

PUBLIC CONTRACTS REVIEW BOARD

Case 1427 – RFP 001/2019 – Request for Proposals for a Public Service Concession Contract for the Provision of Passenger Ferry Services between Malta and Gozo

The tender was published on the 27th May 2019 and the closing date of the call for tenders was the 28th June 2019. The estimated value of the tender (exclusive of VAT) was € 375,000.

On the 23rd January 2020 Mr Clyde Muscat, Blue Lagoon Ferry Co-op Ltd, Mr Lawrence Azzopardi and Mr Ian Azzopardi (hereinafter referred to as Appellants) filed an Application for Ineffectiveness against Transport Malta as the Contracting Authority seeking a remedy in accordance with Regulation 113 of the Concession Contracts Regulations.

There was one (1) bidder.

On 20th February 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Mr Clyde Muscat, Blue Lagoon Ferry Co-op Ltd, Mr Lawrence Azzopardi, Mr Ian Azzopardi

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative
Mr Clyde Muscat	Representative
Mr Lawrence Azzopardi	Representative
Mr Ian Azzopardi	Representative
Ms Abigail Mamo	Representative

Recommended Bidder – Comino Ferries Co-op Ltd

Dr Mark Simiana	Legal Representative
Mr Antoine Portelli	Representative
Mr Mark Bajada	Representative

Contracting Authority – Transport Malta

Dr Shazoo Ghaznavi	Legal Representative
Ms Mary Rose Pace	Representative
Mr Kevin Farrugia	Representative

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Jonathan Mintoff Legal Representatives for the Appellants said that this application for ineffectiveness relates to a request for proposals for a concession to run a scheduled ferry service to Comino. The first claim to prove ineffectiveness is that there was no prior publication of the notice of the proposal in the Official Journal of the European Union.

Ms Elizabeth Markham (186970M) called as a witness by the Public Contracts Review Board testified on oath that she is the Senior Procurement Manager at Transport Malta and that she facilitated the publication of the tender. She stated that the CPV (Common Procurement Value) Code for this concession was 60610000 which refers to ferry transport services under EU directives. Witness was referred to different articles and annexes of EU Directive 2014/23 and it was pointed out to her that a different notice should have been published. Witness testified that under the EU system when one puts in the mentioned CPV code (which in this case is the correct one) the form to be used is generated automatically and that this follows the Malta regulations. When different EU forms were tabled (Doc 1 and 2) and shown to her witness confirmed that there were minute differences between these forms and the actual one used (Doc TM1).

Questioned by Dr Formosa Legal Representative of Appellants, witness read out a list of parties that had expressed an interest in the proposal and/or had sought clarifications and confirmed that the Contracting Authority had published the notice in the Government Gazette, local newspapers and all information was published on line making all information available to all interested parties.

In reply to a question from Dr Ghaznavi Legal Representative for Transport Malta witness tabled a copy of the computer printout showing the information available on line (Doc 3).

Dr Mintoff said that the Board had just heard from the witness that the CPV code chosen for this concession does not qualify as ‘social and specific services’ and Transport Malta should have used a concession or contract notice form where different information is required. According to Regulation 113 §2 of the Contracts Concession Regulations a contract issued without prior published notice in the official journal can be declared ineffective. This requisite has not been met – instead an extraneous notice was issued which is neither relevant nor applicable and makes the whole process ineffective and incorrect. No evidence had been produced that the correct notice was published in the EU journal.

Interested parties, said Dr Mintoff, are entitled to be kept informed and the lack of information to interested parties gives the Public Contracts Review Board enough reasons to annul the award. On behalf of Appellants Dr Mintoff had submitted a clarification which makes his clients’ interest sufficient to give them a juridical interest.

Dr Ghaznavi stated that the fact that the application was out of time had not even been touched upon by Appellants. This procedure is regulated by law with the rights of interested parties in respect of ineffectiveness limited by Regulation 118 § a ii which states that such application is deemed admissible if made before the expiry of at least 30 calendar days from conclusion of contract. Witness testified that candidates and bidders were notified on 13th August 2019 hence appeal is prescribed by the passage of time.

It is outside the law, according to Dr Ghaznavi, for Appellants to be asking the Board to declare ineffective the whole procedure – ineffectiveness cannot be for the whole procedure as the law speaks only of ineffectiveness of the contract. Prior notice had been properly given under EU directives as evidenced by documents produced (referred to Doc TM1) and the notice is not nullified if it is given under a different annex. Interested parties were notified and those that did not bid had enough time to claim ineffectiveness of the whole RfP within the time limits.

Dr Mark Simiana Legal Representative of Comino Ferries Co-op Ltd agreed that ineffectiveness could not be for the whole process. Article 113 demands publication of the notice of a contract and the Directive referred to by Appellants is only to allow exemption to the Contracting Authority from having to make publication. The publication happened with enough information to enable any interested party to participate. Appellants cannot claim that they were prejudiced by the lack of publication since they requested certain clarifications and therefore they were fully aware of the existence of the contract. Juridical interest of a party legally is if someone who is entitled to participate but is prevented from doing so which is not the case here. The application should be refused as it has no basis at law.

Dr Mintoff in reply stated that Regulation 113 § 2 speaks of the prior publication of the contract notice not as claimed. Regulation 118b stated that the period of appeal runs for six months from the signing of the contract – this was signed in October 2019 and therefore the appeal is not outside the time limit. The system has various classifications including that of interested party, which he was, and it is incumbent on the Authority to keep them all informed.

Dr Simiana, in a final point, said that Dr Mintoff was not an appellant in this case and he must distinguish on whose behalf he was appearing.

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

End of Minutes

Decision

This Board,

This Board also noted the Contracting Authority’s ‘Letter of reply’ dated 31 January 2020 and its verbal submissions during the hearing held on 20 February 2020, in that:

a) The Authority maintains that:

- i. The contracts notice was published as per Directive 2014/23EC**
- ii. The award notice was also published through the Public Procurement Platform.**

This same Board also noted the testimony of the witness namely:

Ms Elizabeth Markham senior procurement manager (TM) duly summoned by the Public Contracts Review Board.

This Board also taken note of the documents submitted by Appellants:

Document 1 & 2 – EU Forms for Publication of Notes in the European Union Official Journal

Document 3 – Computer Printout of Notice of Award

This Board, after having examined the relevant documentation to this application and heard submissions made by the parties concerned, including the testimony of the witness duly summoned opines that the issues that merit consideration are two-fold namely:

a) Prior publication notice of the RFP in the Official Journal of the European Union and

b) Publication of award through the Public Procurement Platform.

1. This Board would respectfully refer to clause 113 (Concession Contracts) of the Public Procurement Regulations, which states that:

“Ineffectiveness of a Concession Contract

a. 113. (1) An interested party or a tenderer may file an application before the Public Contracts Review Board to declare that a concession contract with an estimated value which meets or exceeds the threshold established under Schedule 3 is ineffective.

b. (2) An interested party may only request the Public Contracts Review Board to declare a signed concession contract ineffective if the contracting authority or the contracting entity has awarded a contract without prior publication of a contract notice in the Official Journal of the European Union without this being permissible in accordance with Directive 2014/23/EC.”

2. With regard to Appellants’ claim that there was no prior publication of the RFP in the European Journal, this Board, after having carried out the necessary verifications, would confirm that such a prior notice was

published in the Official Journal of the European Union on 29 May 2019 in Edition number 103, so that such a prior publication was, in actual fact, effected by the Authority.

3. With regard to the Appellants' claim that, in the Publication process, the Authority should have applied under different European Union forms for the publication of the noted, this Board, after hearing the credible testimony of the witness, can comfortably affirm that the Authority applied the Proper Common Procurement Value (CPV) code which was 60610000 and which refers specifically to ferry transport services under the European Union Directives. This Board was also made aware that, under European Union system when one enters the CPV code, which in this case, was the correct one, the proper form to be used is generated automatically, so that, the proper code chooses the proper form for the publication.

4. In this particular case, the publication was properly effected by the Authority, so much so that, such a prior notice was published in the European Journal included in issue of number 103.

Tenderers are to note that this information does not imply any objection on the part of Transport Malta to actually implement any of the decisions indicated.

02 August 2019
Date

In this regard, it is affirmatively clear that the publication of the prior notice was carried out in an appropriate manner by the Authority.

- 6. This Board must express its dismay and somewhat surprise to learn that Appellants were prejudiced due to lack of knowledge of the publication of RFP, when one takes into consideration the fact that same Appellants had requested clarifications during the process, so that they were well aware of the existence of the contract.**

- 7. This Board would also confirm that the whole procedure instituted and carried out by the Contracting Authority was in total conformity with provisions of domestic and European Union Legislation.**

In conclusion, this Board opines that:

- a) The publication of the prior notice of the RFP was appropriately effected in the Official Journal of the European Union, by the Contracting Authority.**

b) The notice of award was properly notified through the Public Procurement Platform.

c) The whole procedure regarding the publication of the prior notice and award notice, was in conformity with Local and European Union Directives.

In view of the above, this Board,

i. does not uphold Appellants contention,

ii. confirms that the contract is valid and effective.

Dr Anthony Cassar
Chairman

Mr Lawrence Ancilleri
Member

Mr Carmel Esposito
Member

5 March 2020