

PUBLIC CONTRACTS REVIEW BOARD

Case 1471– TM RfP 001/2020 – Request for Proposals for a Public Service Concession Contract for the Provision of Scheduled Sea Passenger Ferry Services in Malta and Gozo

Remedy before the Closing Date of a Call for Proposals

The tender was published on the 14th July 2020 and the closing date of submissions was the 7th September 2020. The estimated value of the tender (exclusive of VAT) was € 115,500,000.

On the 31st July 2020 Marsamxetto Steamferry Services Ltd filed a Precontractual Complaint before the closing date of a call for proposals against Transport Malta as the Contracting Authority on the grounds that the tender was discriminatory and disproportionate.

On 11th August 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Carmel Esposito as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Marsamxetto Steamferry Services Ltd

Dr Joseph Camilleri	Legal Representative
Dr Matthew Cutajar	Legal Representative
Mr Edward Zammit Tabona	Representative

Contracting Authority – Transport Malta

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

Interested Party – Supreme Travel Ltd

Dr Reuben Farrugia	Legal Representative
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Interested Party – Virtu Holdings Ltd

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

Dr Anthony Cassar Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties had agreed to treat it as a normal hearing of the Board. He then invited submissions.

Dr Reuben Farrugia Legal Representative for Supreme Travel Ltd suggested that since both the appeal by Marsamxetto Steamferry Services Ltd and that of Supreme Travel Ltd were based on paragraph 2.12.5 of the tender and that Transport Malta had indicated that they are prepared to deal with these appeals by means of a clarification the Board might consider treating with both appeals at a joint hearing and all parties concurred.

Dr Farrugia said that his clients agreed with the proposed wording of the clarification proposed by Transport Malta subject to substituting the words 'Passenger Ferries' by the words 'passenger vessels' and the words 'ferry services' by the words 'ferry or boat'.

Dr Joseph Camilleri Legal Representative for Marsamxetto Steamferry Services Ltd agreed and said that since Appellants' concerns have been met there is no point in discussing this matter further.

Dr Shazoo Ghaznavi Legal Representative of Transport Malta agreed with the proposal but suggested that the words 'passenger vessels' as proposed by Dr Farrugia should be substituted by the words 'sea vessels' and 'ferry or boat' to be substituted by 'evidence of ferry services or boat services'.

Dr Farrugia agreed with this suggestion without prejudice to any other legal point which might be raised apart from paragraph 2.12.5.

It was agreed by all parties that the revised wording of the Clarification Note to be issued by Transport Malta to replace paragraph 2.12.5 will now read as follows:

Proponents should provide evidence showing that they have a minimum of five (5) consecutive years' experience operating various types of sea vessels of various capacities offering ferry services or boat services during period 2010-2020. To this end, proponents shall provide evidence of ferry services or boat services provided, routes operated and vessels utilised over any five (5) consecutive years within the last ten (10) years being (2010-2020).

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

End of Minutes

Decision

This Board,

having noted this concern filed by Marsamxetto Steamferry Services Ltd (MSS) (hereinafter referred to as the Appellants) on 31st July 2020, refers to the claims

made by the same Appellants with regard to the Request for Proposals (RFP) of reference TM RFP 001/2020 listed as case No. 1471 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Joseph Camilleri

Dr Matthew Cutajar

Appearing for the Contracting Authority: Dr Shazoo Ghaznavi

Appearing for Supreme Travel Ltd (interested party): Dr Reuben Farrugia

Appearing for Virtu Holdings Ltd (Interested Party): Dr Adrian Mallia

Whereby, the Appellants contend that:

- a) Clause 2.12.5 of the selection criteria of the RFP (Technical and Professional ability) states that, the annual number of passengers handled must not be less than eight hundred and fifty thousand passengers per annum. In this respect, Appellants maintain that, such a minimum requirement is discriminatory and disproportionate to the objectives of the RFP and does, in actual fact, limit the one of competition, which in the end, would also be detrimental to the Contracting Authority.**

This Board also noted the Contracting Authority's 'Letter of reply' dated 4th August 2020 and its verbal submissions during the virtual hearing held on 11th August 2020, in that:

- a) **The Authority has considered the concerns made by the interested parties and will issue the necessary clarification note to amend clause 2.12.5 to the effect that, without prejudicing the objectives of the RFP, the amended clause will suppress, as much as possible, limitations for participation and will also reflect a more proportionate approach to the aims of the RFP.**

This Board noted carefully the Authority’s ‘Letter of reply’ dated 4th August 2020, wherein, through a clarification note same Authority, intends to amend clause 2.12.5 to reflect the concerns brought forward by interested parties. In this respect, this Board noted the agreement of all parties that, such a clause should not limit the scope of open competition and be proportionate to the aims of the RFP.

- 1. This Board would therefore direct that, clause 2.12.5 be substituted by the following:**

“Proponents should provide evidence showing that, they have a minimum of five (5) consecutive years’ experience operating various types of passenger sea vessels of various capacities offering passenger ferrying services during the period 2010-2020. To this end, proponents shall provide evidence of passenger ferrying services provided, routes operated, and vessels utilised over any five (5) consecutive years within the last ten (10) years being (2010-2020).”

- 2. Due to the fact that, such an amendment to clause 2.12.5, will provide a solution to the parties’ concerns, this Board will not consider the merits of this**

case, after having noted that, all the interested parties including the Contracting Authority, are in full agreement with such an amendment.

In view of the above, this Board,

- i. directs the Authority to issue a clarification note as duly dictated in paragraph 1 above,**
- ii. directs that the processing of the RFP be resumed with immediate effect, after the issue of the clarification note.**

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Carmel Esposito
Member

14th August 2020