

PUBLIC CONTRACTS REVIEW BOARD

Case 1567 – Application for Ineffectiveness – Compromise Agreement regarding Organisation and Management of Mooring Areas in Xemxija Bay

8th July 2021

This Board,

Having noted the application filed on the 3rd March 2021 by Drs. Clement Mifsud Bonnici, Antoine Cremona and Calvin Calleja on behalf of the operators of the establishment “Beach Haven” Xemxija Hill, St. Paul’s Bay, hereinafter referred to as the complainants;

Having noted the reply to the above application filed on the 22nd March 2021 by Dr Chris Cilia on behalf of the Authority for Transport, hereinafter referred to as the Contracting Authority;

Having also noted the reply filed by Dr Joseph M. Sammut on the 22nd March 2021 on behalf of the Harbour Management Limited – the company that was awarded the concession;

Having noted and considered all the other documents produced, including the Compromise Agreement signed on the 12th November 2020;

Having heard the submissions made during the virtual hearing held on the 25th May 2021 and noted the minutes of the said meeting, hereunder reproduced.

MINUTES:

The application was filed by Mr Godwin Cutajar and Mr Simon Cutajar operators of the establishment ‘Beach Haven’ on the 3rd March 2021 against Transport Malta seeking a remedy that the Concession Contract is ineffective in accordance with Regulation 113 of the Concession Contracts Regulations.

On 25th May 2021 the Public Contracts Review Board (PCRB) composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri 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 – Mr Godwin Cutajar and Mr Simon Cutajar

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Simon Cutajar	Representative

Contracting Authority – Transport Malta

Dr Chris Cilia	Legal Representative
Dr Robert Vassallo	Representative
Mr Konrad Muscat	Representative

Preferred Concessionaire– Harbour Management Ltd

Dr Joseph Sammut	Legal Representative
Mr Pierre Balzan	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 then invited submissions.

Dr Clement Mifsud Bonnici Legal Representative for Mr Godwin Cutajar and Mr Simon Cutajar stated that as there was a legal point affecting a decision in this case he suggested that the Board should hear the whole of the objections since if the this point prevails the whole case collapses.

Dr Chris Cilia Legal Representative for Transport Malta (TM) said that the case dealt with the continuation of a 2009 Request for Proposals (RfP) and thus it was not subject to current regulations. The claim of ineffectiveness by Appellants under Regulation 113 cannot be considered by the Board as the concession does not meet the established value threshold. If this preliminary point is resolved then the appeal fails and therefore it stands to reason that it should be addressed first.

Dr Joseph Sammut Legal Representative for Harbour Management Ltd (HML) concurred with the comments of Dr Cilia.

Dr Mifsud Bonnici contended that the objections were inter-linked and should be dealt with accordingly. Besides, he wished to request the Board to consider disclosing the Concession Agreement to enable it to consider the appeal in full.

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

At the resumption the Chairman stated that the Board was of the view that it should deal with the preliminary point at this stage.

Dr Mifsud Bonnici said that the remedy being sought was in line with EU Directive 2007/66 which created the remedy for ineffectiveness as this enabled a case to be re-opened in instances where no proper tender was issued to annul a contract. The 2009 tender was won by HML but there was no agreement between the parties due to a change in tender terms and TM cancelled the tender. HML applied for a remedy for a judicial review under Article 469A of Cap 12. The case dragged on for years and a compromise agreement must have been reached at some stage for HML to eventually withdraw the Court case and be awarded the concession. Appellants, although participants in the tender were never notified of the cancellation of such tender, The Court did not decide the outcome of the case and once the case was withdrawn it signalled the end of that process. The next appropriate step should have been the issuing of a fresh tender – the lack of such a step is regarded as the most serious breach of public procurement according to the EU Directives.

The point at issue is – could TM rely on the RfP as being still extant? Once the RfP was cancelled and the Court case abandoned TM could not reverse the decision and revive the RfP which they themselves admit had been cancelled. It does not make commercial sense that a 2009 RfP is revived at 2021 market value. Appellants are merely seeking a fresh call for tenders in line with the concepts of transparency, equal treatment and genuine competition.

Dr Mifsud Bonnici listed three points regarding the preliminary contention. Firstly, the concession agreement was not signed prior to 2016 but in 2021 and therefore it could not resurrect the RfP which had expired, was not reversed and thus, it follows that the concession is a new contract which has to be analysed on 2021 basis and one cannot do a u-turn to a 2009 agreement.

Secondly with regard to the matter of juridical interest the argument put forward is that since Appellants have the Beach Haven concession they have no interest in attacking this concession. This reasoning is not correct since Appellants have a commercial interest in the same area. Regulation 133 recognises tenderers and interested parties. Reference was made to Court of Appeal case 102/2020 (10/8/20) Blue Lagoon Ferry vs Transport Malta wherein paragraph 15 *inter alia* defined interested party as one having ‘an interest in not losing an interest or in gaining one’. Appellant is not asking to be awarded the concession but simply to participate in the tender.

Dr Mifsud Bonnici added that the monetary value of the threshold is high but Appellant thinks that this is a ruse by TM to avoid scrutiny by the PCRB. The RfP refers to the Public Contracts Regulations (L.N. 177/2005) of that time. If the value is based on those Regulations threshold then it is satisfactory to TM but the market should be open to competition and not rely on factors and values of 2009 when by 2021 circumstances have totally changed and when much higher offers could be secured.

Dr Chris Cilia stated that Beach Haven not only participated in the tender but appealed the decision which appeal was not upheld. It has therefore used up all available remedies. Appellants seem to be using both pre-2016 as well as post-2016 regulations to make their case. Regulation 4 of S.L.601.09 does not apply on concessions that have been cancelled – in this instance the concession was not cancelled but contested in Court under Art.469A. Court procedure can be discontinued by agreement. This means that the RfP started in 2009 was still open and once the action was withdrawn and a compromise reached the contract was signed on the basis of the 2009 tender.

If one follows Regulation 4 diligently it is noted that it states ‘Any concession procedure which has been issued prior to the publication of these regulations shall be regulated by the laws which were previously in force....’ The operative words here are ‘issued’ and ‘regulated by previous regulations’. The tender was issued in 2009 but the regulations came into force in 2016 and hence it is still regulated by the previous regulations. A concession issued but not completed prior to the new regulations comes under the previous ones. As regards the concession’s worth Appellants accept that the concession does not exceed the statutory value but it seems they want the 2016 regulations to apply to it. The appeal is ill-founded and should be denied.

Dr Sammut said that once the Court case started TM’s decision was suspended until matters were clarified – it follows from that, that the RfP was not cancelled and could be revisited at any time. Contestation of the tender took place and the normal process followed and the passage of time since 2009 does not nullify the decision. The Appellants are stretching facts in requesting a fresh tender. On the point regarding juridical interest the Appellants had to prove that regulations were not followed or totally ignored, which is not the case. As to the matter of the value of the concession it has been admitted that the value is below € 5 million and one cannot apply current values to a 2009 situation and regulations.

Dr Mifsud Bonnici referred to Regulation 4 and said that its interpretation is the crux of the matter. What needs to be considered is not when the RfP was issued but whether it was extinct or extant? Words have been used like reversal or revival which indicates that the tender was considered extinct, since one cannot revive something that is defunct. Regulation 4 does not apply as by the time the concession agreement was entered into the tender was extinct. Once the threshold value was satisfied in 2009 under the previous Regulations then the threshold similarly follows under 2021 Regulations. Referring to the Court case Dr Mifsud Bonnici stated that the Contracting Authority has certain obligations in regard to proportionality, transparency and genuine competition and once the decision to reverse the decision had been taken the other parties and the market in general should have been notified. There was no transparency in this instance and all parties should have been treated equally and notified of the outcome. The principle of *pacta sunt servanda* demands that parties have reached agreement but paragraph 36 of CJEU Case 503/03 underpins the point that one cannot rely on an agreement between parties without considering other parties involved and the principle does not apply in this case as Dr Sammut claims. What the parties agreed between themselves is immaterial because it is illegal and the concession must be opened up to competition.

Dr Sammut said that one is here dealing with public acts and it was up to Appellants to involve themselves in the Court case. There was no obligation on the Contracting Authority to inform any party, least of all a tenderer who had lost an appeal.

End of Minutes

Hereby resolves:

That this case is about a Request for Proposals (MMA/001_rfp/2009) issued in 2009. This same Rfp was awarded to Harbour Management Limited.

There had been disagreement on the preferred bidder's proposed fees on which the Contracting Authority had requested revision. Since the preferred bidder did not want to review these fees, on the 19th May 2011 the Contracting Authority had decided to cancel the Request for Proposals.

However, the preferred bidder had challenged this decision to cancel the Rfp on the 16th November 2011 by means of judicial proceedings in terms of Article 468A of the Code of Organisation and Civil Procedure.

The case remained pending before the Courts until the 16th November 2020 when the case was withdrawn (ceded).

On the 12th November 2020, the Contracting Authority and the Preferred bidder settled their differences and signed a Compromise Agreement setting the date of the 1st March 2021 for the signing of the Concession Agreement following the Rfp.

Complainant is asking this Board to declare the Compromise agreement and any other Concession Agreement signed on the basis of the Request for Proposals to be Ineffective since after the cancellation of the RfP, the Contracting Authority was bound to issue a fresh competitive tender before awarding the Concession.

The Contracting Authority in its reply raised a preliminary plea that has to be decided first. The Authority claims that according to Regulation 4 of S.L. 601.09 (The Concession Contracts Regulations) the present action is not permissible. The CCR came into force in 2016 (LN 353/2016) and since the compromise agreement refers to an Rfp issued in 2009, according to Regulation 4 of the CCR, the Compromise Agreement shall continue to be regulated by the laws which were previously in force and Concession Contracts Regulations do not apply.

The Contracting Authority also raised another preliminary plea in that Regulation 113(1) states that "*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*". Although claiming that the concession value did not exceed the threshold mentioned in Schedule 3, no evidence was produced before this Board as to the actual estimated value of the Concession.

This Board did not find any instance in the documents made available in these proceedings where the original decision of the Contracting Authority to cancel the tender was ever revoked. The cancellation remained in force, although in suspense because of the pending Court Case, up to the 16th November 2020. The Compromise Agreement of the 12th November 2020 does not mention the revocation of the cancellation of the RfP either.

Thus it is this Board's opinion that when the preferred concessionaire, Harbour Management Ltd withdrew (ceded) its court case on the 16th November 2020, in effect the dormant cancellation of the RfP as ordered on the 19th May 2011 became operative and any further action regarding the said RfP was not according to law.

For the above reasons this Board declares that both the Compromise Agreement entered by the Contracting Authority and the concessionaire on the 12th November 2020 and the Concession Agreement signed between the Contracting Authority and Harbour Management Ltd on the 22nd February 2021 are ineffective in terms of the Concession Contracts Regulations 113.(2).

Charles Cassar
Chairman

Lawrence Ancilleri
Member

Carmel Esposito
Member