Evaluator

(i) Confirmed that the evaluation procedure was conducted in accordance with the parameters outlined by Chairman of Gozo Channel (Operations),

(ii) witness confirmed that he did not take into consideration the tender conditions RFP in which GCO was going to participate.

Mr Matthew Portelli

Director Virtu Ferries

(i) Witness only confirmed the fact that the prospective partner to GCO must be compliant with the technical specifications and conditions as dictated in the RFP.

Capt Gaetano Mallia

Master Mariner Class 1

(i) Witness confirmed that high speed craft, doing more than 20 knots are to be in possession of an ISM certificate.

Mr Joseph Cuschieri

Chairman, Evaluation

Committee

(i) Witness confirmed that Ing Gutteridge was in charge of the technical evaluation whilst Mr Azzopardi was responsible for the financial aspect of the offers,

(ii) confirmed that Evaluation Committee adopted a weighting of 25% technical and 75% financial.

9. This Board, after having considered the submissions and the testimony of the witnesses arrives at the following conclusions:

- a) The Authority, failed to abide by the principle of self-limitation, by processing an offer which had to be an offer for a partnership, whilst, in actual fact accepting an offer that was a subcontracting arrangement.**

- b) This Board confirms that the agreement signed between Gozo Channel (Operations) (Authority) and Islands Ferry Network Ltd breached Regulations of the Public Procurement and thus declares same to be ineffective.**

- c) From the submissions made by the parties concerned, this Board established that, during the evaluation process, the Authority applied a weighting principle of 25% to technical and 75% to**

financial aspect. In this respect, this Board opines that for such a tendered service which entails strict regulations and maritime compliancy, in the execution of the service, the weighting adopted by the Authority, was not sufficient and proportional enough to establish which offer was fully compliant with the technical specifications and conditions as duly requested in the RFP, issued by the Ministry for Transport.

- d) The Evaluation Committee did not delve into a satisfactory level of assessment with regard to the technical aspect of the offers.**

- e) From the testimony of the witnesses, this Board noted that the Evaluation Committee did not attribute the expected importance to the technical aspect and the relative consequences of failing to abide by the maritime regulation, which are enforced to ensure proper certification and safety, at sea.**

- f) The Board would emphasize that the technical specifications and conditions, as laid out in the RFP issued by the Ministry for Transport, should be the technical specifications and conditions of**

this PMC which the Bidder must satisfy, in all respects, to be eligible for the award of this tender, without any compromises.

In view of the above, this Board,

- i) does not uphold the Contracting Authority's decision in the award of the tender,**
- ii) directs the Authority to appoint a new Evaluation Committee, two members of which must be of a technical standing, well versed in maritime activities and regulations,**
- iii) directs that the weighting of the evaluation process should reflect more prominently the technical compliance aspect,**
- iv) directs that the new Evaluation Committee will carry out an in-depth assessment of the two shortlisted offers namely, those of Islands Ferry Network Ltd and Virtu Holdings Ltd, to arrive at a fair and transparent conclusion, in their deliberation,**

v) In arriving at its decision, this Board took into consideration the importance of this tendered service and also the fact that, both competing offers are now public, so that both offers are to be reassessed on their present merit.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

30 August 2019