

PUBLIC CONTRACTS REVIEW BOARD

Application for Declaration of Ineffectiveness of a Contract

Case 1835 – Richard Cauchi vs Regjun Tramuntana, Regjun Punent, Regjun Ilvant, Regjun Nofsinhar, Regjun Ghawdex and Enemalta plc

30th January 2023

On the 15th November 2022 Mr Richard Cauchi filed an Application under Regulation 277 of the Public Procurement Regulations seeking a Declaration of Ineffectiveness of a Contract which has been awarded to Enemalta plc without prior publication of a contract notice.

On the 12th January 2023 the Public Contracts Review Board composed of Dr Charles Cassar as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the application

The attendance for this public hearing was as follows:

On behalf of Mr Richard Cauchi

Dr Joseph Camilleri	Legal Representative
Mr Richard Cauchi	Representative
Eng Renzo Curmi	Representative

On behalf of the Local Councils Association and Regions

Dr Adrian Mallia	Legal Representative
Ms Lianne Cassar	Representative
Ms Elke Sghendo	Representative - online

On behalf of Enemalta plc

Dr Clement Mifsud Bonnici	Legal Representative
Dr Sylvann Aquilina Zahra	Legal Representative
Mr Norman Zammit	Representative
Mr Etienne Lewis	Representative

Interested Parties

Mr Fabian Paul Mallia
Mr James Agius

Dr Charles Cassar Deputy Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Joseph Camilleri Legal Representative for Mr Cauchi said that he had filed three similar applications and requested that they be heard simultaneously as the preliminary pleas in all three cases were identical. This was agreed to by all parties.

Dr Clement Mifsud Bonnici Legal Representative for Enemalta gave a brief resume of the purpose of the contract subject of this application and stated that his clients had no idea as to what was being contested as they were simply claiming that a contract had been awarded illegally without identifying such contract in what was no more than 'a shot in the dark'. He then explained the basis of the Agreement, a redacted copy of which was provided to the contesting parties (DOC 1). Enemalta maintains that this is not a contract but a Service of General Economic Interest (SGEI) Contract which member states of the European Union have a right to issue. Street lights, which this Agreement between the Government of Malta (GoM), Enemalta and the Local Council' Association covers, come under this category due to the national aspect and general public interest. The Public Service Obligation (PSO) that was given to Enemalta in terms of this SGEI contract is fully in line with the EU law and places an obligation on Enemalta to provide a service and be funded and regulated according to the Agreement. The Local Council's Association is not contractually bound.

Dr Camilleri said that his submissions on the preliminary pleas would follow his letter of objection and would refer to the circulated Agreement between the GoM and Enemalta.

Dr Mifsud Bonnici listed the four points he would deal with on the matter of the preliminary pleas and said that on the first and the fourth point he would rely on the written submissions at this stage.

On the third plea, according to PP Regulations, recourse is limited to six months and this is backed by EU Directives. The Court of Appeal has given a ruling on the point of the timing on the signing of a contract but has given the wrong interpretation and perspective. The point of timing is well recognised in the Courts of Justice of the EU and the Advocate General has ruled that if a contract exists it is in everyone's interest that the contract is maintained and claiming ineffectiveness has devastating effects and that time runs from the time of the contract signature immaterial of whether others are aware of this. It is the remedy of compensation that runs from the time of identification of the contract without seeking cancellation of the contract. Reference was made to CJEU Case C166/14 (MedEval) paras 39 and 40 on the onerousness and far-reaching consequences on the cancellation of a contract, which contracts merit legal certainty and the effectiveness of these time limits should be respected. The remedy has to be equivalent and related but let the contract stand. This decision is further backed by C406/08 (29.10.09) paras 33 and 34 and C454/06 (13.5.08) para 162.

Regarding the second pleas, continued Dr Mifsud Bonnici, a contract requires amongst others, the execution of works or the need for services or supplies but one essential point is reciprocity. The CJEU in Case C51/15 and the Advocate General make it clear that binding and reciprocal elements are essential in a public contract characterised by exchange of consideration. There are two parts – one part binds and the other part agrees to be bound with an agreement on payment therefrom. In the case of this Agreement the arrangement is 'a one way street'. The Local Councils are not bound by the Agreement either to use the service or to pay for it. It is to be used at option and payment only made on using the service but there is no reciprocal arrangement. The agreement between the GoM and Enemalta does not involve the Local Councils.

Dr Adrian Mallia Legal Representative for the Association of Local Councils said that here one is not referring or speaking of a hidden contract and he referred the Board to information included in the written submissions indicating that information on the Agreement was indeed published on the website of Enemalta and a cursory Google search also refers to the contract. The Agreement is also listed under the EU awards website.

Dr Camilleri said that the fact that the contract was an SGEI is a matter not for today's discussion but on the merits of the case. If, as has now been revealed, the Gozo Region is not part of the Agreement then there is no juridical interest on their part and this point is dropped.

In the case of the Mica Med Ltd's appeal there was a prohibitory injunction taken out as there was in existence a contract for provision and maintenance of street lighting in Mellieha. Mica Med's concern therefore was not only that the Agreement was not public knowledge but that they were being prejudiced by its existence. In the course of the mentioned Court action it was stated that Mica Med were not aware of any contract and Enemalta who were a party to the action failed to divulge the existence of the Agreement. *Post facto* it is easy to claim that the other side should have known but in reality it took time and trouble to establish the existence of the Agreement. The effected parties felt that there was no alternative but to request ineffectiveness and to request the cancellation of the Agreement as a remedy.

It is accepted, said Dr Camilleri, that there is a six month limit and it is accepted that this appeal is outside that limit. In the case *Supreme Travel vs Transport Malta* the Court of Appeal decided that where an agreement was not public knowledge then the term does not run from the time of the signature. Although it is accepted that the procedure is directed by the Remedies Directive the intention is to give effective remedy where there is unfairness or ignoring of the law. The case referred to was heard twice by the Court of Appeal and in the second hearing a different interpretation and application was given and included hard words directed at Transport Malta for their attitude. This Appeal Court decision is invoked in support of this appeal.

According to Dr Camilleri the decision in above case is also relevant to the claim that the appeal is vague. The appellant could not be clear in their appeal as they had no knowledge of the existence of the Agreement – the position today is different as appellant is aware what he is dealing with as Enemalta has provided what it claims is the only extant contract. This side agrees with the definition by the other party as to what is a public contract and that pecuniary interest is a factor and that the contract must be synallagmatic. In CJEU Case C376/19 para 60 the point arose as to whether if the price of a contract is placed at '0' (zero) consideration exists? In this case it is clear that two way traffic exists as Enemalta has obligations in writing whether requested or not, but have to be given albeit only if requested – a legal binding obligation therefore exists. Enemalta is being paid for work carried out as consideration; this element of charge based on cost plus profit creates a two way agreement. If one applied the general principles of law then one accepts that payments may be made by third parties. The Local Councils are benefitting from payments being made to Enemalta as the latter is being paid for services rendered to the Local Councils.

Dr Mifsud Bonnici stated that the fact that the Local Councils are not paying has to be interpreted in its universality in the entire EU concept not in terms of local understanding – one must consider the broad terms rather than the cosy local interpretation and terminology. In his opinion of 28th May 2020 the Advocate General (Case C367/19) gives a thesis on the concept of consideration in a contract – the focal point that arises is that consideration is not a precise sum of money but if two contracting parties are locked in a relationship of reciprocal legal obligation which is enforceable. The Local Councils are not bound at all to either use Enemalta or to pay and are at perfect liberty to use outside parties. The Agreement was not exhibited at the Court injunction stage as it was not binding on or relevant to the Local Councils' question.

The request in the appeal letter, said Dr Mifsud Bonnici, is to declare the contract ineffective and the only reservation made regarding other remedies is that they may be brought at a later stage. No further request has been made now. This is a matter of primary legal protection and the PCRB are bound by this. Regarding the PCRB position in respect of the Court of Appeal decision referred to, the Board must bear in mind that EU laws and Directives are paramount and superior over Maltese law and have superiority over local decisions. The Board is obliged by and must apply EU law. In para 40 of the MedEval case, previously referred to, it is made clear that EU legislation places greater importance on the requirement for legal certainty rather than a declaration of ineffectiveness with the balance being in favour of certainty. The EU Courts also state that effectiveness overcomes certainty in the case of damages.

In conclusion Dr Camilleri said that the Local Councils acknowledge the Agreement and are aware that it can be used and there is no point in going elsewhere for their needs.

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

End of Minutes.

This Board,

Having noted this Application under Regulation 277 of the Public Procurement Regulations seeking a Declaration of Ineffectiveness of a Contract which has been awarded to Enemalta plc. filed by Mr. Richard Cauchi, (the claimant), dated 15th November 2021.

Having noted the letter of reply dated 6th December 2021 by Regjun Tramuntana, Regjun Punent, Regjun Ilvant, Regjun Nofsinhar, Regjun Ghawdex and Enemalta plc.

Having noted the submissions made during the hearing held on the 12th January 2023, whereby;

"Enemalta maintains that this is not a public contract but a Service of General Economic Interest (SGEI) Contract which member states of the European Union have a right to issue. Street lights, which this Agreement between the Government of Malta (GoM), Enemalta and the Local Council' Association covers, come under this category due to the national aspect and general public interest. The Public Service Obligation (PSO) that was given to Enemalta in terms of this SGEI contract is fully in line with the EU law and places an obligation on

Enemalta to provide a service and be funded and regulated according to the Agreement. The Local Council's Association is not contractually bound."

The Board concludes that;

The articles relating to ineffectiveness of a contract within public procurement regulations refer to contracts that would have been awarded following a tendering process. (ARTICLE 277)

In this case articles 277-283 do not apply as the contract agreement has been set between the Government of Malta and Enemalta since the services to be rendered are deemed as a Service of General Economic Interest.

Consequently this appeal cannot be addressed by PCRB and neither can PCRB address any compensation requests being submitted in line with Article 278.

Dr Charles Cassar
Chairman

Ms Stephanie Scicluna Laiviera
Member

Mr Lawrence Ancilleri
Member