

## **PUBLIC CONTRACTS REVIEW BOARD**

**Case 1741 – CT3015/2022 – Tender for the Supply, Installation, Commissioning, Certification, Training and Handing Over and Maintenance of Qty 1 MR LINAC and related IT software and energy efficient equipment to be installed at the Radiotherapy Department at Sir Anthony Mamo Oncology Centre (SAMOC), including the design and build of a dedicated Bunker Area to house the MR LINAC, to High Energy & Environmental performance standards**

**30<sup>th</sup> June 2022**

The Board,

Having noted the call for remedies filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Charles de Giorgio Limited, (hereinafter referred to as the appellant) filed on the 6<sup>th</sup> May 2022;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo and Dr Leon Camilleri acting for Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 11<sup>th</sup> May 2022;

Having heard and evaluated the testimony of the witness Ms Maria Cynthia Spiteri (Lead Radiotherapy Department SAMOC) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Ms Celia Falzon (CEO Mater Dei Hospital) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Ing Chris Attard Montalto (Director Biomedical Engineering Department Mater Dei Hospital) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Ms Carmen Ciantar (CEO Foundation for Medical Services) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Ing Noel Psaila (Director Engineering Department Mater Dei Hospital) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Ms Dorothy Aquilina (Medical Physicist Area Coordinator) as summoned by Dr Antoine Cremona acting for Charles de Giorgio Limited;

Having heard and evaluated the testimony of the witness Dr Nick Refalo (Chairman Oncology Department SAMOC) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ms Carmen Ciantar (CEO Foundation for Medical Services) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Perit Douglas Bliesener (Head Architectural Services Foundation for Medical Services) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Patrick Spiteri Fiteni (Structural Engineer Foundation for Medical Services) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Perit Marina Mania (Architect Foundation for Medical Services) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Chris Attard Montalto (Director Biomedical Engineering Department Mater Dei Hospital) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ing Noel Psaila (Director Engineering Department Mater Dei Hospital) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having heard and evaluated the testimony of the witness Ms Celia Falzon (CEO Mater Dei Hospital) as summoned by Dr Alexia J Farrugia Zrinzo acting for the Central Procurement and Supplies Unit;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sittings of the 14<sup>th</sup> June 2022 and 15<sup>th</sup> June 2022 hereunder-reproduced.

## **Minutes**

**Case 1741 – CT 3015/2022 – Tender for the Supply, Installation, Commissioning, Certification, Training and Handing Over and Maintenance of Qty 1 MR LINAC and related IT software and energy efficient equipment to be installed at the Radiotherapy Department at Sir Anthony Mamo Oncology Centre (SAMOC), including the design and build of a dedicated Bunker Area to house the MR LINAC, to High Energy & Environmental performance standards.**

### **Remedy before the Closing date of a Call for Competition**

The tender was issued on the 17<sup>th</sup> April 2022 and the closing date was the 17<sup>th</sup> May 2022. The value of the tender, excluding VAT, was € 24,369,492.

On the 6<sup>th</sup> May 2022 Charles de Giorgio Ltd filed an appeal against the Ministry for Health as the Contracting Authority in terms of Regulation 262 of the PPR.

A deposit of € 50,000 was paid.

On the 14<sup>th</sup> June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Ms Stephanie Scicluna Laiviera as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

**Appellant – Charles de Giorgio Ltd**

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr David Stellini	Representative
Dr Maxine Montanaro	Representative
Mr Adriano Spiteri	Representative

**Contracting Authority – Ministry for Health**

Dr Leon Camilleri	Legal Representative
Dr Alexia Farrugia Zrinzo	Legal Representative
Eng Karl Farrugia	Representative
Dr Alison Anastasi	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Antoine Cremona Legal Representative for Charles de Giorgio Ltd said that this appeal dealt with the acquisition of a MR LINAC (through EU Funds) and related the use thereof and the beneficial treatment it provided. The point of this appeal was to seek answers from the Contracting Authority why there was a change in the treatment of the acquisition process by creating a new project which would cause a delay in the period to start operating it through not using the existing infrastructure. This delay would have an effect on people’s lives.

The decisions taken have to be justified and it is essential to find out why, when and by whom this change was authorised. The first decision was that bunker 4 was acceptable, the second that the bunker was not suitable, further that the equipment does not fit, then there was the floor loading excuse and finally that bunker 4 was always redundant. It is worth noting that the tender was issued on Easter Sunday with only four weeks for submissions.

A submission regarding the refund of costs has to be made irrespective of other matters so as to protect Appellant’s rights and to find out the facts and get answers to questions which remained unanswered leaving the filing of an appeal as the only recourse. This should be treated as a separate matter as it was the only avenue open to obtain information.

The Foundation for Medical Services (FMS) Report dated 24 February 2022, handed in by the Authority this morning shows a lack of respect to the other parties.

The merits of the case is fundamental and goes beyond if the PMC is binding and hinges on what is expected of a public body. An administrator of ‘*res publica*’ cannot act like that – the threshold is higher and each step has to be explained – ‘why’ ‘when’ and by ‘whom’ questions have to be answered. This is not the case here as the existing bunker met the requirements but the decision now is to combine the acquisition with the construction of a new bunker leading to a higher cost of the project. If, as stated, the construction costs are only 5% of the project this strengthens the case for separation. For that 5% the main supplier is expected to incur joint and several liability for the full contract; Euro funds are not meant to be used for that purpose. The marriage of such a partnership does not make sense and need not be combined as the trades are consequential.

Dr Alexia Farrugia Zrinzo Legal Representative for the Ministry for Health stated that the tender follows all the legal steps and the role of the PCRb is to judge if the tender follows those steps whilst

the Contracting Authority is entitled to demand what they require. The PMC was a purely informative exercise and is not binding.

Ms Maria Cynthia Spiteri (434962M) called as a witness by the Appellant testified on oath that she is a radiographer and has been involved with the management thereof for two and a half years. She stated that she is involved in procurement except medical supplies. Witness explained that MR LINAC is used to deliver therapy to specific tumours without affecting other organs, but was not aware of the life cycle of the machine. Her involvement was to guide on the radiography needs in the team building the requirements for the tender which consisted of Dr Refalo, Dorothy Aquilina and Engineers Attard Montalto and Psaila with later addition of IT persons. Witness was not involved in the evaluation on the PMC but recalls that there were four submissions but does not recall if she took part in the discussions. The team drafting the tender was the same as for the PMC. The appraisal by the FMS was done by all the parties but witness was not involved in the writing of the report as Mr Ray Bartolo had overall responsibility for this. The PMC submissions were taken into consideration when the tender was being drafted. It was in late January when witness first became aware of the idea of the new bunker after the architects and engineers had expressed views thereon.

Witness could not say who made the decision regarding the bunker as it was a team decision based on discussions and report. Following the PMC submissions it was decided that there was a need to consult architects but this did not affect witness as she was only involved in the radiography aspects in the drafting of the tender and particularly that concerning the location of the MR LINAC. Although not involved in detailed timelines witness knew that the project was EU funded and had to be completed by June 2023.

Ms Celia Falzon (473265M) called as a witness by the Appellant testified on oath that she has been the Chief Executive Officer at Mater Dei Hospital since June 2020. She had overall responsibility for the acquisition needs of the Hospital but was not involved in the evaluation or the details of contracts. Her initial involvement in this case was in identifying use of EU funds around June 2021 when she attended a number of meetings with persons dealing with procurement with an eventual decision to have the PMC. The team consisted of Dr Refalo, the Chairman of the Oncology Department, Dorothy Aquilina, Cynthia Spiteri, Cheryl Young, Engineers Attard Montalto and Psaila. At a later stage Ray Bartolo was appointed as a consultant. Witness recalled that the whole team, with the exception of Ray Bartolo, was responsible for the preparation of the PMC, and the same team, excluding herself, assessed the submissions. Four replies to the PMC were received two of which had the necessary equipment according to witness's knowledge.

Witness stated that bunker 4 was located in the Oncology Department and was intended to meet the demand for an Accelerator whilst bunker 5 is planned to accommodate an MR LINAC. The PMC was intended to see if bunker 4 was suitable and if the equipment fulfils the needs of the Department. Referring to the assessments of the requirements in the PMC witness quoted Section C Subsection (f) which states that the machine is to be located in bunker 4 but then asks the question 'is this possible?'. Witness also agreed that bullet point in Section (d) also states that the machine is to be located in bunker 4. Witness further stated that a site meeting was held in January with technicians to discuss the necessary work on bunker 4 including if the structure could take the weight of the machine plus the additional facility for the ancillary equipment, and was later advised that the Appellant's machine offered did not fit bunker 4 and thus did not justify the investment.

The knowledge witness had of the project was gathered through the experts. The meeting in January discussed the footprint and the weight factor was highlighted at the February meeting whilst the decision to combine trades was a collective one by the team. Witness confirmed that the final decision

on the project was hers as the Chief Executive Officer. This was an important investment project with restricted time limits and success had to be ascertained. The construction of the bunker was integral to the operation of the project and it was necessary to ensure that all functions were combined and all necessary certifications obtained. As the machine would not fit in bunker 4 without the ancillary works one had to go for the alternative of bunker 5 where it would be easy to co-ordinate all the operations simultaneously.

Ms Falzon further stated that the feedback by the EU on the MR LINAC was given in June/July with no mention of bunker 5 as submissions were only on the machine, but EU were subsequently advised of the need to use bunker 5. To witness's knowledge no impact assessment was provided why bunker 4 was not being used.

Questioned by Dr Farrugia Zrinzo witness stated that the decision on the fifth bunker followed the submissions on the PMC.

[At this stage the Board directed that the EU submission made by the Authority be provided to Appellant party within four working days.]

Engineer Chris Attard Montalto (260567M) called as a witness by the Appellant testified on oath that since 2012 he has been the Director of Medical Equipment at the Ministry for Health. His role is to investigate requests for medical apparatus which in this case was done by a team. He was part of the team that dealt with and evaluated the four proposal received from medical suppliers in response to the PMC. Witness confirmed that the PMC dealt solely with bunker 4, that there was no mention of bunker 5 and that the PMC did not state or indicate that any works were necessary in the stated bunker (Section D point 2(b) of the PMC). It was stated by witness that in Clause 6.2 of the site meeting there was no mention of any works required as at that stage these were not known but he accepts that the PMC was based on assumptions.

Witness went on to testify that the life of the MR LINAC was ten to fifteen years and that he formed part of the team which included personnel from the CPSU and FMS – the latter were kept informed of the PMC submissions and expressed concern that different weights of the machine were indicated. He further confirmed that one of the PMC bidders had mentioned 'a bunker 5'. The decision to combine the two parts of the tender was a team decision. Although the FMS was not involved in the drafting of the tender they expressed some views which were taken into consideration and the decision to have one contractor was to make the project easier to run. Witness agreed that in past projects the Ministry had several projects where the component parts were issued as separate tenders.

In reply to questions from Dr Farrugia Zrinzo witness confirmed that this was a design and build project which had developed after the PMC responses. The decision to use bunker 4 was wrong as no economic operator could meet the requirements to fit the equipment in it.

Witness replied to a question from Dr Cremona that reports were internal and it was not up to him to decide if they should be published.

Questioned by Dr Mifsud Bonnici witness stated that when asked for his views he had stated that the use of the fourth bunker was out of the question but did not consider giving his reasons for this.

[Before hearing the evidence of the next witness Dr Vincent Micallef stated that he was the personal representative of that witness in a private matter and enquired if there were any objections to him being present during her testimony. None of the parties expressed any objection.]

Ms Carmen Ciantar (333871M) called as a witness by the Appellant stated on oath that she is the Chief Executive Officer of the FMS and that she had no involvement in the acquisition process either of the PMC or the tender. In January 2022 she had received via her Chief Project Officer a request for a meeting proposing certain structural and design studies on the outcome of the PMC.

The study in January was on bunker 4 but subsequently Mater Dei Hospital sent a medical brief on bunker 5 and FMS decided on layouts and requirements which were passed back. The role of FMS in this case was to assess resources and to deal solely with the planning permission and will have no further involvement once the application is approved. The studies by the FMS covered structure and design and analysis made thereon and indicated problems with the fabric. Witness re-iterated that the Request for Services (RfS) was for studies as mentioned earlier and the subsequent planning application. Between 31 January and 24 February 2022 FMS was involved in in-house studies but there was no involvement with bunker 4. An on site visit revealed that the ancillary services did not fit in bunker 4 but witness stated that she is not aware if any further studies were requested on this site.

Questioned by Dr Farrugia Zrinzo witness stated that the role of the FMS is planning and implementing structural jobs for eventual handing over to the client and to act as a recruitment agency for the Ministry for Health. In this case Mater Dei was a client which provided a brief of their requirements. There is still no decision by the Planning Authority on the planning process. Drawings were finalised on 18<sup>th</sup> February 2022.

[At this stage the Board directed that a copy of the RfS be provided to Appellant by the Authority within four working days].

Engineer Noel Psaila (464070M) called as a witness by the Appellant testified on oath that since 2008 he has been the Director of Engineering at Mater Dei Hospital. His job entailed seeing if facilities were available and practical for equipment requested. He was part of the team that evaluated the PMC and to his recollection there were three or four bidders – all in the medical field and all of which had given details of their equipment and explained how it would fit in bunker 4. He was aware of the RfS requesting assistance with the project facilities. He had no previous experience of this type of machinery and wished to make use of the suitability of bunker 4. Once the information in the PMC was analysed and the requirements looked at, it was decided that input from the FMS was needed. The RfS was brief and the detail was for line requirement from the FMS; the lack of architects at Mater Dei made this necessary.

The submissions in the PMC made it clear that the footprint for the whole technical requirements was not sufficient, but in this context witness does not recall if one of the PMC economic operators suggested a fifth bunker. The actual date of the RfS was immaterial as it merely formalised earlier discussions and indicated why the FMS services were required. He was aware of the meeting of the 6<sup>th</sup> January 2022 and it was after that meeting that he first heard the mention of bunker 5. From the information gathered it was concluded that it was not practical to use bunker 4 so a solution was sought and the use of bunker 5 surfaced.

According to the witness the life of a bunker is around 10 years – the present ones have been in use for six years and are likely to give another four years' service. He explained that he formed part of the team that decided to combine the tender and stated that this was necessary so that the ancillary services do not interfere with the main contract. FMS carried out supervision and co-ordination in other projects. SAMOC was a design and build contract on the bunkers including the supply of plant and equipment. However, it was pointed out to witness that according to document DCG12 (filed) in the final paragraph it indicated that the suppliers of medical equipment were different. Witness was

referred to Table 5 Section 13.2 of the Special Conditions of the tender and he agreed that this a works programme for the project over 42 weeks and that the bulk of the work was by the contractor.

Ms Dorothy Aquilina (6181M) called to testify by Appellant stated on oath that she has been the Area Co-ordinator for Radiotherapy since 2011, her role being the application of equipment and training. She was part of the PMC preparation and evaluation team. She recalls the mention of bunker 5 was around January 2022 and the site visit. According to the witness there was no mention of bunker 5 till the 11<sup>th</sup> January. One of the economic operators, according to Ms Aquilina, suggesting a fifth bunker for this project. All discussions were team based and no single decision was by an individual. Bunker 4 was not feasible as the footprint was not correct.

Dr Nick Refalo (512075) called as a witness by the Contracting Authority stated on oath that for two years he has been the Chairman of the Oncology Department at SAMOC and a previous twelve years as Consultant. He described how MR LINAC was new technology for Malta and the advantages it offers over existing equipment by upgrading the level of radiotherapy. He was involved in the preparation of documents and was aware of the strict deadlines because of the EU funding. He was not present at the PMC evaluation but was aware of the submissions. On the need for the ancillary equipment he could not comment as it was not in his competence.

Questioned by Dr Cremona witness stated that he estimated that fewer visits for treatment will be necessary with the new machine – probably 150/200 patients annually at the start but likely to rise.

Ms Carmen Ciantar recalled as a witness by the Contracting Authority stated that the request for a meeting was through a re-directed e-mail followed by a telephone call. On 26<sup>th</sup> January she received a request from Adriano Sapiano for a site meeting for some tests to be carried out. She felt that she should not attend such meeting and advised accordingly.

Perit Douglas Bliesener (235404M) called as a witness by the Contracting Authority testified on oath that for three years he has served as Head of Architectural Services at FMS. He has practised as an Architect for 15 years. When he receives requests for services he starts building a team to start the project. In this case FMS became involved after the PMC around the beginning of February 2022. He explained the process leading to the designing of the project. The report was prepared by Perit Patrick Spiteri Fiteni an experienced senior engineer whilst the report on bunker 4 was also prepared by another experienced architect.

In reply to questions from Dr Cremona witness said that the process to design the project to prepare the tender was in February with the request possibly made in December. In the beginning an assessment was made on bunker 4 to see if it would work. It then took three to four weeks to understand the requirements and gather information prior to starting the design concept. Gathering of information took around seven to ten working days. Witness confirmed that the design drawings shown to him were prepared by FMS.

Perit Patrick Spiteri Fiteni (59876M) called as a witness by the Contracting Authority stated that he had 27 years' experience as a Structural Engineer and has been employed by FMS for the last seven months. He had been requested to provide a report on the passageway leading to bunker 4. He confirmed the contents and the dates of the exhibited report. His role was to check the structure to assess loads and to avoid any possible permanent damage to the structure. The PMC indicated heavy abnormal loads.

Questioned by Dr Cremona witness stated that he was still on probation at FMS. He was commissioned to prepare the report by Perit Bliesener and requested to carry out a site inspection before which he

had scanned the offers but then inspected them in detail after. Dimensions had been entrusted to other architects. He had not considered or looked into the methodology of how the machine could be delivered but still reached the conclusion that it could not be done without damaging the structure. Witness analysis is that there is no solution to overcome the problem of delivery but when further questioned could not say if there is a way of overcoming the delivery problem. He was not aware of how long it would take to install the machine.

In reply to further questions by Dr Mifsud Bonnici witness confirmed that the site visit was on the 11<sup>th</sup> January followed by a desk study over five weeks. The appraisal report followed the lines recommended by the Institute. During the site visit he does not recall if there was any discussion on a new bunker. The four PMC offers indicated the machinery that was being offered - the result indicated a weight three times the maximum possible loading besides the safety factor parameters. Witness could not explain how the existing LINAC machines had not affected the floor loading.

Perit Marina Mania (01838248) called as a witness by the Authority testified on oath that she qualified as an Architect 18 years ago. On the 31<sup>st</sup> December 2021 she received a request from Mater Dei to attend a site visit on 11<sup>th</sup> January. She confirmed the report tabled earlier during the hearing. The conclusion in that report was based on Mater Dei requirements. Her role was to check on the ancillary areas required and concluded that the available area was not sufficient to house all services. It was not possible to transfer the machine to the bunker because of size and weight restrictions.

In reply to his questions Dr Cremona was told that work on the tender document started on the 14<sup>th</sup> January and was finished on the 18<sup>th</sup> February . There was a line management meeting on the 11<sup>th</sup> January and it took three days to study the requirements of Mater Dei, but could not say if these requirements had to do with the PMC. She received the PMC documents on the 31<sup>st</sup> December 2021.

Questioned by Dr Mifsud Bonnici witness stated that the persons who were present at the site visit were Dorothy Aquilina, Cynthia Spiteri and others she could not recall. There was no talk on the new bunker but witness stated that she does not want to comment on the fifth bunker. She refused to answer the question as to how she did not know about the fifth bunker.

Engineer Chris Attard Montalto recalled as a witness by the Authority said that his first involvement was in June or July 2021 when the possibility of an MR LINAC was first discussed with the eventual decision being to issue a PMC. This was needed to find out about the equipment and the possible use of the available bunker 4. After the PMC it was very obvious that the space and floor loading were not suitable – it was clear that the machine would not fit bunker 4 and the Authority had to turn to a fifth bunker to accommodate the machine.

Engineer Noel Psaila recalled to testify by the Contracting Authority said that he was advised by the CEO of Mater Dei that there was a possibility of EU funding becoming available. He had no previous experience of this equipment. From the information gathered from the PMC it transpired that bunker 4 was not suitable because of weight and space problems, so the original concept had to be changed. Time was needed to prepare new design and from past experience it was decided to go for a design and build project for better co-ordination. From knowledge gathered from the PMC outcome it was clear that the input of the FMS architects was required. Prior to the issue of the PMC, witness had no idea of what was required for an MR LINAC machine.

Ms Celia Falzon recalled as a witness by the Authority stated that the new equipment was very desirable and of benefit to the community. She was not involved in the tender process but was present when the decision was made to abandon the fourth bunker and to consider the fifth one as an alternative. The priority was to ensure that the ongoing treatment would not be affected even



bearing in mind the time frames and funding constraints. The idea of having one team to do the whole job as a design and build was precisely to overcome these risks. The question of having two lots could lead to one appeal holding up the whole tender or create difficulties for the Authority of having to be the go-between among parties. Having one entity mitigates these problems.

Questioned by Dr Cremona witness said that she had not read the tender terms but she does not agree that in a complex tender like this a longer time should be allowed to increase competition. She does not agree that a time of four weeks is insufficient to allow the marriage of two parties. Having two parties would not work as having separate operators risks that the project will not be successful. Witness does not think it is relevant that the additional time it is going to take will cost lives.

This concluded the testimonies.

The Chairman said that with the agreement of all parties the requested documents will be provided today and that therefore the hearing will re-convene virtually on the 15<sup>th</sup> June 2022 at 12.00 noon.

End of Minutes

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## **SECOND HEARING**

On the 15<sup>th</sup> June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Ms Stephanie Scicluna Laiviera as members convened a public virtual hearing to consider this appeal further.

The attendance for this public hearing was as follows:

### **Appellant – Charles de Giorgio Ltd**

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative

### **Contracting Authority – Ministry for Health**

Dr Alexia Farrugia Zrinzo	Legal Representative
Dr Leon Camilleri	Legal Representative

The Chairman welcomed the parties and invited them to make their final submissions.

Dr Antoine Cremona Legal Representative for Charles de Giorgio started by giving a chronology of events leading to the publishing of the tender;

- 21<sup>st</sup> November 2011 – PMC issued
- 22<sup>nd</sup> December – PMC offers closed
- 31<sup>st</sup> December – Request for Services issued to FMS
- 11<sup>th</sup> January 2022 – Site visit
- 25<sup>th</sup> January - Request for plans
- 18<sup>th</sup> February - Plans completed including fifth bunker
- 24<sup>th</sup> February – Structural Report issued by FMS
- 17<sup>th</sup> April (Easter Sunday) – Tender issued.

Regarding the claim by the Contracting Authority that the PMC is not binding Dr Cremona stated that Appellant was requesting a review of procedures not a review of the right to change the tender. The question of the deposit is also important due to the anomalous situation with this tender's many facts emerging at the last minute leading to a costly process to enable the Appellant to decide whether it was worth appealing. The PCRB is being requested to detach the question of costs from the actual facts of the case.

None of the witnesses could answer the question why there was a change of decision There were various versions and reasons offered from a prepared script with various changes along the way regarding the use of the bunker – initially bunker 4 was not fit; then the corridor could not take the weight; then the question of time and finally that bunker 4 was meant to be redundant anyway. No allegations are being made but it is evident that along the way there was a serious mistake – one of the PMC offers planted the idea of a bunker 5 and all that followed from this was a whitewashing to justify the change of decision with a complicated process and paper trail to support the decision. How can the report of 24<sup>th</sup> February as shown by the evidence of the architects be used to justify plans for a fifth bunker? Two architects testimony confirm that the plans and the evidence do not tally – eight weeks from the 18<sup>th</sup> February takes on to the beginning of January which makes it clear that the concept was created then. The FMS Minutes of the 11<sup>th</sup> January makes at least four references to the new bunker.

According to Dr Cremona the latest permutation offered by the Authority why there was a changed need for a fifth bunker was the weight and dimensions of the machinery – this is a completely red herring as although such operation was possible they never requested how this could be done. It is a red herring because the RfS never referred to load on the passageway. According to the Authority the reason why certain works could not be carried out on bunker 4 was that it would create noise, vibration, disruption etc which are exactly the same problems that will prevail in the construction of a new bunker. Raising this point shows that the PMC was not even read since it states that any work must be carried out between 7pm and 7am. The change of decision and the bundling of construction and provision and being given only four weeks to submit is wrong.

Dr Clement Mifsud Bonnici Legal Representative for Charles de Giorgio Ltd said that the default setting in tenders is the splitting up into lots and referred to previous cases 1315/1535/1719/1731 dealt by the PCRB in regard to the extension of competition and analysis of needs. It is unusual that a small construction costs part has been tied to a large contract. The programme of works clearly indicates that the trades are sequential not as claimed by a witness. The Authority claims that it is a complex operation but in fact the reason is the avoidance of responsibility.

On the matter of the EU funding Dr Mifsud Bonnici stated that in June and July 2021 the Government had to bid for funds from the Recovery and Resilience Facility and several proposals were made. This proposal was to purchase an MR LINAC not to build a fifth bunker. EU Regulations make it mandatory that an eligibility criteria is that the project does not do any significant harm – technical guidance was issued thereon. The principle in regulation 2.2.4 has to assure that the measure has sustainability and waste prevention and if an alternative is available it should be used. There was a change of plan but no assessment was made on this aspect. One asks the question why discard something suitable leading to lack of proportionality and cost effectiveness?

Dr Leon Camilleri Legal Representative for the Ministry for Health stated that clear explanations were given by all witnesses that were consistent and indicated that all were fully aware of what happened. Dr Refalo mentioned the need for advanced technology which EU funding made possible. Initial research was required and hence the need for a PMC to find out what the market offered. The PMC did not oblige the Authority to issue an identical tender document. It is a fact that the Authority wanted to install the equipment in the existing facilities if possible but then doubts emerged as to the suitability of bunker 4. At that stage the ministry engaged FMS architects with eventual site visits, reports etc. which confirmed that bunker 4 could not be used and the need for a new bunker. The dates when decisions were taken by the working group were the result of ideas being developed as the process went on. No proof has been provided by Appellant that the provision of a new bunker limits competition. Ms Falzon in her testimony explained the risks of splitting up the tender into lots and the effects of likely delays – responsibility overall has to be in the hands of one entity.

The two grounds of objection can be rebutted. Facts make it clear that bunker 5 was needed and its outcome decision was the result of a process with EU principles being observed. The decision was not a capricious one and was only reached after serious study. Appellants' objections should be rejected.

Dr Mifsud Bonnici queried why if the witnesses were consistent none of them could reply to the question of how, when and by whom was the concept of bunker 5 originated? In 11 days the idea of bunker 5 was born through a PMC reply. There is provision for co-ordination of trades and equipment following the arguments that bunker 4 will never be used and there is the possibility of overcoming the non-existent problems about the splitting of the contract which could indicate that the lots are awarded at the same time. . The co-ordination of parts of the tender is not an impossibility as the Government has vast experience of this in past projects and experienced entities in handling them. A tender, similar to a PMC can be cancelled and is no less binding.

Dr Mifsud Bonnici referred to CJEU Case 132/03 regarding legitimate expectation and that reasons have to be given for decisions taken – there was no explanation by the Authority to the requests for clarifications on why bunker 4 was deemed to be unfit for purpose.

Dr Camilleri said that bunker 4 was originally designed for a LINAC and could be similarly used in future. Witnesses made it clear that this was a process and no exact dates could be established when things happened. The PMC made it clear that there was no commitment and so did not create legitimate expectations. Lots can be appealed against separately but this also creates risks which need not be entered into.

The Chairman thanked the parties for their participation in what turned out to be a very lengthy hearing and declared the hearing closed.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 14<sup>th</sup> June 2022 and 15<sup>th</sup> June 2022.

Having noted the call for remedies filed by Charles de Giorgio Limited (hereinafter referred to as the Appellant) on 6<sup>th</sup> May 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT3015/2022 listed as case No. 1741 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Antoine Cremona, Dr Clement Mifsud Bonnici &  
Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Alexia J Farrugia Zrinzo & Dr Leon Camilleri

Whereby, the Appellant contends that:

a) ***First Ground of Objection: Procurement of the Build of the Fifth Bunker is Illegal***

The Applicant is aggrieved by the Contracting Authority's decision to procure the design and build a dedicated fifth bunker area, when a perfectly suitable empty fourth bunker exists.

The Applicant submits that in this respect the Tender is in violation of the law or is likely to violate the law if it is allowed to continue inter alia since:

- i. it constitutes an abuse of discretion by the Contracting Authority's power in that it is done for improper purposes or on the basis of irrelevant considerations;
- ii. it is fundamentally incompatible with European Union law inter alia Regulation (EU) 2021/241 establishing the Recovery and Resilience Facility;

***Improper Purposes / Irrelevant Considerations***

The Applicant submits that the Contracting Authority's decision to procure the civil works for a fifth bunker in this Tender and bundling it with the procurement of the medical equipment is illegal since it is done for improper purposes and/or on the basis of irrelevant considerations. As an entity exercising a public duty, the Contracting Authority is obliged to exercise its discretion by only taking into account matters which are proper, lawful, relevant and objectively justifiable. Such benchmarks are objective benchmarks and not in any way conditioned by its own failures, its own inactions or its own subjective outlook to participation in the market.

Plainly put, the fourth bunker is perfectly suitable and the procurement of works for a fifth bunker is unnecessary, disproportionate and costly. It is an administrative decision which can be reviewed

judicially and which when so reviewed will show that it was objectively not justifiable in the circumstances.

The first time that the Contracting Authority claimed that the fourth bunker is unfit for purpose was on 29 April 2022 (!) in the Clarification Meeting Minutes issued to economic operators. In fact, the Preliminary Market Consultation published in November 2021 was specifically and expressly published solely to identify an MR LINAC machine capable of being housed in the empty fourth bunker.

The Applicant cannot understand this sudden one-eighty change in procurement strategy by the Contracting Authority within the span of a mere 4 months. The construction of the fifth bunker was never part of the PMC, and for all intents and purposes the procurement of works has been included in the Tender ex post facto following disclosure by interested economic operators of their respective plans.

Furthermore, the Contracting Authority has failed to substantiate its sudden claim that the fourth bunker has all of a sudden become unsuitable to house the fourth machine and its consequential insistence on housing the MR LINAC machine in a newly-built fifth bunker.

#### *Breach of EU Law*

First, and as to the principle of cost efficiency, the Tender is aimed at procuring works which are not necessary since there is already a fourth bunker which is fit for use being the main subject-matter of the project approved under Malta's recovery and resilience plan: "procurement of Magnetic Resonance Linear Accelerator (MR Linac) equipment solution at Sir Anthony Mamo Oncology Centre". The Contracting Authority's decision to include the procurement of works in the Tender means that funds from the Facility which could be better utilised on another project are to be inefficiently allocated to the Tender to build a fifth bunker which is surplus to the Contracting Authority's requirement and when there is already a fourth bunker which is fit for use. Further, the bundling of the procurement of design and build of the fifth bunker with the procurement of the MR LINAC, puts at unnecessary risk the project as a whole which requires the MR LINAC to be installed and ready for use by Q2 2023.

Second, and as to the principle of DNSH Principle, the Tender is fundamentally incompatible with this principle since it seeks to build a fifth bunker, including, the destruction of current premises and the generation of unnecessary waste. The starting point of the DNSH Principle is the waste prevention and the priority of reuse of current resources. The Tender, in essence, discards infrastructure which is fit for use and rather prioritises a works project which will generate unnecessary waste and will come at an unnecessary cost.

Thirdly, the objective of the project in terms of the Facility is the procurement of the MR LINAC machine. Therefore, the Contracting Authority's bundling of the procurement of the build of the fifth bunker together with the procurement of the MR LINAC machine itself breaches the principle of proportionality by exceeding that which is necessary and appropriate to achieve this objective.

b) **Second Ground of Objection: Failure to Separate the Tender into Lots**

The Contracting Authority's justification for not separating the Tender into lots is based on the allegation that the works, services, and supplies subject-matter of the Tender overlap, thereby creating a need to have a single contractor in place for the entire duration of the Tender. This is evidently not true. Even if (for the sake of argument) specific technical skills are required in the civil works part for the construction of an additional bunker, there are highly specialised Contractors which can deliver such a relatively simple project in good time and there are very sound contractual EPC frameworks which can be used to procure such civil works projects. In any case, and without prejudice to the above, the Applicant humbly submits that this is not a sufficient justification for bundling apparently and substantively separate sectors of a Tender into a single lot. The Contracting Authority's decision not to segregate the Tender into lots is unduly restricting competition on the market and is discriminatory in nature.

Furthermore, there can be no question that the above two events are sequential in nature, that is to say, in order for the cancer-treating machine to be installed in the fifth bunker, the fifth bunker must first be built. In view of the foregoing, the Contracting Authority's refusal to separate the Tender into lots on the basis of 'several overlapping trades' does not hold water. The Tender is already by its own nature divisible into two separate lots covering Part A and Part B. This will enable both local and foreign-based contractors in the construction industry to participate the competition.

The failure to segregate the Tender into two naturally divisible lots puts the precious few economic operators capable of supplying from start to finish at an unfair advantage and is discriminating against the smaller economic operators who are not – effectively foreclosing them from their relevant market. Furthermore, the number of local distributors of the MR LINAC machine is extremely limited which contrasts sharply with the significant amount of construction contractors operating in Malta.

The inevitable outcome of the Tender is forcing the hand of the local construction contractors into joining forces with the extremely limited pool of local MR LINAC distributors. Therefore, bundling all procurement into a single lot in this case not only goes against the promotion of genuine competition, but is in itself a breach of the principle of proportionality. Furthermore, this is at odds with the Contracting Authority's duties in Regulation 39 of the PPR to 'treat economic

operators equally and without discrimination' and to design the procurement model in such a way that 'artificially narrows competition'. These duties emanate from the fundamental general principles of public procurement law as developed by the EU Directives and case-law of the Courts of Justice of the European Union.

The Applicant submits that the principle of competition is of constitutional importance to public procurement and it is important that competition on the market--whether public or a neighbouring private market--is fostered. If there is no or limited competition, it is the contracting authority which suffers by obtaining higher offers, bad quality supplies or services or possibly no offers at all. The Applicant submits that the failure to separate into lots runs contrary to the spirit of the Tender itself which is designed as an open procedure. The Contracting Authority must have done this with the intention of promoting genuine competition, and therefore, the failure to separate into lots is in conflict with the apparent intention of the Contracting Authority, but more importantly, with the objectives of the relative EU Directives and the PPR.

The failure to separate into lots is also in breach of Regulation 47(2) of the PPR which in reference to advice obtained from economic operators in response to preliminary market consultations: *“That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.”*

It is not contested that there was a substantial shift in the scope of the public procurement following the receipt by the Contracting Authority of the plans submitted by interested economic operators. While this shift may have been done with the best of intentions to open up the competition, it has had a diametrically opposite effect: that of distorting competition

The Applicant submits that there is an extremely limited pool of potential suppliers in the international market represented locally by a couple of exclusive distributors. This effectively prevents most construction contractors, in particular small-to-medium enterprises, from participating in the procurement process or forces them to join forces with the extremely limited pool of distributors. In view of the foregoing, the Applicant submits that the failure to segregate the Tender into at least two naturally-divisible lots has resulted in a tender which is: (a) 'open' only in name and (b) severely undercut by its discriminatory nature and its effect of narrowing and distorting of competition.

c) **Costs – Refund of Deposit**

Finally, and without prejudice to all the arguments brought above the Applicant is here making one final submission on the costs of this Application. Typically in the vast majority of cases, the allocation of costs by this Honourable Board follows the decision on the merits of the case. However, this is not always so and there have been exceptional circumstances where

notwithstanding the outcome of the case on its merits the Applicant has been refunded the significant costs of appeal. This current case is one such case.

The Applicant feels strongly that this Application should be acceded to on its merits. However, even if this Application is not so acceded to this Honourable Board should order the refund of the very significant appeal fee of EUR 50,000 paid together with this Application. This is so in view of the very specific circumstances of the case namely:

- i. the Applicant participated in the PMC in November, made all the preparations to be able to participate in that tender only to discover 4 months later that without any market notice whatsoever the Contracting Authority decided to completely change the procurement strategy;
- ii. the Contracting Authority took more than 4 months to communicate this to the market;
- iii. it issued an extremely collapsed timeline on the tender published, of all days, on Easter Sunday in which economic operators like the Applicant who had been led by the same Contracting Authority down one path with the PMC had to re-engineer everything, seek alliances with economic operators completely outside their economic sectors (i.e. civil works contractors) and put together a competitive bid;
- iv. the Contracting Authority could not even be bothered to answer clearly questions put to it within such collapsed timeline so that this Regulation 262 application was the only measure that could be taken to stop this senseless call for tenders

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 11<sup>th</sup> May 2022 and its verbal submission during the hearings held on 14<sup>th</sup> June 2022 and 15<sup>th</sup> June 2022, in that:

a) **On the Preliminary Market Consultation**

As the name 'Preliminary Market Consultation' clearly implies, this is an initial procedure, contemplated by law, which is initiated prior to a procurement procedure of a considerable extent, serves as a compilation of information which the contracting authority makes use of to determine how the actual procurement process shall commence. In addition, it also serves to inform 'economic operators of their procurement plans and requirements', thus providing sufficient time to potential bidders to plan their submissions.

The Department of Health also submit with emphasis that according to regulation 47 of the Public Procurement Regulations, conducting a PMC is a choice and not an obligation - this is clearly indicated in the word 'may'.

The PMC document in section B-, General Information, Clause 1 – Purpose clearly provided that: *“This issuance of this PRELIMINARY MARKET CONSULTATION does not constitute a commitment to issue a request for bids, award a contract, or pay any costs incurred in preparation of a response to this PMC. Any information received in response to this PRELIMINARY MARKET CONSULTATION will assist*



*the Contracting Authority's project team in finalizing the scope of work and requirements which may be used at a future date in the issuance of a call for tenders. Submitting a response to this PRELIMINARY MARKET CONSULTATION is not a guarantee in any way that an Economic Operator will be selected for any subsequent call for tenders, nor does it preclude any Economic Operator from responding to future procurement opportunities.”*

The same PMC document in Clause 3 - Scope also provides that: *“This Preliminary Marketing Consultation Call for the installation of an MR LINAC for Sir Anthony Mamo Oncology Centre (SAMOC) is in no way binding, and does not preclude any Economic Operator from participating in the Tender, if he/she so wishes not to participate in this Pre Marketing Consultation Call.”*

b) **On the First Ground of Objection**

The first ground of objection raised by the appellant is entitled 'Procurement of the Build of the Fifth Bunker is Illegal', as if it is against the law that the Ministry For Health decide on the extent the treatment facilities within SAMOC. The applicant attempts to justify this frivolous argument on the unfounded claim that this constitutes an abuse of discretion by the contracting authority as the applicant is claiming that the Contracting Authority's decision is based on improper purposes or irrelevant considerations without any proof or explanation in this regard.

The Department of Health however submits that the only argument being put forward by the applicants to attempt to sustain their allegation that the procurement for the 5th bunker was done for improper purposes /irrelevant considerations is that the reason for requesting a 5th bunker was not disclosed. Such serious allegation should have been, with all due respect to the applicants, sustained with concrete argumentation. The Department of Health submits that, although they are not at this stage obliged to disclose internal considerations that led them to the decision of constructing a 5th bunker, such information will be given in this reasoned reply and during the sitting.

Some of the various reasons why the contracting authority resorted to the procurement of a 5th bunker designed and built by the supplier of the MR LINAC machine, following the PMC, after obtaining information on the MR LINAC Machines on the market were:

- i. Warranties, Guarantees, Insurance, Certification, Maintenance, Safety;
- ii. Technical, Structural considerations, which include also the fact that the corridors leading to the 4th Bunker at SAMOC could not support the weight of the MR LINAC Machines;
- iii. The space for the ancillary areas as well as engineering services requirements for the MR LINAC machine operation requirements is larger than the available existing space.

Moreover and without prejudice to the above, it is the Contracting Authority which is purchasing and therefore it is the contracting authority which has the prerogative to assess its needs and requirements within the parameters of that permitted by law - Determining the Hospital's needs following an consultation process and allowing for the maximum possible competition, is to date

not only not illegal, but highly commendable procurement procedure as at the end of the day the contracting authority's interest is the patient's best interest within the parameters of public procurement legislation. The applicant also 'bases' its application on the alleged breach of European Union Law. The Department of Health submits that the publication of the tender followed internal processes adopted by the Planning & Priorities Coordination Division of OPM which included consultation with the European Commission.

The applicant alleges that the request for tenders breaches the principle of cost efficiency and the principle of 'do no significant harm'. The principle of cost efficiency in public health procurement has to be intertwined with another principle, that of what is required by a world class health service in the best interest of the patient. This effectively means that cost efficiency is not the sole criterion in such procurement processes, but the contracting authority must ensure that it obtains what it requires in the best interest of the patient, at the best price.

Once having determined the need of a fifth bunker, an open competitive procurement procedure is a guarantee that the principle of cost efficiency within the above indicated parameters will be respected. Moreover in relation to the 'do no significant harm' principle, which the applicant claims that will be breached with the creation of construction waste, the Department of Health remarks that the tender document in sub-section 11 of Section 3 - Specifications / Terms of Reference, has well catered for this and provided the below condition: *"For construction works, it will be ensured that at least 70% (by weight) of the non hazardous construction and demolition waste [...] generated on the construction site shall be prepared for reuse, recycling and other material recovery"* The Department of Health submits that this specific point was reviewed by the European Commission and the tender takes into account the comments of the European Commission and addresses these matters. This therefore proves that this claim is also unfounded, in fact and at law.

The DNSH criteria has been discussed in detail with the National Managing Authority and were subjected to review to the European Commission who submitted their feedback. The contracting authority has, as a matter of fact, included all feedback in the published tender document. Thus, this claim is not only unfounded, but the European Commission itself has confirmed that the tender is in compliance with the DNSH criteria.

In conclusion to this first ground of objection by applicant, that the procurement of the Fifth bunker is illegal, The Department of Health submits that the applicant despite its lengthy arguments on general principles, failed to indicate one single legal provision that the procurement of the 5th bunker is breaching.

c) **On the Second Ground of Objection**

Applicant submits in its application that failure to separate into lots runs contrary to the spirit of an open procedure. This claim is false and unfounded. Open procedure is a procurement process whereby tender is published on the open market and advertised across-borders to ensure competition. On the other hand, the division of contracts into lots is a facility which may be used by the contracting authority in the conduct of the procedure and it is Directive 2014/24 /EU of the European Parliament and of the Council of 26 February 2014 on public procurement itself in preamble 78 which provides that tenders should not be divided into lots were *“such division could risk restricting competition, or risk rendering the execution of the contract excessively technically difficult or expensive, or that the need to coordinate the different contractors for the lots could seriously risk undermining the proper execution of the contract.”*

Moreover regulation 33 of the Public Procurement Regulations clearly shows that it is an absolute discretion of the contracting authority to divide the tender into lots, subject to an inclusion of justification in the procurement documents which indeed was included. Primarily on this matter, and in order to put this Honourable Tribunal into perspective, the design and building of the bunker constitutes only circa 5% of the tender value as will be proven. One of the arguments is that the call for tenders as published favours the economic operators capable of supplying from start to finish, to the disadvantage of those who are not able to supply from start to finish. The contracting authority has in actual fact, following the preliminary market consultation (and hence the scope of such consultation) confirmed that no local undertaking has on its own the capability of providing both the MR LINAC, construction of bunker and related works. However, should there be undertakings capable of providing both, this would have not been a disadvantage to the other economic operators which can always join forces and present an offer through a joint venture, sub-contracting or any other form of collaboration, regardless of the legal nature of the links the entities have between them. The applicant has in fact admitted that there are plenty of companies operating in the construction industry which the extremely limited number of MR LINAC machine distributors can choose from to join forces in a joint venture agreement.

The applicant also chooses in its application, to strive for more competition in the construction industry. In no way does the publishing of a design and build tender has limited the possibility of the applicant, and other interested parties, to submit a bid and therefore such argumentation from the applicant should not be further considered by this Honourable Tribunal. The Department of Health submits that, in practice, all and any specifications imposed or set in tender documents, limits the number of possible participants and the more detailed these specifications are, the more the potential participants decrease. However, no one disputes the right of a contracting authority to impose in its call for tenders, specifications if these are required for the level of product or service which the contracting authority is procuring for its needs. Such needs are naturally to be

determined by the contracting authority as no third party can determine the needs, aims and targets of the contracting authority.

The Department of Health submits that all the conditions specified in the detailed call for tenders against which the current action is directed, are necessary and are there for a reason, particularly the condition that the same economic operator has to provide both the MR LINAC machine and the bunker.

It is imperative and necessary that the same economic operator is responsible for both the MR LINAC machine and the bunker since:

- i. The MR LINAC Machine has to be installed in the bunker, thus the bunker has to be built in line with the dimensions, specifications, safety requirements and other necessary features to be able to house the MR LINAC machine. Naturally for this purpose, extensive exchange of information, logistical planning, trust, working relationships and management are necessary between the supplier of the machine and the contractor of the bunker and thus the reasonable way forward determined was that the same economic operator is responsible for both tasks to overcome various possible issues in contract implementation and management.
- ii. The risk factor for the Department of Health to go through separate lots was significantly higher for various reasons, including, the ultimate responsibility in case of a fault, the warranties at the end within a delicate extensive project as these are required to be one and the risks of non-completion within the established time frames (in case of a defaulting contractor) which are too high should this project be divided into 2 separate contracts.
- iii. Other reasons which will be further explained and elaborated during the sitting.

It is therefore clearly demonstrated that one section of this tender has clear implications on the other works of the tender thus they are to be seen and dealt with as a whole in order to ensure a smooth implementation and execution of the project.

The applicant also alleges that the failure to split the tender into lots is in breach of regulation 47(2) of the PPR. This is fundamentally wrong as hereunder explained.

Competition would have potentially been distorted if the contracting authority decided to make use of bunker 4 since that would have drastically restricted potential tenderers (without prejudice to the argumentation that this was in fact impossible), as this would definitely limit the machine to particular specifications. Whereas the manner in which this project is proposed, is ensuring open and undistorted competition, and the prospective successful economic operator has the opportunity to design and build the bunker to the specifications and requisites of the MR LINAC machine that would be installed and operated.

All construction contractors are free to join forces with any supplier of the MR LINAC machine whilst suppliers of the MR LINAC machine are free to join forces with any construction contractor. Market distortion has to be sufficiently proven by whoever is alleging it.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances as follows in their entirety. Initially, this Board will refer to the testimony under oath of various witnesses and list down the main statements which again are deemed the most relevant. Finally, this Board will provide its conclusions on the matter and grievances of the Appellant.

#### Extracts from testimony under oath of Ms Celia Falzon

- a) *"The PMC was intended to see if bunker 4 was suitable and if the equipment fulfils the needs of the Department."*
- b) *"Section C Subsection (f) (of the PMC) states that the machine is to be located in bunker 4 but then asks the question 'is this possible?'"*
- c) *"...bullet point in Section (d) (of the PMC) also states that the machine is to be located in bunker 4. A site meeting was held in January with technicians to discuss the necessary work on bunker 4 including if the structure could take the weight of the machine plus the additional facility for the ancillary equipment, and was later advised that the Appellant's machine offered did not fit bunker 4 and thus did not justify the investment."*
- d) *"As the machine would not fit in bunker 4 without the ancillary works one had to go for the alternative of bunker 5 where it would be easy to co-ordinate all the operations simultaneously."*

#### Extracts from testimony under oath of Ing Chris Attard Montalto

- a) *"...the PMC dealt solely with bunker 4, there was no mention of bunker 5 and that the PMC did not state or indicate that any works were necessary in the stated bunker (Section D point 2(b) of the PMC)"*
- b) *"in Clause 6.2 of the site meeting there was no mention of any works required as at that stage these were not known but yes, that the PMC was based on assumptions"*
- c) *"... FMS – the latter were kept informed of the PMC submissions and we expressed our concern that different weights of the machine were indicated"*
- d) *"Although the FMS was not involved in the drafting of the tender they expressed some views which were taken into consideration and the decision to have one contractor was to make the project easier to run."*
- e) *".....eventual decision being to issue a PMC. This was needed to find out about the equipment and the possible use of the available bunker 4. After the PMC it was very obvious that the space and floor loading were not suitable – it was clear that the machine would not fit bunker 4 and the Authority had to turn to a fifth bunker to accommodate the machine."*

#### Extracts from testimony under oath of Ms Carmen Ciantar

- a) *“An on site visit revealed that the ancillary services did not fit in bunker 4.”*

#### Extracts from testimony under oath of Ing Noel Psaila

- a) *“We had no previous experience of this type of machinery and wished to make use of the suitability of bunker 4. Once the information in the PMC was analysed and the requirements looked at, it was decided that input from the FMS was needed. The RfS was brief and the detail was for line requirement from the FMS.”*
- b) *“the lack of architects at Mater Dei made this necessary.”*
- c) *“The submissions in the PMC made it clear that the footprint for the whole technical requirements was not sufficient.”*
- d) *“From the information gathered it was concluded that it was not practical to use bunker 4 so a solution was sought and the use of bunker 5 surfaced.”*
- e) *“We had no previous experience of this equipment. From the information gathered from the PMC it transpired that bunker 4 was not suitable because of weight and space problems, so the original concept had to be changed”*

#### Extracts from testimony under oath of Ms Dorothy Aquilina

- a) *“Bunker 4 was not feasible as the footprint was not correct.”*

#### Extracts from testimony under oath of Mr Patrick Spiteri Fiteni

- a) *“I had been requested to provide a report on the passageway leading to bunker 4. My role was to check the structure to assess loads and to avoid any possible permanent damage to the structure. The PMC indicated heavy abnormal loads.”*
- b) *“The four PMC offers indicated the machinery that was being offered - the result indicated a weight three times the maximum possible loading besides the safety factor parameter”*

#### Extracts from testimony under oath of Perit Marina Mania

- a) *“My role was to check on the ancillary areas required and concluded that the available area was not sufficient to house all services”*

#### Board conclusions

- a) From the outset, this Board notes that the Preliminary Market Consultation (“PMC”) is not binding on the Contracting Authority (“CA”). Therefore, it does not constitute a commitment to issue a request for bids, award a contract, or pay any costs incurred in preparation of a response to it.

These and other terms were clearly stated in section B of the PMC. This is also corroborated by the testimony of Ms Celia Falzon whereby she stated “Section C Subsection (f) (of the PMC) states that the machine is to be located in bunker 4 but then asks the question **‘is this possible?’**”. Therefore, it is clear that the PMC’s objective was a ‘fact finding mission’. Various questions needed to be answered and the PMC was correctly used as a tool to assess various facets of feasibility of such project. Even though the PMC is not binding on the CA, it is also an uncontested fact, that such a document was issued and the Appellant did participate in such procedure.

b) First ground of objection -

- i. With specific reference to the first ground of objection, this Board notes that all the testimonies referred to above show in no equivocal manner that the installation of the MR LINAC machine, inside bunker 4, was not possible and / or achievable. This due to various reasons.
- ii. The two reports prepared by the Foundation for Medical Services (“FMS”) entitled; 1) “Structural Appraisal Report – SAMOC – Corridor V109043” with reference No 20220224\_PO-PO-ONC-22-01\_R00 dated 24<sup>th</sup> February 2022 prepared and signed by Ing Patrick Spiteri Fiteni & Perit Douglas Bliesener and 2) “FMS assessment on existing Bunker 4 for MR Linac at SAMOC” (undated) prepared and signed by Perit Marina Eleni Mania & Perit Douglas Bliesener; attest to this. The fact that the machinery can actually fit in bunker 4 but then there is no available space to house all the necessary ancillary services required to operate it to full efficiency, is not deemed to be enough for the CA and this Board fully concurs with such views. The former report clearly states “from the calculations performed it is not recommended that considered machine component weighing 3,400KG (component weigh provided by the client) is transported through corridor V109043. Such a load is in excess of the slab bearing capacity and may result in compromising the existing structure, since materials will be stressed in excess of their design capacity, leading to long term durability issues.” The latter report clearly states “the existing available space in Bunker 4 is not adequate for the end user requirements when considering the MR Linac itself , operations requirements around the equipment and all the support spaces” and “The required plantroom cannot be constructed above existing bunker 4 and would have to be remote which is not desired by design.” The findings of the report prepared by Perit Marina Eleni Mania, are in this Board’s opinion the most relevant.
- iii. What the Board found not to be in the interest of transparency were the replies provided to the economic operator, now appellant, when on two (2) occasions they tried to clarify the position on why bunker 4 was not being considered for the purposes of this tender (after their participation in the PMC). The replies by the CA were very much on the cryptic end. The replies “Bunker 4 is considered not fit for purpose and therefore it cannot be used for the scope of this tender” and “considered not fit for purpose”, when the reports of the FMS were already in hand are not deemed to be acceptable transparent procedure. This, the Board opines, left

no alternative for the economic operator other than to formulate this appeal in order to obtain more information from the CA.

- iv. However, the Board opines, that overall the Contracting Authority, apart from the point mentioned above, managed this whole process in a very responsible and diligent manner. The issuance of the PMC was evidently done due to the fact that this is a new piece of machinery and the persons involved in this project had no specific knowledge on such matters. It is to be noted that bunker 4 was not specifically designed to house an MR LINAC machine. Therefore, they made proper use of the tools (the PMC) available to them as provided by the Public Procurement Regulations (“PPR”), more specifically regulation 47.

Therefore, this Board does not uphold the Appellant’s first grievance.

c) Second ground of objection –

- i. It is to be noted that the prerogative of dividing a tendering procedure into lots rests with the Contracting Authority. Regulation 33 of the PPR states “*Contracting authorities **may** decide to award a contract in the form of separate lots and **may** determine the size and subject matter of such lots.*” (bold emphasis added) Proper diligence was in the Board’s opinion exercised when in paragraph 3.1 of Section 1 of the tender dossier, specific reasons / justifications were provided on ‘why’ the tender was not divided into lots.
- ii. The Board opines that no substantial proof was presented to ascertain that the methodology adopted by the Contracting Authority was fallacious. Therefore, in the opinion of this Board, competition was not restricted.

Therefore, this Board does not uphold the Appellant’s second grievance.

d) Costs – Refund of Deposit

- i. In principle this Board agrees with statement provided by the appellant whereby “*Typically in the vast majority of cases, the allocation of costs by this Honourable Board follows the decision on the merits of the case.*”. This Board also agrees with another specific point when it was stated that “*the Contracting Authority could not even be bothered to answer clearly questions put to it within such collapsed timeline so that this Regulation 262 application was the only measure that could be taken to stop this senseless call for tenders*” (refer to first grievance conclusions sub-section ‘iii’)
- ii. The Board however does not agree with the other points brought forward for the full refund of the deposit. It has already been noted that the PMC is not binding on the CA, while the timeframes imposed are due to strict deadlines that the CA must adhere to.

Therefore, this Board does uphold this ‘grievance’ / argumentation of the Appellant solely on the points mentioned above.



**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) does not uphold Appellant's first and second grievances regarding the call for Remedies.
- b) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that half the deposit be refunded to the Appellant.

**Mr Kenneth Swain**  
**Chairman**

**Ms Stephanie Scicluna Laiviera**  
**Member**

**Dr Vincent Micallef**  
**Member**