

PUBLIC CONTRACTS REVIEW BOARD

Case 1204/1 – Application in terms of Regulation 277 of the Public Procurement Regulations by Virtu Holdings Ltd in relation to the Preliminary Market Consultation regarding Fast Ferry Services

This Application followed a decision of the Court of Appeal (292/2018) on the 11th March 2019 in the case Virtu Holdings Ltd vs Gozo Channel (Operations) Ltd and Island Ferry Network Ltd

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 application.

The attendance for this public hearing was as follows:

Applicants – Virtu Holdings Ltd

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

Island 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 stated that this application followed from the decision of the Court of Appeal directing the PCRБ to decide on the ineffectiveness of the contract signed between Gozo Channel (Operations) Ltd and Island Ferry Networks Ltd.

Dr Clement Mifsud Bonnici Legal Representative of Gozo Channel Operations Ltd (GCO) said that Applicants had failed to file a 'rikors' within the 30 day limit since they claim that they were not aware of the signing of the contract.

Dr Adrian Mallia Legal Representative of Virtu Holdings Ltd (VH) stated that their original application was made on the 22nd June 2018. Normally the notification to all parties is sent via the electronic system to enable all parties to take any appropriate action. In this case VH had only found out that a contract had been signed through a reply sent to them on 25th May 2018 – this reply was an incidental rather than formal one as it had been sent via e-mail. The procedure, started on the 22nd June, was thus within 30 day after they were made aware of the signing of the contract. It is not logical, as claimed by the other side, that VH should have become aware through notices posted on the boards of the PCRb premises, and their procedure was valid and within the time limit.

Dr Mifsud Bonnici said that the text in the Public Procurement Regulations (PPR) stated that the 30 days ran from when the Contracting Authority notified the interested parties (regulation 276) and notification was either through posting on the notice board or through the ePPS. It was not in order to wait till someone or other notified you and an e-mail message was not a formal notification.

Dr Mallia contended that regulation 282 subsection (b) covered the admissibility of applications for the ineffectiveness of a contract for a period of at least six months from the day after the signing of that contract.

This was contested by Dr Mifsud Bonnici who claimed that regulation 282 applied only in the case where no public notification was made. This point was not dealt with by the Court of Appeal and it was therefore up to the Board of the PCRb to decide. The Board can only decide on the merits of the contract if the appeal was made in time.

Dr Mallia said that it seemed as if GCO was persisting in an illegality to try to keep an illegal contract alive.

Dr Ann Fenech Legal Representative of Virtu Holdings Ltd made reference to paragraph 29 of the sentence of the Court of Appeal which dealt with the core of the matter. GCO was disregarding the merits of the Court's decision and dealing instead with details of whether appeals were in time or not.

The Chairman said that the Board had decided that the contract between the parties was conditional and not effective and their decision will be based on that point. Dr Mallia said that the PPR offered several remedies to an aggrieved party. If there was any doubt or ambiguity the remedy should favour the aggrieved party. The Board should not sanction an illegality, acknowledged as such by the Court of Appeal.

Dr Antoine Cremona Legal Representative of Gozo Channel (Operations) Ltd said that the Board should consider the validity of the contract but the first point for their consideration is the timing of the start of procedure by VH which was out of time.

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

This Board,

Refers to an application by Virtu Holdings Ltd in terms of Regulation 277 in connection with the “Preliminary Market Consultation” regarding the operation of Fast Ferry Services and a follow up of the decision of the Court of Appeal of reference 292/2018 dated 11 March 2019.

Appearing for the various Parties;

Applicants – Virtu Holdings Ltd

Dr Adrian Mallia	Legal Representative
Dr Ann Fenech	Legal Representative

Gozo Channel (Operations) Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Antoine Cremona	Legal Representative
Dr Simon Schembri	Legal Representative

Island Ferry Network Ltd

Dr Alessandro Lia	Legal Representative
Dr Paul Lia	Legal Representative

1. This hearing is being held, following a decision of the Court of Appeal, wherein it was decided that the ‘Charter Party’ agreement between Gozo Channel and Island Ferries Ltd, be declared ineffective and since the decision of this Board was thereby cancelled, the Court decided that the Public Contracts Review Board should reconsider its decision on the validity of this agreement, in view of the fact, that this Board might not have taken all the due considerations in its deliberations regarding this agreement.

2. At the same instance, this Board would respectfully refer to an extract from the Court of Appeal’s decision, in appeal case no 290/2018, which states:

“33. Il -fatt hu illi biex tista’ taghti s-servizz li ghalih saret sejha ghal offerti mill-Ministeru, Gozo Channel kienet tehtieg hi stess servizz u ghal-hekk dak li ghamlet kien tassew sejha ghal offerti ghal servizz. Tant dak li ghamlet Gozo Channel kien sejha ghal offerti ghal servizz, illi fil-fatt wassal ghal kuntratt ta’ charterparty bejnha u Islands Ferry biex jinghatalha dak is-servizz. Fi kliem iehor, ghalkemm, kif sewwa qal il-Board tar-Revizjoni, Gozo Channel ma hijiex l-awtorita’ kontraenti fil-kaz tal-kuntratt li saret sejha ghal offerti

ghalih mill-Ministeru, hija stess, viz. is-servizz ta'fast ferry li tehtieg biex tista' taghmel offerta shiha lill-Ministeru.”

“40. Fil-kaz tallum dak li ghamlet Gozo Channel ma kienx shubija bejnha u Islands Ferry biex jaghtu servizz flimkien, jew holqien ta' operatur ekonomiku gdid bejniethom b'kontribut ta' kapital miz-zewg partijiet; li sar huwa dak li effettivament sejjer ikun sub-kuntratt biex Gozo Channel tkun tisa' taghti s-servizz li jkun irid il-kuntratt eventwali mal-Ministeru.”

In this regard, this Board acknowledges the fact that Gozo Channel, although not being considered as a Contracting Authority, in the Request for Proposal of the Ministry, entered into a subcontracting agreement with Island Ferries, such an instance constituted a call for service by Gozo Channel so that, the latter, a Public Entity constituted itself as the Contracting Authority in such a contractual obligation and in this respect, Gozo Channel Operations had to adhere to the Public Procurement Regulations.

- 3. This Board would refer to Regulation 277 (3) (a) (b) wherein it is stipulated that:**

“(a) When, notwithstanding an appeal is lodged before the Public Contracts Review Board, the Authority responsible for the tendering process concludes

the contract before a final decision is given by the Public Contracts Review Board, or

(b) when the contract is concluded by a Contracting Authority or the Authority responsible for the tendering process before the expiry of the period for the filing of an appeal as provided for in Regulation 271.”

This Board confirms that Gozo Channel Operations is to be considered as a Contracting Authority in obtaining contractually, the services of Island Ferries for the provision of Fast Ferry Services. At the same instance, this Board, as previously noted, in its decision dated 11 September 2018, confirms that Gozo Channel Operations did enter contractual obligations with Island Ferries, prior to a final decision by this Board.

- 4. With regard to the admissibility of the application for the ineffectiveness of the contract signed between Gozo Channel Operations and Island Ferries Ltd, this Board would refer to Regulation 277 (3) (a) which stipulates the following:**

“(3) Any tenderer may also request the Public Contracts Review Board to declare a contract ineffective in the following two instances:

a) When, notwithstanding an appeal is lodged before the Public Contracts Review Board, the authority responsible for the tendering process concludes the contract before a final decision is given by the Public Contracts Review Board; or”

In this respect, this Board would point out that Gozo Channel did enter into contractual obligation on the 13 April 2018, well before any decisions taken by the Public Contracts Review Board.

At the same instance, reference should also be made to Regulation 282 (b) which dictates that:

“Applications for the ineffectiveness of a contract shall be deemed admissible, if they are made:

b) In any other case before the expiry date of a period of at least six months with effect from the day following the date of the signing of the contract.”

This Board notes that the application for the ineffectiveness of the contract, was made on 22 June 2018, whilst the signing of the contract was effected on 13 April 2018, so that such an application was within parameters as laid out in the Public Procurement Regulations.

In conclusion, this Board confirms,

- a) The application for the ineffectiveness of the contract signed between Gozo Channel Operations and Island Ferries Ltd is within the stipulated time frame of the Public Procurement Regulations.**

- b) The agreement entered into between Gozo Channel Operations and Island Ferries Ltd was concluded prior to the final decision of the Public Contracts Review Board and to this effect, this Board declares that the agreement is ineffective.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

30 August 2019

