

PUBLIC CONTRACTS REVIEW BOARD

Case 1565 – Application for Ineffectiveness – Provision of Scheduled Maritime Ferry Services for the Grand Harbour and the Port of Marsamxett – TM 100/2011

1st June 2021

This Board,

Having noted and examined the Application for Ineffectiveness filed by Dr Reuben Farrugia on behalf of Supreme Travel Limited, hereinafter referred to as the appellant, on the 17th February 2021.

Having noted also the letter of reply filed by Dr Chris Cilia on behalf of Transport Malta, hereinafter referred to as the Contracting Authority on the 25th February 2021;

Having also considered the reply filed by Dr Joseph Camilleri on behalf of Marsamxetto Steamferry Services Ltd on the 2nd March 2021;

Having examined all the documents filed and all the submissions made during the virtual hearing held on the 15th April 2021 and the virtual hearing held on the 20th May 2021;

Having taken cognizance of the minutes of both the virtual hearings hereunder reproduced;

Minutes:

The application was filed by Supreme Travel Ltd on the 17th February 2021 against Transport Malta for the purpose of determining the effectiveness of the current concession.

On 15th April 2021 the Public Contracts Review Board (PCRB) composed of Dr Ian Spiteri Bailey as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public virtual hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellant – Supreme Travel Ltd

Dr Reuben Farrugia
Mr Nazzareno Abela

Legal Representative
Representative

Contracting Authority – Transport Malta

Dr Chris Cilia
Mr Joseph Bugeja

Legal Representative
Representative

Preferred Bidder – Marsamxetto Steamferry Services Ltd

Dr Joseph Camilleri
Mr Edward Zammit Tabona

Legal Representative
Representative

Dr Ian Spiteri Bailey Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations (LN 174.04). He then invited submissions.

Dr Reuben Farrugia Legal Representative for Supreme Travel Ltd requested the Board to limit the hearing to dealing with the preliminary exceptions at this stage and not to discuss the merits of the case.

Dr Chris Cilia Legal Representative for Transport Malta requested the Board to deal with the first preliminary exception regarding '*decadenza*' – the appeal hinges on this point which if met decides the whole case and there will be no need to go on to discuss the merits of the appeal.

Dr Farrugia said that all three preliminary exceptions should be dealt with at the same time.

Dr Joseph Camilleri Legal Representative for Marsamxetto Steamferry Services Ltd stated that there is a clear distinction between the three exceptions and agreed that the first exception should be dealt with initially.

Dr Farrugia said that in that case he needed to circulate to all parties copies of answers to two Parliamentary questions. These together with the documents already presented comprised his submissions on the first exception.

The Chairman asked that it be recorded that the Board notes that in view of the plea raised by Transport Malta as well as in view of the fact that the parties declare there is no further evidence to be submitted, except a request by Transport Malta to deliver a partial decision in respect of the same first plea.

Dr Cilia said that the first exception was based on Concession Contracts Regulation 118(b) which deals with the time period of six months from the date of the conclusion of the contract and which makes the Appellant's application inadmissible. The law on this is not subject to any interpretation but is stated in absolute terms. It is very clear that the date of the contract is the salient point. Reference was made to the Court of Appeal case 'Blue Lagoon Ferry Co-op Ltd et vs L'Awtorita ghat-Trasport f'Malta et' where it was clearly stated that the six month period is one of *decadenza* rather than of prescription. The contract was signed on the 27th March 2020 with this application filed on the 18th February 2021 well beyond the six months period from the date of signing.

Dr Farrugia claimed that the contract extension was not published, and this was confirmed in the reply to a Parliamentary question. EU Directive 89/665 states in Article 1 that an effective review of contracts

is to be provided on decisions by a contracting authority. Distinction had to be made between Article 2(f) of the Directive, which one had to rely on, which states ‘and in any case’ and Regulation 118(b) which states ‘in any other case’. Public authorities had to be transparent in their actions and had an obligation to notify the public on matters like the extension of a contract, the lack of publication of which, if followed to its logical conclusion meant that Government authorities can conceal anything they wished without public right of recourse. It is seriously dangerous ground when a contract is not even disclosed in Parliament with a Government Minister claiming commercial sensitivity.

Dr Farrugia further said that the EU Directive binds the six month period to a 30 calendar day period for notification – the reason being to provide an effective review of public contracts. Transport Malta never divulged the existence of the new contract and this is a case where a Government entity is neutralising any chance of a remedy by the public.

Dr Camilleri referred to the comments made about the transposing of the EU Directive into Maltese law and said that the Board must apply the law as it is. He said that he cannot agree with Appellant’s interpretation of the Directive which merely gives the parameters for creating local laws. The articles of the Directives cannot be read exclusively of each other. The terminology in Maltese law must be followed.

Dr Farrugia expressed the view that transposition must be loyal to the Directive. The parameters allow 30 days if there is publication to a maximum of six months in any case. Article 118 is not a true interpretation of the Directive if effective remedy is annulled. If one follows this reasoning it would be a parody of the law.

Dr Cilia said that the argument just made is faulty as it is based on a personal interpretation of the law. It is not up to the Board to interpret the law and the transposing of EU Directives and the Contracting Authority cannot accept Appellant’s arguments.

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

End of Minutes

SECOND HEARING

On the 20th May 2021 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Carmel Esposito and Mr Richard Matrenza as members convened a second public virtual hearing to discuss the Case further.

The attendance for this public hearing was as follows:

Appellant – Supreme Travel Ltd

Dr Reuben Farrugia

Legal Representative

Mr Nazzareno Abela

Representative

Contracting Authority – Transport Malta

Dr Chris Cilia	Legal Representative
Mr Joseph Bugeja	Representative
Mr Konrad Muscat	Representative

Preferred Bidder – Marsamxetto Steamferry Services Ltd

Dr Joseph Camilleri	Legal Representative
Mr Edward Zammit Tabona	Representative
Mr Michael Bianchi	Representative

Dr Charles Cassar Substitute Chairman of the Public Contracts Review Board welcomed the parties. He noted that since this was a virtual meeting all the parties agreed to treat it as a normal hearing of the Board in line with Article 89 of the Public Procurement Regulations. He went on to explain that this second hearing was necessary due to a change of Chairman since the first hearing.

He requested the parties to confirm the submissions made at the first hearing to enable the Board to come to a decision in this Case.

All parties agreed.

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

End of Minutes

Hereby resolves;

Having noted that during both the virtual hearings held, agreement had been reached by all the parties that this Board should first decide the preliminary pleading raised by the Contracting Authority in its letter of reply to appellant's application;

This plea contends that the request made by appellant, to have the contract signed on the 27th March 2020 between the Contracting Authority and Marsamxetto Steamferry Services Ltd declared ineffective, was in fact inadmissible since it was not filed within the six month period following the signing of the contract.

The Board considers that the facts speak for themselves. The contract extending the concession was signed on the 27th March 2020. The application requesting Ineffectiveness was filed on the 17th February 2021.

The Regulation in question, 118(b) of the Concession Contracts Regulations, does not mention any circumstances where the six month period could be extended but it clearly states “.....**six months with effect from the following date of the conclusion of the contract.**” Thus anyone who wanted to declare the contract ineffective had to act by the 28th September 2020 as otherwise the right to declare its ineffective is lost. For the above reasons therefore, this Board accepts the Contracting Authority's first preliminary plea and declares that the appellant's Application to have the contract signed between the Contracting Authority and Marsamxetto Steamferry Services Ltd on the 27th March 2020 declared Ineffective was inadmissible since it was filed after the lapse of the period allowed for such declarations.

Charles Cassar
Chairman

Richard Matrenza
Member

Carmel Esposito
Member