**PUBLIC CONTRACTS REVIEW BOARD**

**Case 1499 – RFP 001/2020. Request for Proposals for a Public Service Concession Contract for the Provision of Scheduled Sea Ferry Services in Malta and Gozo**

**Pre-Contractual Remedy**

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

On the 29th July 2020 Virtu Ferries Ltd filed a Precontractual-Remedy against Transport Malta as the Contracting Authority in terms of Regulation 98 of the Concessions Contracts Regulations.

On 7th October 2020 the Public Contracts Review Board composed of Dr Anthony Cassar as Chairman, Mr Lawrence Ancilleri and Mr Carmel Esposito as members convened a public virtual hearing to discuss the application.

The attendance for this public hearing was as follows:

**Appellants – Virtu Ferries Ltd**

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| Dr Adrian Mallia | Legal Representative |
| Dr Anne Fenech | Legal Representative |
| Mr Matthew Portelli | Representative |
| Mr Francis Portelli | Representative |

**Contracting Authority – Transport Malta**

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| Dr Shazoo Ghaznavi | Legal Representative |
| Mr Konrad Muscat | Representative |

**Interested Parties:**

**Marsamxetto Steamferry Services Ltd**

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| Dr Joseph Camilleri | Legal Representative |
| Dr Nicholas Valenzia | Legal Representative |
| Mr Julian Zammit Tabona | Representative |
| Mr Edward Zammit Tabona | Representative |
| Mr Michael Bianchi | Representative |

**Supreme Travel Ltd**

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| Dr Reuben Farrugia | Legal Representative |
| Mr Nazzareno Abela | Representative |
| Ms Denise Balzan | 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 agreed to treat it as a normal hearing of the Board. He then invited submissions.

Prior to formal submissions Dr Shazoo Ghaznavi Legal Representative for Transport Malta requested confirmation that this appeal was based on Article 98 (e) of S.L. 601.09 and that therefore the affidavits presented at the last minute, which had no relevance to the above section, would not be taken into consideration.

Dr Adrian Mallia Legal Representative for Virtu Ferry Ltd (Virtu) requested that the affidavits are kept on record together with the copies of the covering emails. No allegations had been made in Mr Matthew Portelli's affidavit and accompanying information and these needed to be rebutted.

Dr Joseph Camilleri Legal Representative for Marsamxetto Steamferry Services Ltd (Marsamxetto) said that the intended message of Virtu's client was clear.

The Chairman stated that the additional documents submitted will be kept on record but the Board's decision will be based on facts submitted at this hearing.

Dr Mallia opening his submissions stated that the basis of this Request for Proposals (RfP) by Transport Malta is the award of a service concession for 15 years. The tender specifies that the servicing of six localities is mandatory and grants the opportunity of introducing other non-mandatory localities to extend the service. The contract value is estimated at € 115.5 million and the award is on Best Price Quality Ratio (BPQR) basis. The specifications include the use of eco-boats, waterline length of vessels and a minimum capacity of 200 passengers. There is no obligation on the number of vessels to be used to provide the service nor on the schedule of service – it is up to the bidder to decide on these points and on the fare to be charged. The routes, localities and landing places are not specified in the tender documents. The documents presented on the issue of the contextual background to this tender are contested by the other parties.

There are three main arguments, based on legal instruments, challenging this tender – the Maritime Cabotage Regulations, the Concession Contracts Regulations and the European Union Rules on State Aid.

Dealing with the Cabotage Regulations Dr Mallia said that there is consensus among the parties that this point is relevant but there is divergence on its application. These Regulations are EU directives which have a direct effect on Malta and have more force in certain areas as they override Maltese law provisions if a conflict exists. If the RfP proposals conflict with the Cabotage Regulations then it should be cancelled – and this is a point that cannot be denied. The EU Treaty is based on four freedoms including the

freedom to provide a service. Maritime Cabotage Regulations (the transport of passengers by sea in one country) which became operational in 1993 removed the severe restrictions before then on these operations. The fundamental principle to provide a service is clearly reflected in Article 1 of the Regulations which allows free movement of services between member states. Article IV (i) however provides an exception to this principle; an exception that must be treated with restrictive care as it is only there in case an essential transport service cannot be provided as a result, allowing a Government to intervene by granting either a concession or a Public Service Obligation or both. This only applies in the case where an isolated island is not being serviced by the market.

According to article IV (i) the grant of a public service contract can only be given for transport from, to and between islands. Clause 2.13.7 of the RfP names five mandatory locations in Malta and one in Gozo – since the service is required for all these localities it is not to and from islands but in 80% of the cases it is on mainland Malta and in breach of the quoted regulations. Marsamxetto agrees with this point in certain aspects, namely that the RfP impacts on the freedom of cabotage services but they argue that it provides environmental benefits and increases efficiency and they also claim that the arguments is hypothetical as the tender is not clear on routes.

Dr Mallia referred to the opinion of Advocate General Tizzano in ECJ Case 323/03 Commission vs Spain wherein it was claimed that service is only allowed between islands and not mainland towns. In that context paragraphs 40 to 47 deal with the issue of islands and environmental benefits and states that services can be extended between towns in special circumstances however since towns were directly accessible by road they were not analogous to islands. Appellants are not convinced that localities in Malta are not easily accessible by road (or that they are similar to fjords) and therefore article IV (i) does not apply. As regard the environmental and economic considerations, paragraph 46 of the opinion states that such considerations do not justify the extending of Article IV (i) and the ECJ accepted the Advocate General's opinion, did not accept the exception regarding fjords and stated that in the case of Spain where there are road links the exceptions under the Clause did not apply.

The RfP demands six localities which are definite and therefore the point raised is not hypothetical. Clause 98 (e) lays down the requirements for cancellation – in this instance it is clear that that requirement is the breach of Cabotage regulations. Transport Malta claim that they were taking a broad view and were not taking into consideration the 1993 regulations. This is a very baffling statement to make as the EU study to which they make reference does not take precedence over legislation.

There are three conditions laid down by the EU in the Analir Case (C 205/99) to be met before a Government of the member states can give a public service contract. These conditions are that there must be a real need for state intervention due to an inadequacy of service, that it is necessary and proportionate and that it is objective and non-discriminatory. It is obvious that such a study was not carried out before the RfP was published.

The offerors are free to include other non-discriminatory locations so how can Transport Malta intervene to say that there is a real need if the locations are not even known? Respondents to this Appeal claim that no study is necessary because no one is offering the service yet to which one would reply that the answer to that question is obvious since the landing places are not available to enable the

service to be offered. The Authority should first construct the landing places, judge the response and intervene if the service is not there. Documents submitted at the last minute include a scheduled time-table which indicates that some operator has intervened already to provide a service – the logical process would be to wait until the landing places are constructed and wait to see what happens in other locations.

Exclusivity is only justified where there are overriding reasons in the public interest and the onus on proving this is on the Transport Authority. No justification has been proven in this case for this exclusivity and the Study Report commissioned by the Authority and the tender are at divergence on several points. The report is based on assumptions on the use of ten landing places and subsequent estimates on costs, number of vessels, revenue etc therefore making the business case faulty from the start. Paragraph 47 of the Advocate General's opinion makes it clear that consideration of environmental and economic nature is immaterial when considering a concession.

Dr Mallia continued by stating that when considering the Concession Contracts Regulations (CCR) the parties contesting this Appeal argue that Virtu should have sought clarifications first before seeking a remedy. This argument overlooks the fact that the issue here is that there are crucial and fundamental matters in the nature of the contract and it is not a question of tinkering with points here and there.

With regard to the terms, the tender considers a 15 year duration plus a further two extensions of six months each. Both the Cabotage and the Concession Regulations consider the closing of the market for that period and conclude that it is in the interest of the State and all other operators to have competition – there is no one size fits all duration but the fundamental point is that it should be as short as possible, normally regarded as five years – anything over that requires justification. The Commission's guidelines held that at one time contracts should not be longer than six years – this was changed to twelve years if it could be justified as necessary to recoup investments on new vessels, although this point was highlighted as a red light. Transport Malta have based their term on workings carried out on cost-benefit analysis basis – this is assumed to be based on the report by E-Cubed Consultants since their report analyses workings on ten, fifteen and twenty years and stated that 'initial investments costs do not change but change of years alters the figures'. The analysis on page viii of the Consultants Report recommends a 15 year concession period which matches the concession period proposed in the RfP and which maximises revenue for Transport Malta. There is disregard to the vital requirement of what the law states in setting the terms of the tender. It is interesting that on page 27 of the Report there is an analysis on a 20 year concession – the main point here is that it indicates that after 15 years the vessel reaches its economic lifetime and therefore if a longer concession had been proposed by the Authority the contractor would have had to re-invest in new vessels, obviously indicating that the decision on the terms of the concession was based solely on the useful life of the vessel.

Specifications in previous tenders were very detailed. In this case there is very scant definition of the Eco-boat with not a single objective specification – no reference to safety, security, environment etc. Regulation 70 (i) of the CCR dictates that the technical and functional specifications have to be clearly defined, while Regulations 62 and 79 relate to objectivity. Marsamxetto view is that it is clear what the

Transport Authority has in mind, but alas no one else knows and the potential for abuse is manifest when the terms are not clear.

Tender clauses 2.13.5 to 2.13.8 set out the definition of service and the mandatory and non-mandatory localities and introduce the concept of options of landing places. In the Implementation Plan the bidder must state the landing place options in each locality being serviced. After the Implementation Plan is submitted and the tender closed, bidders at the evaluation stage will be given the opportunity to change two landing places in the mandatory and two landing places in the non-mandatory locations if access at those sites is impossible. The Authority can ask the bidder for changes in four places but if more than four changes are proposed the submission will be eliminated unless the bidder could not have reasonably known that a location was inaccessible. All clauses under criteria 2.13 of the tender, including the Technical Specifications come within Note 3 which inherently makes the above clauses contradictory as Note 3 permits no changes. The basis of this tender is incorrect and it is totally unworkable, and contrary to CCR 79 which restricts the limits of choice on the Contracting Authority and can also lead to abuse. On this point Marsamxetto agree that the tender is not clear but they claim that it helps to increase flexibility and competition; however their claim that Virtu has market dominance is incorrect as the latter do not operate in this sphere.

The nature of the vessel according to the RfP requires vessels with a waterline of between 25 to 35 metres and a carrying capacity of 200 passengers minimum. No objective reason has been given for these restrictive clauses. Apart from this being an area for flexibility, how can an operator decide the size of vessels if the locations are not known? On page 19 the Consultants' Report assumes vessels of 300 passenger capacity but in a footnote accepts smaller vessels which naturally would give different outcomes. Specifications should not artificially narrow competition and there is legal basis for this in article 67 of the CCR.

The question of State Aid has to be considered on a contract of this monetary magnitude, said Dr Mallia. In page ii of their Report the Consultants state that the data for this project was provided by Transport Malta and was not independently verified. Page 21 of that Report provides a costing exercise on port facilities maintenance. This is calculated as a percentage of the initial investment costs assumed at 1% of expenditure by Transport Malta on building port facilities at a cost of € 25.6 million. Transport Malta is giving these facilities at no charge and exclusively to the concessionaire. This point is relevant as Article 107 of the Treaty on the Functioning of the EU introduces the concept of one economic market and its resultant benefits – a concept to have a free market without member states interference in that market. The distortion of competition in the market does not appear to have been heeded, more so since the amount of aid is immaterial in creating distortions and on its effect on trade and the potential to confer a selective advantage through the exclusive use of the landing places.

Transport Malta claim that since this tender deals with a public power function it comes under Article 107(1) of the Treaty and therefore State Aid does not apply. The Authority's objective to have vessels with the least $CO^2$ emissions appears to overcome all other parameters. If the State Aid question in this case is referred to the European Court then Article 19(e) has the potential for undermining the economic fundamentals of this project concluded Dr Mallia.

Dr Shazoo Ghaznavi Legal Representative for Transport Malta said that this RfP is a service concession in respect of a scheduled passenger ferry service which has to be provided punctually irrelevant of any other factors and whether there are passengers or not. Appellants claim that there is a breach of a number of laws or potential breaches of three different laws. It is also claimed that a number of issues, such as the vessel stipulation could have been clarified, yet at the clarification meeting held Virtu representative chose not to ask questions – this attitude is inconsistent with the claim that the RfP lacks clarity. Breach of law only exists at present, but circumstances may change and not lead to a breach and one must look at actual not potential breaches.

Appellants chose a selective approach when dealing with the Cabotage Regulations, and are not asking for rectification of the RfP but for complete cancellation. EU directives 3577/92 to which reference was made was issued in 1992, the Advocate General's opinion in the Vigo case goes back to 2006 and the Commission's Directive was in 2014 and there have been no other cases since the Vigo one. Appellants seem to have failed to take notice of the footnotes to these legal pronouncements as to how the aspect of islands is to be considered and the references to treating long distances as islands. Cabotage rules do not allow exclusivity except in the case of islands – the RfP concession includes two islands on the mandatory list otherwise it would be in breach of the law. The EU Parliament in 2016 demonstrated a continuous development in their line of thought on this subject and which reflect changes coming about which might be relevant in future.

In reply to a question from the Chairman, Dr Ghaznavi said that there were no new laws on this subject. He was simply stating that changes might take place in future and that they might become relevant. He further stated that the Board can delve into the matter of breaches of cabotage regulations in the written submissions, but the claim that there is a potential breach is not in question.

In respect of the CCR Dr Ghaznavi said that the aim of the RfP is to provide an affordable regular ferry service and the routes proposed show that emphasis is on the localities with the possibility of changing the landing places not the localities. The Transport Authority indicated that there are four other scheduled services operating at present and the aim of the RfP was to have other points serviced, hence the need for a mandatory provision. The claim that the provision of landing places to the concessionaire is indicative of favouritism is not so, since no one pays for the use of existing landing places now and therefore there is a level playing field. The EU Commission clearly states that exclusivity is necessary in certain circumstances such as unprofitable routes and they go beyond twelve years in defining the length of period of a contract and says that they may be longer but not to equate to full depreciation of the vessel. Virtu seems to be unclear what they are claiming when it comes to the specifications of the vessel – is it too binding or does it lack clarity? The Authority has defined an Eco-vessel, length and capacity, and then indirectly states that the least $CO^2$ emission is the main objective target.

On the matter of State Aid Dr Ghaznavi said that where feasible or essential Transport Malta will develop landing facilities. The approximate cost of each landing place is € 5 million with an estimated lifespan of 50 years. Article 107 does not apply in instances like maritime traffic control and safety and therefore this issue does not exist as the Authority will not be making any direct payment to the concessionaire. The letter of appeal from Virtu (page 12) refers to Article 107 (1) and it is an easy process for the Board

to evaluate if the tender affects trade – there is no selectivity, no advantage to any party, no distortion of competition since this is a scheduled service. There is no present breach of any law, no present potential exists of future breaches of law and the Board is requested to look at all factors and agree that the requirements of article 98 (e) are not met and the RfP should go ahead.

Dr Camilleri stated that a very detailed reply had already been submitted on behalf of his clients and was certain that the Board will give it its full consideration. Dealing with the submissions made on the Cabotage Regulations the line taken by Appellants is that the regulations are very strict and that the circumstances in Clause IV (i) are highly exceptional. The Regulations permit exceptions and if they were so strict the EU would not have had the need to issue guidelines on how they should be applied. Advocate General Tizzani refers to exceptions made for fjords but that is not the only exception that applies and is an acknowledgement that exceptions can be made and there is discretion allowing the authorities to accept exceptions. In the Spanish case referred to, distances between the towns are very small and reached by a highway and do not necessarily apply to circumstances in Malta, which although small faces traffic problems leading to lengthy journeys. One should not exclude a connexion between islands incorporating the possibility of an alternative public transport service through ferries akin to the public transport land service. Such an RfP would be justified in law.

The length of the RfP and its exclusivity create issues, according to Dr Camilleri. The request is for a public service that is affordable at reasonable prices; the routes cannot be selected and one must take cognisance of demand and prices to be charged. The call is to reach locations not currently served and at a reasonable price, but the market has not shown an interest in these uneconomic routes – in such situation 15 years is not an unduly long period to recover the investment involved, more so if one bears in mind the type of ferries required which no doubt would demand new-builds. It is also necessary to consider the extra costs to be incurred in providing a ticketing system and the infrastructure costs to be borne by the entrepreneur. It is to be noted that the landing places are to be provided but the bidder is expected to improve and maintain them, and the service has to be provided even if it is not profitable – without Government assistance the service would still not be offered. Exclusivity would therefore be justified as a matter of principle.

Dr Camilleri stated that on the point of lack of clarity claimed by Virtu one must consider that the emphasis of the tender is on the offer of service and the routes, and the details of the vessel to be used is not a specification of the tender. It was up to the bidder to declare what was being offered and this flexibility increases the element of competition. Restrictive terms are likely to increase the risk of lack of interest in offers. Through previous appeals evidence has already be noticed that the details were not wide enough and therefore flexibility is essential. Request for clarification would have eliminated certain unclear points and enabled the tender to be saved – instead the extreme remedy of cancellation is now being sought by Appellants.

There will be no breaking of State Aid regulations since the essential element of violation of those rules is the impact it has on competition and since the market is not offering the service there is no impact on competition as it does not exist so there is no breaking of laws and the RfP should progress further.

Dr Reuben Farrugia Legal Representative for Supreme Travel Ltd said that the cardinal point that the Board should consider is the reason why exclusivity is justified in the case of a considerably long tender. The tourism service aspect has certain importance as for example the open top buses (commonly referred to as hop-on hop-off) which operate a service imposed by Transport Malta with stops en-route in three zones in Malta and one in Gozo. When the service was introduced an exclusive eight year concession was granted but this was attacked as the exclusivity was felt not justified. After a Court case Transport Malta were made to withdraw the concession awarded. They established new routes and anyone interested could apply for a licence and conform to the regulations and specifications; thus the hop-on service is not exclusive. What is the justification for exclusivity in the case of the ferry service? All landing points can be determined by the Transport Authority and there should be no argument for it to be exclusive. If the point of exclusion is to render the service viable it should be the operator not the Authority that ensures it's viable – the case of the open top buses is based precisely on this principle; the operator worked out if the service was viable before entering the market. Before any other aspect of the tender is considered this exclusivity restriction must be addressed.

Dr Ghaznavi disagreed and stated that the tender offers a scheduled not a hop-on hop-off service; the latter was purely touristic and of a circular rather than linear nature. Exclusivity in the case of the ferry service is necessary to ensure a regular service for local residents.

Dr Farrugia said that the hop-on service was provided from fixed points and had nothing to do with the argument about whether it was of a circular or linear nature. Times of departures and arrivals are set, with pre-determined routes and pre-determined stops with competition allowed and services scheduled by the Transport Authority whilst the service is not restricted to tourist use but open to anyone wishing to use it – it is a public scheduled service with set times and points; an identical service exactly as proposed in the RfP, and if the routes and stops are not followed the operator is penalised.

Dr Camilleri was of the view that one is here looking at a different scenario as the hop-on service is mainly for tourists and is priced accordingly.

Dr Farrugia said that there was no pre-determined price in the RfP and merely because more tourists use the hop-on service it does not mean that it is not a scheduled service. The RfP gives exclusivity for 15 years and the Authority are laying themselves open to further action by playing with the Regulations. Not one single justifiable reason has been given why the service should be exclusive for 15 years – it is the nature of the service that matters not whether is it on land or sea.

Dr Nicholas Valenzia Legal Representative for Marsamxetto Steamferry Services Ltd said that according to Legal Notice 149.56 the open bus service is not a public transport service. The routes are created by Transport Malta and open to operation by anyone and it is not an identical service to the ferry one as it is less onerous.

Dr Farrugia pointed out that both land and sea services were identically onerous as both have to offer a yearlong service. Each of the four hop-on routes required a separate licence but on the chosen route the operator is obliged to service that route and cannot miss any stops. The RfP only obliges service at other

than non-mandatory ones and is not circumscribed to any particular type of passenger and is identical to a hop-on service except in the way exclusivity is granted without any justification.

Dr Ghaznavi re-iterated that the hop-on service is a circular not linear one and that the service did not have to operate during the Covid pandemic. Also, there are no penalties on the operator if he ceases operations, to which Dr Farrugia replied that it was the Police, not the operators, who stopped the hop-on service during the pandemic and in any case the original RfP made reference to a hop-on service.

Dr Mallia said that the two respondents to the appeal claim that the exception in Clause IV (i) in the Cabotage regulations has to be widened in the case of Malta due to traffic and environmental considerations. Since the opinion of the Advocate General and the subsequent sentence, there have been no further cases which widened what was established then. Jurisprudence is clear on this point and the PCRB cannot re-interpret European law – that right is given only to the ECJ. The way is always open to the PCRB, if it not comfortable with the claim on this point to consider a preliminary plea to the ECJ, an obligation that rests with the Court of Appeal if not with the PCRB.

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

End of Minutes

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**Decision**

**This Board,**

**having noted this 'Call for Remedy Prior to the Closing Date of a Call for Competition' filed by Virtu Ferries Ltd (hereinafter referred to as the Appellants) on 29th July 2020, refers to the claims made by the same Appellants with regard to the 'Request for Proposals' (RFP) of reference RFP 001/2020 listed as case No. 1499 in the records of the Public Contracts Review Board.**

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| **Appearing for the Appellants:** | **Dr Adrian Mallia** |
| | **Dr Anne Fenech** |
| **Appearing for the Contracting Authority:** | **Dr Shazoo Ghaznavi** |

**Appearing for Marsamxetto Steamferry Services Ltd: Dr Joseph Camilleri**

**Dr Nicholas Valencia**

**Appearing for Supreme Travel Ltd: Dr Reuben Farrugia**

**Whereby, the Appellants contend that:**

a) **The 'Request for Proposals' (RFP) is in breach of the 'Maritime Cabotage Regulations', the 'Concession Contracts Regulations' and the European Union Rules on 'State Aid'. In this regard the RFP should be cancelled, as it does not take into consideration certain provisions in the foregoing mentioned regulations.**

**This Board also noted the Contracting Authority's 'Letter of Reply' dated 14th September 2020 and its verbal submissions during the virtual hearing held on 7th October 2020, in that:**

a) **The Authority maintains that, Appellants' contentions bear a truly negative approach. It contends that, there are provisions for exceptional circumstances where the stated provisions allow the conditions as duly stipulated in the RFP document and such conditions fall within these exceptions, so that cancellation of the RFP is not justified.**

**This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties during the lengthy hearing held**

**on 7th October 2020, will consider the issues raised by Appellants, in their 'Letter of Objection' under the following main headings namely:**

1. **The Maritime Cabotage Regulations**
2. **Exclusivity**
3. **Concession Contracts Requirements**
4. **State Aid**

**It must also be recorded that, both Appellants and Marsamxetto Steamferry Services Ltd (the latter being an interested party), presented documentation consisting of affidavits and related emails. In this respect, this Board informed the parties that, such documentation will be kept on record but not treated on their merits, as the Board opines that, such documentation does not relate directly to the merits of this appeal.**

1. **<u>Maritime Cabotage Regulations (1992) (The Regulations)</u>**

    **1.1. With regard to Appellants' first concern, this Board was eloquently made aware of the Cabotage Regulations (1992) in that, such regulations govern the provisions of Maritime Transport Services within Member States. Such regulations contain important definitions and conditions which not only merit consideration, but definitely deserve amplification and adherence thereto.**

**1.2. The Regulations clearly define what is meant by Maritime Transport and article 4 (1) states that:**

*"A Member State may conclude public service contracts or impose public service obligations as a condition for the provision of cabotage services, on shipping companies participating in regular services to, from and between islands"*

**Appellants maintain that, the transport services, being proposed in the RFP, are in breach of article 4 (1), as the major part of the service being proposed is not 'to, from and between islands', but from one landing place to another, within the same island (Malta).**

**1.3. The Authority, on the other hand, is claiming that, the maritime services being proposed include a service to the Island of Gozo, so that, there will also be a maritime service between Islands. In this regard, this Board would respectfully refer to clause 2.13.7 of the award criteria, wherein the mandatory routes are stipulated as follows:**

*"2.13.7 The routes proposed by the Proponents should as a* ***MINIMUM*** *include landing areas in the following Mandatory localities:*

*i. Marsaxlokk,*

*ii. Ta' Xbiex*

*iii. San Pawl il-Bahar*

*iv. St. Julians*

*v. Valletta*

*vi. Gozo"*

**1.4. From the above clause, it is clearly being stipulated that, the proposed routes must include landing areas (Ferrying Points) in the above-mentioned localities, five of which provide transportation within mainland Malta. This Board notes, as has also been vividly confirmed, during the hearing, that, the main scope of the RFP is to provide alternative transportation within the islands of Malta and Gozo and not primarily to provide sea transportation solely between the two islands of Malta and Gozo, as such a service already exists and is operational as a scheduled service.**

**1.5. This Board is highly concerned as to whether the service being proposed in the RFP, will breach the regulations duly stipulated in article 4 (1) of the 'Maritime Cabotage Regulations'. At the same instance, this Board notes that, the Authority did not present any evidence that they considered the requirement of the need of adherence to the regulations in article 4 (1). In this respect, this Board opines that prior to the issuance of the RFP, the Authority should have investigated with the relevant and competent Authorities whether, the service being proposed conforms to these regulations.**

**1.6. This Board is aware that, under certain exceptional circumstances, there might be a solution to the classification of the proposed service, however, same Board will be comfortably assured only, after confirmation that the necessary investigation and assurances have been obtained, so that, the Authority will not be in breach of the 'Maritime Cabotage Regulations', as the consequences can be considerable and also highly detrimental in financial terms. In this respect, this Board could not identify any indication that the Authority carried out the necessary enquiries prior to the publication of the RFP.**

**1.7. This Board also refers to article 1 of the Regulations which clearly states that, Member States might not introduce any scheme without prior authorisation unless;**

- **The scheme is justified by overriding reasons in the public interest**
- **The proposed service is necessary and proportionate to the proposed objective**
- **The proposed service is based on objective, non-discriminatory criteria made known in advance to prospective bidders.**

**1.8. In this respect, this Board is aware that, article 1 of the Regulations, allows the introduction of services which satisfy the above mentioned conditions and also acknowledges that, the Authority's objectives may**

**fall within such parameters; however, its main concern is the fact that, no indication has been presented to this Board that, in actual fact, the proposed service in the RFP will not breach any of the above-mentioned conditions stipulated in article 1 of the Regulations. At the same instance, this Board is not comfortably assured that, enough research and verification was carried out by the Authority prior to the publication of the RFP.**

**2. <u>Exclusivity</u>**

**2.1. With regard to exclusivity, this Board acknowledges the fact that, any economic operator submitting any offer would rightly expect that, at the end of the concession period, he would recoup his investment together with a return on that investment. The question arises as to what period of years the concession should be awarded.**

**2.2. This Board noted that, quite appropriately, prior to the publication of the RFP document, the Authority commissioned a professional report to determine and evaluate its objectives and projected the results thereof to the proposed services. In doing so, the report, based on information provided by the Authority, established the concession period. Respectfully, this Board notes that, the report although professionally compiled, is based on too many assumptions, through no fault of the originators, as this is mainly due to the fact that, the**

**Authority did not establish the precise technical specifications of the vessels and the fixed landing places for the entire proposed service. Although the RFP did stipulate the landing areas, it gave the opportunity to prospective bidders to propose additional landing sites. In this regard, this Board opines that, all the landing areas should be identified in the RFP (without any options) and technical information regarding the vessels to be deployed must be identified. It must be pointed out that, the outlay costs of the proposed service by the economic operator will depend upon such clearly defined specifications and information. In this regard, this Board would point out that, it is the responsibility of the Contracting Authority to dictate the technical specifications in a clear manner to enable prospective bidders to base their calculations on solid foundations.**

**2.3. In this particular case, Appellants are claiming that, the 15 year concession period is excessive and apart from the fact that, such a duration is based on incomplete information, this period is in breach of the maximum allowable duration of 12 years, which in itself has to be justified.**

**2.4. In this respect, this Board would also point out that, in establishing the duration of the concession, the Authority must also bear in mind that, the duration being proposed, after taking into account the above-**

**mentioned considerations, should never allow the suffocation of open competition in this particular maritime sector. This Board would remind the Authority that, concession contracts should not be longer than 12 years and this period must be truly justified on the grounds that it has to be necessary in order to recoup investments on new vessels, so that existing and more rigorous justification must be presented by the Authority for the granting of a concession of more than 12 years.**

**2.5. In this regard, this Board would, again refer to the consultants' report in that, such a report is based on incomplete information given by the Authority. If the Authority, establishes the technical specifications of the vessels, the routes and the fixed landing areas, the concession period can be justifiably assessed and determined in a more realistic manner.**

**2.6. This Board would refer to the very basic principles in the formulation of the technical specifications in public procurement which states that, the technical specifications should:**

- **Be precise in the way they describe the requirements**
- **Be easily understood and interpreted by the prospective bidder**
- **Have clearly defined, achievable and measurable objectives**
- **Do not limit the scope of competition**

**In the opinion of this Board, the technical specifications of the RFP are too vague and subject to various interpretations. In this regard, the Authority should be more direct, precise and determined in formulating the conditions and technical specifications of the RFP.**

**2.7. Last but not least, this Board acknowledges the fact that exclusivity in such a concession is a must, as the economic operator must recoup his investment and reap the dividend thereon. It is also acknowledged that, exclusivity in itself does suppress the competitive market, so that a balance has to be struck. Such balance can only be attained through establishing the Authority's objectives without going to extremes and by clearly determining the requirements thereto. However, the basic fact is that, the exclusivity period should represent the realistic duration in which time the economic operator will recoup his investment and a return thereon.**

**2.8. It must also be stated that, exclusivity also releases the Authority of other administrative and operational burdens as the Authority would deal administratively with only one operator, thus facilitating the administrative and operational functions of the whole project.**

**3. <u>Concession Contracts Regulations (CCR)</u>**

**3.1. Appellants maintain that, the RFP is also in breach of the Concessions Contracts Regulations with special reference to clause 70 (1) which clearly stipulates that:**

*"Technical and functional requirements shall define the characteristics required of the works or service that are the subject-matter of the concession"*

**3.2. The above-mentioned clause clearly stipulates that, the technical specifications and conditions should be defined and vividly determined in the RFP and not allow prospective bidders to formulate their own proposals. In this respect, this Board opines that, the RFP document should steer the bidders and not vice versa, so that, a level playing field is established by the Authority at the outset.**

**3.3. This Board would also refer to clauses 2.13.5 to 2.13.8 wherein, there exists the concept of options of landing places in locality being serviced. In this respect, this Board opines that, such a 'Context of Options' forms an integral part of the technical operation of the proposed service and hence, forms part of the technical requirements of the RFP and options in technical specifications will only create confusion and a subjective approach during the evaluation process.**

**3.4. This Board justifiably establishes that, the technical specifications, including the routes, type of vessels and landing places, should be**

**established and determined by the Contracting Authority in the RFP. Such an approach will eliminate, as much as possible, lack of transparency and ensure equal treatment, two of the fundamental pillars in Public Procurement. At the same instance, the importance of drafting technical specifications and conditions to reflect the Authority's objectives, cannot but be more emphasised.**

**4. <u>Award Criteria</u>**

**4.1. With regard to the award criteria, this Board confirms that the Authority will adopt the 'Best Price Quality Ratio' (BPQR) method as the award criteria. This same Board would also confirm that the BPQR is the most fair and suitable method for the selection of the most advantageous offer.**

**4.2. The system however, will operate in a fair and transparent manner only, if the specifications and conditions are clearly stipulated and well-defined in the RFP, at the outset so that, a level playing field is attained and justifiable comparison can be achieved, during the evaluation process.**

**5. <u>State Aid</u>**

**5.1. Public purchases of goods, services and infrastructure projects in all EU Member States are subject to Public Procurement Rules. In particular, Directive 2004/18/EC regulates the procedures for the**

**award of Public Services Contracts (apart from other form of procurement). In essence, such a directive with particular reference to article 107 (1) of the Treaty on the Functioning of the European Union, refers to State Aid as follows:**

*"Any Aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is, in so far as it affects trade between Member States, incompatible with The Common Market"*

**5.2. Appellants are maintaining that, the Authority is providing landing facilities free of charge and this amounts to State aid in form. From the consultants' report, it is estimated that such facilities would cost the Authority €25 million. In this respect, Appellants' insist that, such aid is in breach of article 107 (1) of the TFEU.**

**5.3. On the other side of the coin, the Authority insists that, by providing such facilities (landing sites, etc.) it is not favouring any prospective economic operator, as these facilities are being constructed and provided on the Authority's initiative to last for at least fifty years.**

**5.4. This Board was made aware that, the landing places will have a lifespan of 50 years, a much longer period that the proposed duration of the concession and in this regard, this Board takes into consideration that,**

**although such facilities will be utilised exclusively by the concessionaire during the period of the concession, the remaining lifespan of the landing places by far exceeds the duration of the concession.**

**5.5. This Board would also point out that, the landing facilities, being provided by the Contracting Authority, represent a long term investment which will be made available without preference to the successful party so that, there will not be any distortion of competition as the present market is not offering such a service. In this regard, this Board does not identify any form of limitation to an open competition and does not consider the use of these facilities by the concessionaire, as State Aid to the particular successful bidder, but rather a long term investment to provide alternative public transport for ferrying passengers.**

**In conclusion, this Board opines that:**

**a) With regard to Appellants' claim that, the RFP is in breach of the 'Maritime Cabotage Regulations', this Board notes that, the Authority formulated specifications and conditions without seriously considering such regulations or without obtaining verification as to compliance thereto. In this respect, this Board recommends that professional opinion**

**from the relevant Authorities should be obtained prior to the formulation of conditions in the RFP.**

**b) The general opinion of this Board is that, the technical specifications are too vague and subject to various interpretations. Special reference is being made to the vessels' specifications, definite routes and landing areas. These must be established and determined by the Authority and should not allow prospective bidders to dictate or propose other options.**

**c) Options allowed in the RFP document will create problematic issues during the evaluation process as the doors will be wide open for subjectivity. The Authority itself should stipulate the specifications and conditions in the RFP.**

**d) The award criteria adopting the BPQR method is the most suitable system for such an evaluation process, however, for the system to be effective, a 'Level Playing Field' has to be maintained and this can only be guaranteed by inviting prospective bidders to abide by definite technical specifications and conditions as strictly stipulated in the RFP and not otherwise.**

**e) In a concession of this magnitude, this Board opines that, the Authority should primarily obtain indications to ensure that, the conditions in the RFP will not be in breach of any of the requirements contained in the**

**'Maritime Cabotage Regulations' and the 'Concession Contracts Regulations'.**

**f) With regard to 'Exclusivity', this Board opines that, the nature of the operational activity of the proposed service merits the introduction of an exclusivity clause. It must be acknowledged that, for an open participation in the RFP, the economic operator must incur substantial capital investment and running costs and last but not least, realise a return on his investment. It must also be mentioned that, it will be more practical and beneficial for the Authority to deal with one economic operator, for the efficient running of the proposed service.**

**g) With regard to the concession period, this Board recommends that, such a period should only be established, after the Authority determines the specifications and conditions in detail and after ensuring that, no condition is in breach of the Regulations. The professional consultants' report should be updated on the detailed technical specifications and conditions and the establishment of definite routes, by the Authority.**

**h) The concession period should represent the duration through which the economic operator recoups his capital investments on new vessels together with a return on capital. If the equation of the duration results in more than 12 years, the Authority should obtain verifications that, under the particular circumstances such period can be justified and accepted by the**

**relevant EU Authority. This Board is concerned in that, should there be a breach of the EU Treaty Regulations, the financial consequences on the Authority could be substantial with damaging effect in general.**

**i) With regard to State Aid, this Board after taking into consideration the duration of the concession and the lifespan of the landing areas, opines that, such facilities being constructed at the expense of the Authority should not be considered a form of State Aid, in favour of the concessionaire but rather a necessary long term investment in the interest of the public in general and as an alternative means of transport.**

**In view of the above, this Board,**

**i. directs that the RFP be cancelled,**

**ii. directs that a new RFP be issued taking into account all the considerations deliberated on by this Board, on the formulation of technical specifications and conditions in the RFP,**

**iii. directs that the Authority seeks professional advice from competent Authorities, regarding the period of the concession.**

**iv. recommends that, enquiries be made with the relevant EU Authorities to ensure that, conditions laid down in the new RFP document do not breach any of the provisions relating to the 'Maritime Cabotage Regulations'.**

Chairman Member Member

*27th October 2020*