

## **PUBLIC CONTRACTS REVIEW BOARD**

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### **Case 1333 – Application to request a preliminary reference to the Courts of Justice of the European Union (CJEU) in terms of Article 267 of the Treaty on the Functioning of the European Union (TFEU)**

This Application was made by Gozo Channel (Holding) Company Ltd and Gozo Channel (Operations) Ltd on the 5<sup>th</sup> April 2019.

On 30<sup>th</sup> July 2019 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Dr Charles Cassar and Mr. Carmel Esposito as members convened a public hearing to discuss the application.

The attendance for this public hearing was as follows:

#### **Applicants – Gozo Channel (Holding) Company Ltd and Gozo Channel (Operations) Ltd**

|                           |                      |
|---------------------------|----------------------|
| Dr Clement Mifsud Bonnici | Legal Representative |
| Dr Antoine Cremona        | Legal Representative |
| Dr Simon Schembri         | Legal Representative |
| Mr Joe Cordina            | Representative       |

#### **Interested Party - Virtu Holdings Ltd**

|                     |                      |
|---------------------|----------------------|
| Dr Adrian Mallia    | Legal Representative |
| Dr Ann Fenech       | Legal Representative |
| Mr Matthew Portelli | Representative       |
| Mr John Portelli    | Representative       |
| Mr Henri Saliba     | Representative       |

#### **Interested Party - Island Ferry Network Ltd**

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| Dr Alessandro Lia   | Legal Representative |
| Dr Paul Lia         | Legal Representative |
| Mr Antoine Portelli | Representative       |

#### **Contracting Authority – Ministry for Transport and Infrastructure**

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|-------------------------|----------------------|
| Dr Steve Decesare       | Legal Representative |
| Dr Ron Galea Cavallazzi | Legal Representative |
| Mr Marco Cassar         | Representative       |

Dr Anthony Cassar, Chairman of the Public Contracts Review Board, welcomed the parties and asked the Applicants to make their submissions.

Dr Antoine Cremona Legal Representative for Gozo Channel (Holding) Ltd and Gozo Channel (Operations) Ltd (hereinafter referred to as the Applicants) stated that the basic background principles of this Application were those listed in their '*rikors*' of the 5<sup>th</sup> April 2019 and there was agreement between all the parties regarding the background requirements of Article 267 of the TFEU. He asked that it be noted that the reference made by them to Article 3.2 of Directive 2014/23 should read Article 3.1.

The principles underlying Article 267 were outlined and their relevance in dealing with European matters when seeking a remedy under national laws of a member state. The CJEU elucidates and interprets the law but does not decide – this is done at national level. It is quite usual to use as a means of defence against such an Application the claim that the matter is one of application not interpretation of rights. No request is made in abstract and reference was made to CJEU Case 42/13 *Cartiera del Adda* which dealt with a request for a preliminary ruling on a decision of the administrative tribunal of Lombardy.

Every request to the CJEU must start from a case – however the European Court does not examine the factual background but gives an interpretation on resolving a dispute. It is necessary to understand the parameters of where the decision is to be made. The question is whether Article 3(2) of the Concessions Directive 2014/23, which is transposed as Regulations 60(1) and 60(2) of our Legal Notice requires a Contracting Authority to lay a time period for the submission of bids to allow a public entity to participate freely in such an exercise. Another requisite is that the interpretation of the law is not an academic exercise but a useful tool to enable the PCRБ to come to a decision on the outstanding matter.

Another primary principle is that only the CJEU can interpret the Court of Appeal decision that a public entity can bid in open tender. How can a public entity participate openly in a tender with all the disadvantages (compared to a private party) when there is lack of equal treatment between the economic operators? Interpretation is necessary by the CJEU on the question of how to allow a public entity to participate freely within the time period for the submission of bids while adhering to any other duties it might have under the Directives.

Dr Steve Decesare Legal Representative of the Ministry for Transport and Infrastructure said that the first decision which the PCRБ must take is if the precontractual calls for a remedy and the preliminary reference are valid. After the deadline for submissions of the tender procedure Virtu Ferries appealed. Their grievance was that the Board failed to fix a date for the close of calls – in this respect all parties made submissions to the Court of Appeal. The Applicant claimed in regard to their third grievance that they placed themselves at the sage judgement of the Court. The Court

decided, on this point, that the PCRB should have set a date for the closing of calls which was not done and left it to the Ministry to fix a date. The Court fixed the 6<sup>th</sup> March 2019 as a closing date. Applicants in their written submissions referred to two cases by Virtu against Gozo Channel that precluded the latter from making an offer. The Court still fixed a date nonetheless. Any recourse on the preliminary reference should have been made prior to the Appeal. We now have a back to front situation where Applicants are appealing from a decision of a Court of last instance to the PCRB which is a Court of first instance, and one must ask if such an appeal is valid before we even begin to consider the preliminary reference.

In reply Dr Cremona said that the basic principle here is that the Court of Appeal determined the Case and set a closing date – thus they re-opened the entire process and made it open to all. It is therefore not correct to maintain that once the Court had re-opened the process any unlimited right of action was restricted.

Dr Decesare contended that since the Court had fixed a date the Case cannot be re-opened with the Board as this puts the Board above the Appeal Court.

Dr Adrian Mallia Legal Representative of Virtu Holdings Ltd said that the preliminary point is regarding the decision on the closing date on the first '*rikors*'. There was a second urgent '*rikors*' on the 4<sup>th</sup> March 2019 asking the Board to reconsider and it decided thereon. There followed another '*rikors*' regarding the preliminary reference. This is dependent on whether the '*rikors*' of the 4<sup>th</sup> March could be heard – this has already been decided and the PCRB decision is final and therefore cannot be reheard or re-considered. Applicants had the right to go to the Court of Appeal after the first case which for their own reasons they decided not to do. It is evident that the PCRB cannot decide on this matter either on the point of preliminary reference or even on the so called urgent application.

Dr Mifsud Bonnici Legal Representative of Gozo (Holding) Ltd said that his clients had submitted a '*rikors*' on the 1<sup>st</sup> March 2019 seeking a pre-contract call for remedy. The Ministry replied and the PCRB made a decision which was revoked on the 5<sup>th</sup> March 2019. On that basis the original '*rikors*' is valid, and hence the preliminary reference could be submitted.

The Chairman said that he wished to clarify matters by recalling what had actually occurred. A former member of staff had made an administrative error which has since been corrected. The Board considered this issue closed.

Going on to the merits of the preliminary reference, Dr Decesare said that the PCRB was not obliged to refer the matter to the CJEU as this is not a case of interpretation of the law. The Ministry does not agree that there is any need to refer the matter as this is an instance of application of the law and not necessary since the law is clear on the fixing of the terms of a tender by the Contracting Authority and how the principle of equal treatment and transparency should be applied. The

Concession Contracts Regulations (CCR) make no distinction between a public and a private entity. There is a minimum 30 days limit to submit offers – in this Case 60 days were allowed and no pre-contract issues were raised. Following the appeal, the issue was first raised as to whether the date set by the Contracting Authority should be fixed or a moving target dependent on whether a public entity wished to apply. The argument is that an exception should be made for different entities to bid by extending the closing date for bids, and which would make the process interminable. This goes totally against the CCR principles of equality of treatment, fairness and openness for all bidders. The Court of Appeal never stated that the incumbency advantage has to be neutralised totally, merely that it should be as much as possible a level playing field. According to the CCR the closing date has to be fixed objectively without prejudicing any party and according to the complexity of the service to be provided.

Dr Mallia stated that the Gozo Channel argument is that they are at a disadvantage when compared to other bidders – hence their request for a preliminary reference to get direction from the European Court to find out if the Contracting Authority is obliged to minimise this disadvantage. One crucial element to justify the call for a preliminary reference is that the principle involved has not yet been decided or pronounced upon – the *Acte Clair* doctrine. In this instance the guidance already exists. In the European Dynamics case (T 345/03) it was established that a contracting authority is not obliged to neutralise absolutely all the advantages enjoyed by the incumbent service provider – it is merely obliged to strike a balance. Since the matter has already been clarified by the CJEU there is no point in referring it again.

Dr Cremona said that the Ministry seems to agree that a problem exists which is why a preliminary reference is essential as we are dealing with a point that is still not decided in European law. The Court of Appeal decided that Gozo Channel must go through a procurement process and treat all parties equally. This is a fundamental point which needs interpreting by the CJEU.

In his closing remarks Dr Decesare said that the Ministry has to issue a call according to the law without prejudice and without excluding any one entity. Their call had no intention to exclude anyone or to place any specific impediment and if there was one, it was not created by the Ministry or by the call made.

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

**This Board,**

**Having noted, this ‘Application for a Preliminary Call for Reference to European Court of Justice’ (ECJ) in terms of article 267 of the treaty on the**

**functioning of the European Union, filed by Gozo Channel (Holdings) Company Limited and Gozo Channel (Operations) Limited, on the 5 April 2019, listed as case number 1333, in the records of the Public Contracts Review Board.**

**Appearing for Applicants:**

**Dr Clement Mifsud Bonnici**

**Dr Antoine Cremona**

**Dr Simon Schembri**

**Interested Parties**

**Appearing for Virtu Ferries Limited:**

**Dr Adrian Mallia**

**Dr Ann Fenech**

**Appearing for Island Ferry Network Limited: Dr Alessandro Lia**

**Dr Paul Lia**

**Appearing for the Ministry for Transport  
and Infrastructure:**

**Dr Steve Decesare**

**Dr Ron Galea Cavallazzi**

**This Board also noted ‘Letters of Reply’ sent by the following interested parties  
namely;**

- **‘Letter of Reply’ dated 18 April 2019, by Virtu Ferries Limited**
- **‘Letter of Reply’ dated 5 & 18 April 2019, by Ministry for Transport and Infrastructure**

**This Board, after having examined the relevant documentation to this ‘Call for Reference’ to the European Court of Justice (ECJ) and heard submissions made by all the interested parties would respectfully point out the following:**

- 1. This Board, in its decision dated 23 August 2018, opined that a new closing date for the submissions of offers be issued by the Ministry for Transport and Infrastructure. Such a decision was not upheld by the Hon Court of Appeal, in that, this Board had to establish a closing date of submissions in its decision and in this regard, the Court of Appeal in (Rikors numru 228/18) fixed a closing date for submissions of offers to be 6 March 2019, as follows:**

*“Fil-kuntest tat-tielet aggravju, hu minnu li r-Regolament 103 jghid li fid-decizjoni final tieghu l-Bord ghandu jistabilixxi d-data tal-iskadenza għida għall-prezentazzjoni tal-offerti; dan ma sarx mill-Board li halla f’idejn il-Ministru biex jagħmel dan. Din il-Qorti, għalhekk, trid tiffissa z-zmien għall-*

*gheluq tas-sejha. Mehud skont ic-cirkostanzi l-Qorti tiffissa l-jum tal-Erbgħa, 6 ta' Marzu, 2019, fil-11.00am bhala l-jum u l-hin għall- gheluq tal-offerti”*

- 2. Applicants are contending that a Public Entity has disadvantages when competing in an open tender in that, the stipulated time for the submission of offers is too short. In this respect, Applicants refer to the fact that, whilst a Private Entity is able to process its offer without any complex regulatory procedures, a Public Entity has to abide by the Public Procurement Regulations through which the processing and finalisation of its offer takes much longer than the normal stipulated period for the submission of offers, thus the principle of equal treatment is totally disrupted.**
  
- 3. Applicants, in this regard, refer to the stipulated closing date of 6 March 2019, which was established and decided upon by the Hon Court of Appeal. This Board notes that, in establishing the closing date, the Court of Appeal took also into consideration that, Applicants' entity was a Public one and in doing so, it also considered that such entities had to abide by the Public Procurement Regulations, thus recognising the instance that the process of acquiring the necessary**

**partnership to compete in a tender, is somewhat longer than that of a Private Entity.**

**4. This Board would point out that in considering the merit of this particular call for Preliminary Reference, it fails to identify any justification to accede to Applicants' request when one considers that, in establishing the closing date to be 6 March 2019, the Court of Appeal took all due considerations in its deliberation and needless to point out, same Court of Appeal considered also the application of the principle of equal treatment. In this regard, this Board would also emphasize and assert that the Court of Appeal is competent and knowledgeable enough to interpret the implication of equal treatment, in this particular case.**

**5. As, Applicants are well aware, a Preliminary Call for Reference is submitted when the case being considered creates an issue of the interpretation of a particular provision of European Law so that, the local Courts or Tribunals can consider the particular case in the light of such an interpretation. At the same instance, this Board would point out that, the application of the principle of equal treatment has been considered and treated by our Local Courts on many occasions, whilst it is to be emphasized that the ECJ does not treat the implication of the Law**



**but rather the interpretation of same. In this regard, this Board opines that there is no need for such a preliminary request for reference.**

**In view of the above, this Board does not accede to Applicants' request.**

Dr Anthony Cassar  
Chairman

Dr Charles Cassar  
Member

Mr Carmel Esposito  
Member

*30 August 2019*