

PUBLIC CONTRACTS REVIEW BOARD

Case 1330– MMA 01/19 – Request for Proposals for the Provision of Passenger and Baggage Air Transport Services between Malta and Gozo

Remedy before Closing Date of a Call for Competition

The publication date of the call for tenders was the 20th May 2019 whilst the closing date was the 18th June 2019.

On the 18th June 2019 Helicopter Services Malta Ltd sought a Remedy against Malta Air Travel Ltd as the Contracting Authority requesting a remedy in relation to the technical requirements of the tender that are deemed to be restrictive.

On 17th July 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr Richard Matrenza as members convened a public hearing to discuss the objections.

The attendance for this public hearing was as follows:

Appellants – Helicopter Services Malta

Dr Tonio Cachia	Legal Representative
Mr Alessandro Rostirolla	Representative

Contracting Authority – Malta Air Travel Ltd

Dr Ron Galea Cavallazzi	Legal Representative
Dr Lisa Abela	Legal Representative
Mr Paul Bugeja	Representative
Mr Saviour Falzon	Representative

Other Attendees

Ms E Finlay-Broadbent
Mr Brian Abela

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and prior to inviting submissions made it clear that the letter requesting the call for remedy was filed within the statutory time limit prescribed by regulation 262 of the Public Procurement Regulations (PPR).

Dr Tonio Cachia Legal Representative of Helicopter Services Malta referred the Board to paragraph 2.1.2 of the Request for Proposals which distinctly states that it was the Government of Malta which desires to operate an air link service between Malta and Gozo. This puts paid to the claim that Malta Air Travel Ltd (MATL) is not a contracting authority within the meaning of the PPR.

Dr Ron Galea Cavallazzi Legal Representative of Malta Air Travel Ltd referred to paragraph 10 of the EU Directive 2014/20 which defines bodies governed by public law, and which refers to intentions not covered by PPRs.

Mr Paul Bugeja (416960M) called as a witness by the PCRFB stated on oath that he is the Chief Executive Officer of MATL. The Government of Malta provided a sum of US \$80 million mainly as share capital with US \$1.5 million used as working capital. The Company has a total income of US \$2 to \$3 million annually. They operate as an independent business by leasing out airport slots to Air Malta and operate their own aircraft supporting the Government's initiative to encourage tourism. Should the business make a loss it would not look to the Government to bail it out. Another part of the company's business is to lease aircraft dry and to let them out on wet leases.

Dr Galea Cavallazzi said that this tender was not a Public Service Obligation (PSO) and not a Government concession and the company was undertaking this at its own commercial risk. In issuing this tender the company was following PPR to obtain the best financial return.

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

This Board,

having noted this 'Call for Remedies Prior to the Closing Date of Call for Competition' filed by Helicopter Services Malta Limited (herein referred to as the Appellants) on 18 June 2019, refers to the claims made by the same Appellants with regard to the request for proposals reference MMA 01/2019 listed as case no 1330 in the records of the Public Contracts Review Board.

Appearing for the Appellants: Dr Tonio Cachia

Appearing for the Contracting Authority: Dr Ron Galea Cavallazzi

Whereby, the Appellants contend that:

- a) The technical specifications indicated in the ‘Request for Proposals’ (RFP) are discriminatory in that, the minimum requirements are restrictive as to the type of aircraft that may be available. In this regard, Appellants maintain that reference should be made to the Public Procurement Regulations wherein it is specifically stated that restrictive technical specifications should be avoided at all costs.**

- b) The present current requirements do not allow the operations so indicated, at night time so that, this requisite cannot be performed.**

- c) There is also lack of clarity with regards to the type of aircraft, in that the specifications fail to refer to the required standards in this respect of the aircraft required.**

This Board also noted the ‘Malta Air Travel Limited’ (MATL) ‘Letter of Reply’ dated 28 June 2019 and its verbal submissions during the hearing held on 17 July 2019, in that:

- a) MATL maintains that the request for proposals (RFP) does not fall within the remit of the Public Procurement Regulations as the Authority itself is not a Contracting Authority as defined in Regulation 2 of the same regulations.**
- b) MATL also insists that Appellants' 'Call for Remedy' was not filed within the prescribed time limit as dictated by Regulation 262 of the Public Procurement Regulations.**
- c) With regards to the technical specifications, MATL, insists that the RFP does not specify a particular type of aircraft but rather invited recommendations as to the type of aircraft which the prospective bidder would provide, so that the technical specifications of the aircraft are not restrictive.**
- d) With regards to night time operations, MATL after having consulted with the 'Civil Aviation Directorate', can confirm that night time flying is permitted as long as the aircraft being deployed has the necessary night flying equipment and capabilities.**

This same Board also noted the testimony of the witness namely, Mr Paul Bugeja, Chief Executive Officer of Malta Air Travel Limited duly summoned by the Public Contracts Review Board.

Prior to considering the merits of Appellants' concerns, this Board would, discuss the preliminary points raise by Malta Air Travel Limited in their 'Reasoned Letter of Reply' dated 28 June 2019, with particular reference to two issues namely:

- a) Late Application for a Call for Remedy by Appellants and**
- b) Whether MATL is to be considered as a 'Contracting Authority' as duly defined in Regulation 2 of the Public Procurement Regulations.**

1. Late Submission of 'Call for Remedies'

Regulation 262 of the Public Procurement Regulations clearly states that prospective candidates and tenderers may, prior to the closing date of a call for competition, file a reasoned application before the Public Contracts Review Board. In this regard, one must make a meaningful distinction between the 'Closing Date' and 'Closing Day', the former being clearly denoted in Regulation 262. This Board opines that 'Closing Day' means a particular day of the month whilst 'Closing Date' refers to a particular day of the month at a particular time.

2. In this particular case, the ‘Closing Date’ of the submissions was stipulated as Tuesday 18 June 2019 at 12.00am, whilst Appellants lodged their application for remedies on the 18 June 2019 at 9.30am, that is before the closing date of the submission of offers and in this respect such an application by Appellants was valid and within Regulation 262 of the Public Procurement Regulations.

3. Classifications of Status of MATL

Malta Air Travel Limited was registered as a private exempt Company on 2 March 2019, having as its sole shareholder The Ministry of Tourism (Government of Malta). The management and administration of the company are entrusted to a Board of Directors appointed by the Government.

4. Its main objective is to establish, develop, maintain, manage, supply, undertake and/or operate air transport services to and from Malta by the carriage of passengers, freight and mail by air, as well as to supply and/or carry on other services and activities related to and/or ancillary thereto.

5. Apart from the main objectives, this Board refers also to Clauses 3 (d) and 3 (e) of the Memorandum of Association of the company, as follows:

“(d) to make and carry into effect arrangements by way of partnership, co-ownership, working agreement, co-operation or for sharing or pooling receipts, expenses, profits or losses or for reciprocal or other concession or otherwise with any corporation, company, body or person carrying on or proposing to carry on, or engaged in any business or transaction capable of being conducted in conjunction with the business of the company;

(e) To make and carry into effect arrangements with any government, municipality or authority that may seem conducive to the furtherance of the Company’s main object and to obtain from any such government, municipality or authority or otherwise any charter, right, privilege or concession which may be deemed desirable to obtain and to carry out and exercise the same and comply with the conditions thereof;”

From the above clauses in the statute of the company, the latter is free to enter into any type of partnership and to conduct its own business on a commercial basis without restricting its economic activity to the

Government of Malta or any other government or municipality, so that MATL has an industrial and commercial character.

6. It is a well-known established principle that the characteristics of a ‘Body Governed by Publication’ must satisfy all of the following elements,

- (i) it must be specifically established for the purpose of serving the needs in the general interest,**
- (ii) it must not have any industrial or commercial character,**
- (iii) it must have a legal personality,**
- (iv) it is financed, in general, by the state or had an administrative, management or supervisory board, more than half of the members being appointed by the state or other entities governed by public law.**

7. From the statute of the company, the objectives of the company consist of an industrial and commercial nature and there is no element of general interest involved. All the objectives so listed in the memorandum of association of MATL are of normal commercial nature having a wide spectrum of commercial and industrial capabilities.

- 8. The company does have a legal personality in that, it is registered as a private exempt company with the registry of companies.**

- 9. The company's sole shareholder is the Ministry of Tourism (Government of Malta) so that the initial share capital originates from public funds, however, from the testimony of Mr Paul Bugeja, the Chief Executive Officer, this Board was made aware that MATL operates as an independent commercial concern by leasing out airport slots to 'Air Malta' and operates its own aircraft apart from leasing aircraft on a dry lease and let them out on a wet lease.**

- 10. Most important of all was the confirmation of Mr Bugeja that the company operates under on its own steam, in that, should the company sustain a loss, it will not look to the government to bail it out, hence, there is no reliance on future public funds.**

In conclusion, this Board opines that:

- a) **Appellants’ application for a ‘Call for Remedies’, was submitted within the prescribed period, as duly stated in the Public Procurement Regulations.**
- b) **In order for MATL to be classified as a ‘Contracting Authority’ and be subject to the Public Procurement Regulations, it must satisfy all the requirements mentioned in paragraph (6) above and in this respect, this Board opines that MATL is not to be considered as a ‘Contracting Authority’ but a normal private exempt company carrying out industrial and commercial activities without any conditions laid out by the government.**

In view of the above, this Board,

- i) **confirms that MATL is not to be considered as a Contracting Authority and is not subject to the Public Procurement Regulations;**

ii) directs, that since MATL does not fall within the Public Procurement Regulations, it is not the remit of this Board to consider Appellants concerns.

Dr Anthony Cassar
Chairman

Dr Charles Cassar
Member

Mr Richard A Matrenza
Member

30 July 2019