

19<sup>th</sup> September 2021

**Public Contracts Review Board**  
**Notre Dame Ditch**  
**Floriana**  
**FRN 1601**



**Appeal of decision taken after the closing date for the submission of an offer: IMO49/2019 Pre-Qualification Questionnaire (PQQ) for the Award of a Concession Contract for the Design, Build, Finance, Operate, Maintain and Transfer of a Malta-Gozo (Partly Sub-Sea) Tunnel (hereinafter referred to as the “PQQ”).**

We write for and on behalf of Malta Gozo Fixed Link Limited (C 92204) in relation to the PQQ (hereinafter referred to as the “Objector”), with specific reference to the letter issued by Infrastructure Malta dated 10<sup>th</sup> September 2021 attached herewith and marked as “Doc. MGFL 1” (hereinafter referred to as the “Letter”) where the Objector was informed that it has “*not been shortlisted for participation in the ITPD Stage (as defined in the PQQ) of the competitive process for the award of the concession above-mentioned for the reasons attached to this letter*”.

#### **Facts**

Firstly, to allow the Public Contracts Review Board (PCRB) fully to appreciate the arguments made in this document, the Objector highlights the facts which gave rise to the present objection.

- i. The PQQ was published on 9<sup>th</sup> of January 2020.
- ii. The deadline for submission was 4<sup>th</sup> of June 2020.
- iii. In accordance with Section 3.16.1 of the PQQ, the period of validity of PQQ responses was one hundred and twenty (120) days after the Deadline for Submission and therefore lapsed on 2<sup>nd</sup> of October 2020.
- iv. On 19<sup>th</sup> of October 2020, after the period of validity had ceased, the Objector submitted a query to the contracting authority as to whether the PQQ had been extended. The contracting authority informed the Objector that the period of validity had been extended by ten (10) days until 30<sup>th</sup> of October 2020. The contracting authority had in the interim not notified the Objector nor any other bidder of any extensions, and therefore, the PQQ, was for all intents and purposes no longer valid.
- v. The contracting authority further extended the period of validity to 28<sup>th</sup> of February 2021.
- vi. The contracting authority further extended the period of validity to 31<sup>st</sup> of May 2021. Following this there were no further extensions communicated by the contracting authority to the Objector nor any other bidder.
- vii. On 1<sup>st</sup> of March 2021, the Objector received a letter from the contracting authority attached herewith and marked as “Doc. MGFL 2” whereby clarifications were



requested since *“From the MOUs provided, the Evaluation Committee could not determine whether all partners are assuming joint and several liability for the execution of the contract”*. The Objector was thus requested to provide declarations or preliminary agreements to indicate that the lead partner was authorised to bind and receive instructions for and on behalf of all partners individually and collectively.

- viii. The Objector provided clarification by virtue of the letter dated 5<sup>th</sup> of March 2021 attached herewith and marked as **“Doc. MGFL 3”** which was submitted within five (5) working days from notification in accordance with section 6.2.5 of the PQQ.
- ix. The Objector therefore remained compliant with the requirements of the PQQ and the contracting authority’s requests, despite the fact that:
  - The PQQ had expired on 2<sup>nd</sup> of October 2020 and therefore no longer operative; and
  - Additional and excessive extensions were arbitrarily imposed without any justification.
- x. On 10<sup>th</sup> September 2021 the Objector was notified that it was not shortlisted for reasons which the Objector shall address hereunder. Such notification by the contracting authority took place long after the last extensions which lapsed on the 31st May 2021.

In answer to the reasons for failure to be shortlisted:

- a. **Firstly, and most importantly it is important to point out that the contracting authority failed to adhere to the procedures specifically indicated in the PQQ, giving rise to irregularities in the competitive process and consequently this should have lead to the automatic cancellation of the PQQ procedure. The basis for such is two fold:**
  - In accordance with Article 3.16.1 of the PQQ the PQQ had a validity period of 120 days. As indicated above, on the lapse of the 120 days no notification of any extension was given by the contracting authority as a result of which, beyond that 120 day period, the PQQ was no longer valid. Further to such there were a number of other irregular extensions as shall be discussed at length further on in this objection, with the final irregular extension lapsing following the 31st May 2021. Clause 6.6.1 of the PQQ states that *“Prior to the expiration of the period of validity of PQQ Responses, the Administrator will notify each Candidate in writing whether it has qualified and, if so, its ranking, pending any complaint being lodged in terms of Section 8”*. As already indicated above, the shortlisting took place long after the expiry of the PQQ. This is not only contrary to that stated in the PQQ but contrary to the public procurement principle of transparency as enshrined in Regulation 60 of the Concession Contracts Regulations S.L. 601.09. Furthermore, such is neither equitable nor competitive. Without prejudice to that premised, if



there is any doubt as to the validity of the process or otherwise beyond the lapse of the 120 days, this further confirms and reaffirms the Objector's position that the PQQ was no longer valid.

In PCRB case 1022 of 2017 the contracting authority failed to notify the bidders in writing of an extension, following the lapse of the validity period. The board noted that the required procedure was not followed and this should have led to the automatic cancellation of the tender.

- In accordance with Article 3.16.2 of the PQQ, "*The Administrator may, in exceptional circumstances, request that Candidates extend the validity of PQQ Responses*". No justification whatsoever was given with respect to the multiple and lengthy extensions as a result of which the requirement of exceptional circumstances is undoubtedly lacking. Also, in accordance with the manual of procedures in relation to public procurement "*The length of the extension shall be proportionate to the importance of the information or change.*" Again, here no reason and/or justification was given for the multiple and lengthy extensions as a result of which the principle of proportionality is certainly not adhered to. In this respect the contracting authority therefore acted contrary to the PQQ and the public procurement principles of transparency and proportionality as enshrined in Regulation 60 of the Concession Contracts Regulations S.L. 601.09.

Without prejudice to what has been stated above and solely for the avoidance of doubt, the mere fact that there had been multiple requests for an extension after the validity of the PQQ had expired, does not qualify for an 'exceptional circumstance' because the term 'exceptional circumstances' presupposes that there must be certain circumstances not typical of normal situations.

Reference is also made to General Rules Governing Tenders, namely section 8.3 of the General Rules Governing Tenders which stipulates that exceptional circumstances must exist for an extension to take place. Article 8.4 goes on to say that a further extension by eight weeks (8) weeks may lead to the cancellation of the procedure. In this case not only was an extension imposed following the lapse of the period of validity of the PQQ but further numerous and lengthy extensions were imposed in the absence of exceptional circumstances for more than 6 months after the lapse of the validity period indicated in the PQQ. These constitute irregularities in the competitive process brought about by the



contracting authority itself. In this regard, the Objector maintains that the contracting authority had no alternative but to cancel the concession in line with article 3.3 of the PQQ which states that the contracting authority may cancel the process where there are irregularities in the competitive process. Here the contracting authority therefore had a prerogative to cancel the competitive process which it failed to exercise. This prerogative is mentioned at length in the above quoted PCRB case 1022 of 2017.

In a separate case, case 1434 of 2020 the PCRB mentioned that “*an extension to the validity period, is only Authorised in exceptional circumstances*” and, in this particular case, found that no such urgent or exceptional circumstances existed. As a result it pronounced that the tender was rightfully cancelled.

**b. Without prejudice to the above, and solely to address the reasons for failure to be shortlisted, the allegation that the candidate did not comply with the provisions of the PQQ is unfounded in fact and at law. This is being stated on the following basis:**

- Reference is made to the section of the Letter stating “*...the MOUs did not contain a binding undertaking that the relevant entity would i) be jointly and severally liable with the Candidate for the duration of the Contract or, limitedly in respect to the tunnelling contractor, until completion of works relating to tunnel (in relation to economic and financial standing); and ii) undertake the relevant tunnelling works or place the necessary human resources at the disposal of the Candidate (in relation to technical and professional ability), as applicable*”.

Reference is also made to a clarification requested by the contracting authority on 1st March 2021 wherein it was requested that the Objector determines whether “*all partners are assuming joint and several liability for the execution of the contract*” and that the Objector “*provide the declarations/preliminary agreements which indicate that the lead partner is authorised to bind and receive instructions for and on behalf of, all partners, individually and collectively*”.

The Objector refers to Section 3.9.7 of the PQQ which states that “*Provided that with regard to financial standing, the relevant entities shall be required to execute a guarantee in favour of the Administrator confirming that they shall be jointly liable for the execution of the Concession*”. Clarification 8 Reply 14 further states that “*The Relevant Entity which the tenderer is relying on satisfy*



*the other criteria set out in Schedule 2, Section 2.A.(ii) (Current Ratio) and Schedule 2, Section 2.A.(iii) (Total Equity) shall be required to be jointly and severally liable with the Candidate for the entire duration of the Concession...".*

Further to the provisions of Section 3.9.7 and as can be clearly noted from the contracting authority's clarification of 1st March 2021 it is only joint and several liability and the right to bind and receive instructions that is being requested. This requirement, as can be clearly noted from 3.9.7, of the PQQ is only in relation to the economic and financial standing criteria and therefore no mention is being made of the technical and professional ability criteria.

Following such, and in response to the contracting authority's clarification of the 1st March 2021, the Objector promptly submitted a declaration provided by Conduent State and Local Solutions, Inc. (hereinafter "**Conduent**") dated 5th March 2021 attached herewith and marked as "**Doc. MGFL 3**" whereby Conduent confirmed that it authorised the Objector to bind and receive instructions for and on its behalf and that it was assuming joint and several liability for the performance of the contract. This further strengthened what was stipulated in the Memorandum of Understanding between the Objector and Conduent attached herewith and marked as "**Doc. MGFL 5**". With respect to economic and financial standing, the relevant entity is Conduent. This results from the declarations attached herewith and marked as Doc. "**Doc. MGFL 4**" where it is clearly indicated that (i) Conduent has a minimum average turnover of €3,905,000,000 (for the period 2016-2019) and therefore much more than the minimum requested of €500,000,000 in the PQQ schedule 2, 2A(i). (ii) Conduent has a total equity balance of €500,000,000 (for 2017 and 2018) or more as requested in the PQQ schedule 2, 2A(ii) and (iii) Conduent has a current ratio of 1.59 which substantially exceeds the minimum average ratio of 0.5 requested in the PQQ schedule 2, 2A(iii).

As a result, the Objector clearly and fully addressed the clarification requested by the contracting authority and was in full compliance with that requested in the PQQ.

With respect to the technical and professional ability, the Objector was also in compliance with the PQQ.

In fact, the Memorandum of Understanding concluded between the Objector and BAM International B.V. (hereinafter "**BAM**") on the 3<sup>rd</sup> of June 2020 annexed herewith and marked as "**Doc. MGFL 6**" contains a general declaration in Clause 3 whereby BAM undertook to "*provide its credible references for immersed tunnels for the entire duration of the competitive process under the PQQ*". The provision of tunnelling works and human resources is therefore implied by such general declaration. Therefore, had the contracting authority sought to clarify with the Objector whether or not BAM



had given such undertaking, it would have obtained confirmation that such undertaking had indeed been taken.

The contracting authority cannot now indicate that the Objector failed to satisfy the criteria in relation to technical and professional ability when it did not even seek to request a clarification or rectification in relation to such as stipulated in the PQQ document in section 4.7.2 and section 6.3.2 which are being reproduced hereunder due to their importance.

#### Section 4.7.2

*“When checking and comparing PQQ Responses, the Evaluation Committee may, in compliance with any procedure set out in the Concession Contracts Regulations, ask a Candidate to clarify any aspect of its PQQ Response.”*

#### Section 6.3.2

*“The Evaluation Committee shall have the right to request rectifications with respect to incomplete / non-submitted information pertinent to the documentation required in the PQQ Responses. Such rectification/s must be submitted within five (5) working days from notification. Failure to comply shall result in the PQQ Response not being considered any further.”*

The importance of the contracting authority’s obligation to seek clarification and/or rectification cannot be undermined. EU case law has already offered some guidance that points in the direction of an approach aimed at maintaining the maximum possible degree of competition by avoiding the rejection of responses on the basis of automatic rejection. This can be combatted by the contracting authorities’ exercise of due care in the evaluation of responses. As reasoned by EU case law therefore the evaluation committee is under an obligation to conduct the revision of the replies in accordance with the principle of good administration and is under an obligation to exercise the power to ask for additional information in circumstances where the clarification is both practically possible and necessary and as long as the exercise of that duty to seek clarification is in accordance with the principle of equal treatment. (Case T-211/02 Tideland Signal [2002] ECR II-3781 37–38, and cited case law. See also C-599/10 Slovensko [2011] ECR I-10873 and Case C-336/12 Manova [2013] pub. electr. EU:C:2013:647.) As emphasised by case law therefore where the public procurement process and surrounding circumstances known to the contracting authority indicate that the ambiguity probably has a simple explanation and can be easily resolved, then it is in principle contrary to the requirement of good administration to reject a response without exercising its power to seek clarification. A decision to reject a response in such circumstances is consequently liable to be vitiated by a

manifest error of assessment on the part of the contracting authority in the exercise of that power and could result in an unnecessary restriction of competition (Case T-211/02 Tideland Signal [2002] ECR II-3781 37-38; Case T-63/06 Evropaiki Dynamiki v OEDT [2010] ECR II-177 98; Case T-195/08 Antwerpse Bouwwerken v Commission [2009] ECR II-4439 56; Case T-554/08 Evropaiki Dynamiki v Commission [2012] pub. electr. EU:T:2012:194 56; and Case T-553/11 European Dynamics Luxembourg v ECB [2014] pub. electr. EU:T:2014:275 300.)

- Reference is made to the section of the Letter stating that “*the MOU submitted by Royal BAM Group expired on 31st December 2020*”.

The Memorandum of Understanding concluded between the Objector and BAM remained in effect until 31<sup>st</sup> December 2020, therefore it was valid for the duration of the period of validity of the PQQ which originally ceased on 2nd of October, before being irregularly extended without justification let alone in adherence to the requirement of “*exceptional circumstances*” and lapsed again following the 31st May 2021. The Objector submits that not only was it therefore in conformity with that requested in the PQQ but since the period of validity was extended irregularly for the reasons above mentioned, it is unjust and contrary to the aforementioned principles of public procurement to disqualify the Objector from the process without even attempting to seek a clarification and/or rectification in this respect.

- Reference is made to the section of the Letter stating “*In its response, the Candidate stated that Royal BAM Group was no longer in a position to support the Candidate as required by the PQQ, and that this sub-contractor was being replaced by China Railway Tunnel Group Company Limited (CRTG) and China Overseas Engineering Company Limited (COVEC), also claiming that this would result in an improved response for the Candidate.*”

*Royal BAM Group was specified in the PQQ Response to be the party on which the Candidate was relying to meet certain key Selection Criteria and, therefore, an essential element of the Candidate and the PQQ Response. The change of Royal BAM Group is tantamount to a change in the Candidate and would constitute a material rectification to the Candidate’s PQQ Response, which is prohibited by the PQQ (including Section 6.3.3 thereof) and applicable legislation.”*

The Objector refers to section 3.9.3 of the PQQ which states that at ITPD stage, “*The Contracting Authority shall have the right to permit changes to the identity and, or composition of the Shortlisted Candidate during the Competitive Process...*”. While it is seemingly indicated that changes to the economic



operator's composition are permitted at ITPD stage, the Objector draws attention to the fact that competitive process in the PQQ is defined as "*the competitive process for the award of the Project pursuant to which Candidates shall be shortlisted in the first stage, invited to participate in dialogue in the second stage, and invited to submit a best and final offer in the third and final stage*" and thus is inclusive of the first stage and shortlisting stage and therefore the stage the Objector was in before it got disqualified for this purpose. On the basis of this definition, the changes in question should be permitted during all stages of the Competitive Process, including the PQQ first and shortlisting stage. Furthermore, its restriction to the ITPD stage is unreasonable and disproportionate and does not safeguard and adhere to the public procurement principles of equal treatment, transparency and proportionality as enshrined in Regulation 60 of the Concession Contracts Regulations S.L. 601.09. In this regard, the Objector submits that the change in composition should be permitted on the basis that such change did in fact occur during the Competitive Process on the basis of the principles of public procurement.

The Objector further refers to section 3.9.5 of the PQQ which provides that "*In view of the long duration of the Concession, changes in composition shall be expressly permitted in specific circumstances in terms of the Concession Contracts.*" This further confirms the Objector's assertion as stated above that a change in composition is permissible during the first and shortlisting stage of the PQQ since in this clause there is no limitation to the ITPD stage. In addition, the context here is such that the duration of the Concession was further lengthened by the numerous irregular extensions, and the Objector therefore submits that the grounds to change its composition are further strengthened on this basis.

As indicated in the CJEU case of Hojgaard (24 May 2015) (C-396-14) alterations in the composition of a pre-selected tenderer during the tender procedure are not prohibited. Importance must be given to the specific circumstances of the case to justify a derogation from the principle that no material rectification shall be allowed. The contracting authority here certainly failed to assess the circumstances of this particular case, largely brought about by it, where it enacted an irregular procedure of not extending the PQQ prior to the lapse of the 120 days and later continually irregularly extending the procedure with no indication of any exceptional circumstance with the last irregular extension lapsing following the 31st May 2021.





As a result of such, the contracting authority should have permitted the Objector to effect a change in its composition.

Therefore, on the basis of the above, the Objector strongly contests the Evaluation Committee's statements that it was precluded from evaluating the PQQ response submitted by the Objector and that it was not in a position to complete its evaluation.

**In view of the above considerations, and further considerations and evidence that the Objector reserves the right to bring and present during the relative hearing, the Objector humbly requests the PCRB to:**

(i) declare and decide that the Letter declaring that the Objector "*has not been shortlisted*" for the reasons therein mentioned, is erroneous and should thus be annulled and revoked.

(ii) declare and decide that due to the aforementioned extension irregularities, the PQQ process should be cancelled.

(iii) in the absence of (ii) declare and decide that the Objector is in compliance with the provision of the PQQ and instructs the contracting authority to re-integrate the Objector's RFP response in the PQQ process.

(iii) give those orders or directions it deems necessary to give effect to the above requests; and

(iv) declare and decide that the deposit paid by the Objector in connection with the filing of the present objection is reimbursed in full.

**Av. Lara Borg**  
novolegal  
22/9, Vincenti Buildings  
Strait Street  
Valletta, VLT 1432

**Av. Shaheryar Ghaznavi**  
Legal Works Consortium  
45/19  
Strait Street  
Valletta, VLT 1434

**Av. Charlon Gouder**  
Legal Works Consortium



List of Witnesses:

1. Representative/s, past or present of the Objector
2. Representative/s past or present of other candidates including the shortlisted candidate
3. Representative/s past or present of the contracting authority
4. Representative/s past or present of the Department of contracts
5. Members of the Evaluation Committee



**Bank of Valletta p.l.c**  
 Registration Number: C 2833  
 Registered Office: 58 Zachary Street, Valletta VLT 1130 - Malta

## Pay third party

Printed by: Mr. Paul Joe Xerxen  
 Printed on: 17/09/2021 - 12:23  
 Document ID: 9778639

### Transaction details

**Payer's name:** MALTA GOZO FIXED LINK LIMITED

**Beneficiary name:** Cashier Malta Government

**Relation:** Non-profit

**Reason:** Other

**Payment details:** Deposit for appeal Malta Gozo Fixed Link Ltd TID 133636 PQQ IM049 2019

**Currency:** EUR - Euro

**Beneficiary account:** MT55MALT011000040001EURCMG5001H

**Beneficiary account type:** Valid IBAN of country - Malta

**Bank name:** Other bank

**Bank address / Bank's BIC:** Let the bank apply the beneficiary bank BIC

**Beneficiary address:** Yes

**Address line 1:** Central Bank of Malta

**Address line 2:** Castille Place

**City:** Valletta

**Postcode:** VLT 1060

**Country:** Malta

**From account:** 5000386384 1 (EUR)

**Charges should be paid by:** Shared - I pay BOV charges; Cashier Malta Government pays the beneficiary bank charges

**Amount:** EUR 50,000.00

**BOV to transfer the money:** as soon as possible

**Receiving bank to get the money as:** same-day priority payment

**Saved template:** Cashier Malta Government

### Additional information

**Credit amount:** EUR 50,000.00

**Debited amount (excluding charges):** EUR 50,000.00

**Estimated amount to be withdrawn from account:** EUR 50,008.00

**Transaction charge:** EUR 8.00

### Transaction result

**Status:** Your instructions have been processed successfully.

**Transaction ID:** 105138440



10 September 2021

**Malta Gozo Fixed Link Ltd. TID 133636**

**REFERENCE:IM049/2019**

**SUBJECT: Pre-qualification Questionnaire (PQQ) for the award of a Concession Contract for the Design, Build, Finance, Operate, Maintain and Transfer of a Malta-Gozo (Partly sub-sea) Tunnel.**

Dear Sir/Madam,

Thank You for participating in the above-mentioned PQQ procedure.

You have not been shortlisted for participation in the ITPD Stage (as defined in the PQQ) of the competitive process for the award of the concession above-mentioned for the reasons attached to this letter.

Equitix-Itochu-Yapi Merkezi-Makyol-Egis Consortium TID 133630 has been shortlisted for the ITPD Stage.

If you intend to object to this decision, the Concession Contracts Regulations allow for an official objection which in this case has to be lodged electronically with the Public Contracts Review Board by sending an email on: [info.pcrb@gov.mt](mailto:info.pcrb@gov.mt) by noon of 20 September 2021 against the deposit of Euro 50,000.

Payment of the deposit is to be made through bank transfer in terms of the following details:

Name of Account Holder	Cashier Malta Government
Name of Bank	Central Bank of Malta
Address of Bank	Castille Place, Valletta
Account Number	40001EUR-CMG5-001-H
BIC	MALT MT MT
IBAN Code	MT55MALT011000040001EURCMG5001H
Bank Code	01100

This decision has been published and is subject to any official objection being submitted to the Public Contracts Review Board.

Yours sincerely,

Christine Friggieri  
Head of Procurement

## Malta Gozo Fixed Link Ltd. (the "Candidate")

### *Reasons for failure to be shortlisted:*

In the Candidate's PQQ Response, it was stated that it was relying on a number of entities to meet the Selection Criteria set out in the PQQ, as follows:

- (a) Average Total Annual Turnover and Similar Project Turnover:
  - (i) A minimum average turnover over the last three (3) financial years – Conduent Inc. and Royal BAM Group
  - (ii) A project turnover of at least €2,500,000 from one (1) similar project – Royal BAM Group
- (b) Total Equity – Conduent Inc.
- (c) Current Ratio – Conduent Inc.
- (d) Construction Experience – Royal BAM Group and OZGUN
- (e) Design Experience – TEC
- (f) Human Resources – Royal BAM Group, OZGUN and AIS
- (g) Health and Safety Record – Royal BAM Group
- (h) Environmental Track Record – Royal BAM Group
- (i) Standards – TEC, OZGUN, Royal BAM Group

In terms of Section 3.9.7, in accordance with Regulation 78 of the Concession Contracts Regulations, *"with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, an economic operator or group of economic operators may rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational and professional qualifications, or to the relevant professional experience, Candidates may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where Candidate wants to rely on the capacities of other entities, it must in that case prove to the satisfaction of the Administrator that it will have at its disposal, throughout the period of the Concession, the resources necessary for the execution of the Concession; for example, by producing a binding undertaking by those entities to place the necessary resources at the disposal of the Candidate. Provided that with regard to financial standing, the relevant entities shall be required to execute a guarantee in favour of the Administrator confirming that they shall be jointly liable for the execution of the Concession."*

The provisions of Section 3.9.7 of the PQQ were clarified in a number of clarifications (including, Clarification 5, Question 35; Clarification 8, Question 14; Clarification 9, Question 2; Clarification 9, Question 4; and Clarification 10, Question 1).

The MOUs submitted by the Candidate, in relation to entities which the Candidate expressly relied upon to meet the selection criteria relating to economic and financial standing and technical and professional ability (as applicable), did not comply with the provisions of the PQQ. In particular, without limitation, the MOUs did not contain a binding undertaking that the relevant entity would i) be jointly and severally liable with the Candidate for the duration of the Contract or, limitedly in respect to the tunnelling contractor, until completion of works relating to tunnel (in relation to economic and financial standing); and ii) undertake the relevant tunnelling works or place the necessary human resources at the disposal of the Candidate (in relation to technical and professional ability), as applicable.

In addition, the MOU submitted by Royal BAM Group expired on 31<sup>st</sup> December 2020.

In view of the above, it was not possible for the Evaluation Committee to evaluate the Candidate's PQQ Response submitted in accordance with the PQQ.

In order to ensure that the Candidate was given an opportunity to clarify the reason for the inaccuracies referred to above, the Evaluation Committee requested the Candidate to provide the declarations / preliminary agreements allowing the Candidate to rely on such entities, pursuant to a clarification request sent on the 1<sup>st</sup> March 2021.

In its response, the Candidate stated that Royal BAM Group was no longer in a position to support the Candidate as required by the PQQ, and that this sub-contractor was being replaced by China Railway Tunnel Group Company Limited (CRTG) and China Overseas Engineering Company Limited (COVEC), also claiming that this would result in an improved response for the Candidate.

Royal BAM Group was specified in the PQQ Response to be the party on which the Candidate was relying to meet certain key Selection Criteria and, therefore, an essential element of the Candidate and the PQQ Response. The change of Royal BAM Group is tantamount to a change in the Candidate and would constitute a material rectification to the Candidate's PQQ Response, which is prohibited by the PQQ (including Section 6.3.3 thereof) and applicable legislation.

In view of the above, in addition to the issues with the Candidate's original submissions which, as explained above, precluded the Evaluation Committee from evaluating the PQQ Response submitted by the Candidate, the clarification response not only confirmed the initial concerns of the Evaluation Committee but also resulted in an additional justification for disqualification.

Thus, without being in a position to complete the technical evaluation of the Candidate's PQQ Response due to the above, the Evaluation Committee deemed the Candidate's PQQ Response to be non-compliant.

IM049/2019

Tender ID 133636



01 March 2021

**MALTA GOZO FIXED LINK LTD.**

**IM049/2019 – PRE-QUALIFICATION QUESTIONNAIRE (PQQ) FOR THE AWARD OF A CONCESSION CONTRACT FOR THE DESIGN, BUILD, FINANCE, OPERATE, MAINTAIN AND TRANSFER OF A MALTA-GOZO (PARTLY SUB-SEA) TUNNEL**

Reference is hereby being made to IM049/2019 and to your offer submission to same.

The Evaluation Committee noted the following shortcomings with regards to your submission:

**Rectification / Clarification No. 1**

From the MoUs provided, the Evaluation Committee could not determine whether all partners are assuming joint and several liability for the execution of the contract. Hence, you are requested to provide the declarations / preliminary agreements which indicate that the lead partner is authorized to bind and receive instructions for and on behalf of, all partners, individually and collectively.

In terms of Article 1.1 of the Instructions to Tenderers, you are hereby being given the opportunity to rectify / clarify these shortcomings within five (5) working days of notification [**Monday 08/03/2021 at 17:00hrs**].

Tenderers who fail to rectify / clarify the shortcomings identified in this communication shall be deemed to be non-compliant.

The requested information is to be submitted through the appropriate Electronic Public Procurement (ePPS) module.

This rectification / clarification opportunity is being sent without any commitment whatsoever on the part of the Contracting Authority, and does not imply that your offer will be accepted as it may still be deemed administratively, technically or financially non-compliant during the evaluation process.

Best regards,

**INFRASTRUCTURE MALTA**

To

**MALTA GOZO FIXED LINK LTD.**

Warehouse No. 7

St. Bernard Street, Marsa

*To the attention of Mr Mr P.J. Xerxen*

*Via email*

05 March 2021

Dear Sirs,

**Re: Pre-Qualification Questionnaire for the award of a concession contract for the design, build, finance, operate, maintain and transfer of a Malta-Gozo (partly sub-sea) tunnel and the**

we make reference to:

- (i) the memorandum of understanding executed by and between us and your company on [●] (the “**MoU**”) to set forth the main terms and conditions for the participation to the competitive process, opened by the Agency for Infrastructure Malta -also on behalf of the Ministry for Transport, Infrastructure and Capital Projects of Malta- (the “**Authority**”), for the award of a concession for the design, construction, maintenance and operation of a, partly sub-sea, tunnel between Malta and Gozo (the “**Concessions**” **Project**”) and
- (ii) the request of clarification sent to you by Infrastructure Malta on 1 March 2021 (the “**Request of Clarification**”).

We the undersigned **confirm and represent** that:

- a) Malta Gozo Fixed Link Ltd, in its quality as Lead Partner for the Project, is authorized to bind and receive instructions, individually and collectively, for and on our behalf;
- b) we are assuming joint and several liability with the other entities part of Malta Gozo Fixed Link Ltd’s group of economic operators, for the performance of the contract with the Authority in case of award of the Concession.

You are authorized to disclose this letter to Infrastructure Malta in order to provide it with the clarifications requested under the Request of Clarification.

Your sincerely,



Scott Doering

Vice President and General Manager

Conduent State and Local Solutions, Inc.





I, the undersigned Dean Mansueto in my position of Director within Malta Gozo Fixed Link Ltd, Company Registration number C92204, hereby declare that with reference to, IM049/2019 PREQUALIFICATION QUESTIONNAIRE (PQQ) FOR THE AWARD OF A CONCESSION CONTRACT FOR THE DESIGN, BUILD, FINANCE, OPERATE, MAINTAIN AND TRANSFER OF A MALTA-GOZO (PARTLY SUB-SEA) TUNNEL, the **MINIMUM AVERAGE TURNOVER OVER THE LAST THREE (3) FINANCIAL YEARS GREATER THAN OR EQUALS TO €500,000,000** (Average Total Annual Turnover and Similar Project Turnover Schedule 2, Section 2A(i) (1i) ) is as per below.

**Calculation:**

BAM: €6,906,000,000 over the period (2016-2018)

CONDUENT: \$4,450,000,000 (€3,905,000,000) over the period (2016-2019)

*Reference is made to the summary overleaf*

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\_\_\_\_\_  
Signature  
Dean Mansueto, Director

June 3, 2020  
Date

A handwritten signature in black ink, appearing to be 'PJX'.

\_\_\_\_\_  
Signature  
Paul Joe Xerxen, EO Administrator

June 3, 2020  
Date



## Summary of Audited Consolidated Financial Statements

All figures are in millions unless otherwise stated. Currency as shown.

Conduent Inc.

	Minimum	2019	2018	2017	2016	Average
Average conversion rate		1.1195	1.181	1.1297	1.1069	
Conversion rate as at date of balance sheet (31st December)		1.1234	1.145	1.1993	1.0541	
Turnover		\$ 4,467	\$ 5,393	\$ 6,022	\$ 1,917	\$ 4,450
Turnover	€ 500 M	€ 3,990	€ 4,566	€ 5,331	€ 1,732	€ 3,905
Current Assets		\$ 1,586	\$ 1,964	\$ 2,710	\$ 1,917	
Current Assets		€ 1,412	€ 1,715	€ 2,260	€ 1,819	
Current Liabilities		\$ 1,177	\$ 1,197	\$ 1,368	\$ 1,402	
Current Liabilities		€ 1,048	€ 1,045	€ 1,141	€ 1,330	
Current Ratio	0.5	1.35	1.64	1.98	1.37	1.59
Equity	€ 500 M	\$ 1,300	\$ 3,222	\$ 3,529	\$ 3,288	\$ 2,835
Equity	€ 500 M	€ 1,157	€ 2,814	€ 2,943	€ 3,119	€ 2,508



Royal BAM International

	Minimum	2018	2017*	2016	Average
Turnover	€ 500 M	€ 7,208	€ 6,535	€ 6,976	€ 6,906
Current Assets		€ 3,299	€ 3,056	€ 3,326	
Current Liabilities		€ 3,252	€ 3,073	€ 3,228	
Current Ratio	0.5	1.01	1.00	1.03	1.01
Equity	€ 500 M	€ 735	€ 727	€ 839	€ 767

\*restated in 2018



I, the undersigned Dean Mansueto in my position of Director within Malta Gozo Fixed Link Ltd, Company Registration number C92204, hereby declare that with reference to, IM049/2019 PREQUALIFICATION QUESTIONNAIRE (PQQ) FOR THE AWARD OF A CONCESSION CONTRACT FOR THE DESIGN, BUILD, FINANCE, OPERATE, MAINTAIN AND TRANSFER OF A MALTA-GOZO (PARTLY SUB-SEA) TUNNEL, the **Criterion mentioned in the Tender tool V.III.XV Subcontracting Portion percentage, is not know at this stage. We further declare that MGFL will be subcontracting works to a number of Entities, and such percentage will be provided at subsequent stage.**

The presently known sub-contractors are:

- Conduent Inc. – Tunnel Operators
- Royal BAM Group – Tunnel Construction Contractors
- Ozgun Insaat – Tunnel Construction Contractors
- TEC (Parent Company: Royal Haskoning DHV) – Tunnel Design Engineers
- AIS Environment – Environmental Consultants

Furthermore, we declare as per provisions of Section 3.9.7 of the PQQ document, MGFL is relying on the following entities to satisfy the selection criteria:

#### **ECONOMIC AND FINANCIAL STANDING**

Section 1. (i) Minimum average turnover over the last three (3) financial years (2016 – 2018)  $\geq$  €500,000,000 - **Conduent Inc. and Royal BAM Group**

Section 1. (ii) One similar project undertaken within the last 10 financial years with a project revenue  $\geq$  €250,000,000. - **Royal BAM Group**

Section 2. (i) Minimum total equity balance of the financial year (2018)  $\geq$  €500,000,000. - **Conduent Inc.**

Section 2. (ii) Minimum total equity balance of the financial year (2017)  $\geq$  €500,000,000. - **Conduent Inc.**

Section 3. Average Current Ratio over last 3 financial years (2016 – 2018). – **Conduent Inc.**

In line with Clarification 8, Reply 13 the Average Current Ratio for **Royal BAM Group** over the last 3 financial years (2016 – 2018) exceeds 0.5. **Royal BAM Group** is the entity the candidate is relying on for the purposes that it derived a project turnover of at least €250,000,000 from one similar project.



## TECHNICAL AND PROFESSIONAL CAPABILITIES

- Section 1.1 Construction Experience - Number of similar projects during the Relevant Period - **Royal BAM Group and OZGUN**
- Section 1.2 Construction Experience - Currency of similar projects (average)during the Relevant Period **Royal BAM Group and OZGUN**
- Section 1.3 Construction Experience - Highest project value (tunnelling construction contract value) in € of similar project undertaken by the tunnelling construction company during Relevant Period - **Royal BAM Group**
- Section 2.1 Design Experience – Number of similar projects during the Relevant Period - **TEC**
- Section 2.2 Design Experience – Average project value of tunnel project (not amounts of designer) in € per project of similar projects during the Relevant Period - **TEC**
- Section 3. (a) Human Resources - Tunneling Project Directors and Tunneling Managers - **Royal BAM Group and OZGUN**
- Section 3. (b) Human Resources – Tunneling Construction Managers, Supervisors and Foreman - **Royal BAM Group and OZGUN**
- Section 3. (c) Human Resources – Geological and rock mechanical competence minimum MSc-level on formal education **Royal BAM Group and AIS.**
- Section 4.1 Health and Safety Record - Number of accident free man-hours - **Royal BAM Group.**
- Section 4.2 Health and Safety Record – Number of prosecutions or significant accidents in tunneling projects - **Royal BAM Group.**
- Section 4.3 Health and Safety Record -Safety policy for safety in tunneling construction projects - **Royal BAM Group.**



- Section 5.1 Environmental Track Record – Number of infringements, prosecutions and similar actions in tunneling projects - **Royal BAM Group**.
- Section 5.2 Environmental Track Record – Environmental policy in tunneling construction projects - **Royal BAM Group**.
- Section 6 Standards
- (i) ISO 9001:2015 or equivalent – **TEC, OZGUN, Royal BAM Group**
  - (ii) ISO 14001:2015 or equivalent – **TEC, OZGUN, Royal BAM Group**
  - (iii) ISO 45001:2018 or equivalent – **TEC, Royal BAM Group**
  - (iv) ISO 31000:2013 or equivalent - **TEC**

A handwritten signature in black ink, appearing to be "D. Mansueto".

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Signature  
Dean Mansueto, Director

June 3, 2020  
Date

A handwritten signature in black ink, appearing to be "Paul Joe Xerxen".

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Signature  
Paul Joe Xerxen, EO Administrator

June 3, 2020  
Date



I, the undersigned Dean Mansueto in my position of Director within Malta Gozo Fixed Link Ltd, Company Registration number C92204, hereby declare that with reference to, IM049/2019 PREQUALIFICATION QUESTIONNAIRE (PQQ) FOR THE AWARD OF A CONCESSION CONTRACT FOR THE DESIGN, BUILD, FINANCE, OPERATE, MAINTAIN AND TRANSFER OF A MALTA-GOZO (PARTLY SUB-SEA) TUNNEL, the **AVERAGE CURRENT RATIO OVER THE LAST 3 FINANCIAL YEARS 2016 – 2018, IS GREATER THAN OR EQUALS TO 0.5** (Current Ratio, Schedule 2, Section 2A(iii) is as per below.

**Calculation:**

CONDUENT: 1.59

In line with Clarification 8, Reply 13 the Average Current Ratio for **Royal BAM Group** over the last 3 financial years (2016 – 2018) exceeds 0.5. **Royal BAM Group** is the entity the candidate is relying on for the purposes that it derived a project turnover of at least €250,000,000 from one similar project.

*Reference is made to the summary overleaf*

A handwritten signature in black ink, consisting of a series of loops and a long tail.

Signature  
Dean Mansueto, Director

June 3, 2020  
Date

A handwritten signature in black ink, featuring a large, stylized initial 'P' followed by several loops.

Signature  
Paul Joe Xerxen, EO Administrator

June 3, 2020  
Date

## Memorandum of Understanding

Conduent State & Local Solutions, Inc.

And

Malta Gozo Fixed Link Limited

This Understanding ("Agreement") is entered into between **Malta Gozo Fixed Link Limited** (hereinafter "COMPANY"), having its place of business at WAREHOUSE NO. 7, ST. BERNARD STREET, Marsa, Malta and **Conduent State & Local Solutions, Inc.** (hereinafter "CONDUENT") having its place of business at 12410 Milestone Center Drive, Fifth Floor, Germantown, MD 20876. COMPANY and CONDUENT (each individually a "party" and collectively "the parties") agree as follows:

1. **BUSINESS OPPORTUNITY** The purpose of this Agreement is to enter into an agreement between the parties in relation to the following opportunity ("Opportunity"), in which opportunity the COMPANY shall participate as a tenderer:

**REFERENCE NUMBER: IM049/2019  
CONCESSION DOCUMENT PRE-QUALIFICATION QUESTIONNAIRE (PQQ) FOR  
THE AWARD OF A CONCESSION CONTRACT FOR THE DESIGN, BUILD, FINANCE,  
OPERATE, MAINTAIN AND TRANSFER OF A MALTA-GOZO (PARTLY SUB-SEA)  
TUNNEL**

2. **THE AGREEMENT** Having carefully assessed the capabilities and interests of the other party, each party has determined that it would benefit from entering into this understanding whereby CONDUENT and the COMPANY shall explore the possibility of a subcontract for CONDUENT to provide the services, set out in Schedule A (SOW), to the COMPANY, in the eventuality that the COMPANY is awarded the Business Opportunity.

The Parties agree that during the existence of this Agreement, CONDUENT shall exclusively provide its services and products to the COMPANY, in the **EVENTUALITY** that the COMPANY is awarded the Business Opportunity.

In terms of the present Agreement CONDUENT will be required to assist the COMPANY in the preparation and submission of a proposal ("Proposal") and all ancillary requirements upto the stage when the Business Opportunity is awarded to the COMPANY by the Contracting Authority namely **INFRASTRUCTURE MALTA** (hereinafter "Client"), CONDUENT would offer a combination of resources and skills designed to achieve optimum performance of the Opportunity ("Services").

The parties understand and agree that this agreement does not restrict either party from entering into additional agreements for other products and services not included in the Services to be provided by CONDUENT.

3. **INTENTION TO SUBCONTRACT SERVICES TO CONDUENT** If the Client awards the Business opportunity to COMPANY ("Prime Contract"), COMPANY will be the prime contractor, responsible for providing the Services, including overall contract management. COMPANY and CONDUENT will negotiate a subcontract for CONDUENT to perform a portion of the Services, as generally set forth in the Statement of Work ("SOW"), which is attached to and incorporated by reference in this Agreement as Attachment A. In the eventuality that the Parties are unable to reach an agreement in respect of the subcontract, the present Agreement shall terminate immediately ipso jure.

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## Agreement

4. **TERM** This Agreement is effective on ... 2020 ("Effective Date") and shall continue in full force and effect until terminated in accordance with the provisions of this Agreement.

5. **ELIGIBILITY** By executing this Agreement, each party represents and certifies that it is eligible to participate in the PQQ in relation to the Business Opportunity. Each party agrees to take any appropriate action required to maintain that eligibility and agrees that it will not take any action that would jeopardize that eligibility. If either party becomes ineligible to bid on or perform the Services, that party shall promptly notify the other party, in writing, of the ineligibility.

6. **DISCLOSURE OF CONFLICTS OF INTEREST** Each party agrees to fully disclose to the other party any conflict or potential conflict of interest resulting from or which may result from this Agreement or under an award of the Prime Contract to COMPANY. Disclosure shall include, but is not limited to, any conflict of interest, criminal indictment, government civil action, government investigation, or non-compliance with federal, state, or local statutes, ordinances, or regulations. Each party warrants that it is not knowingly adversely affected by any organizational conflict of interest ("OCI") related to this Opportunity as of the Effective Date of this Agreement. Each party agrees that if it determined that an OCI exists or may exist during the Term of this Agreement, that party will immediately notify the other party of the OCI or potential OCI, and that subsequently the other party may terminate this Agreement by written notice to the other party.

7. **PROPOSAL PREPARATION** COMPANY will be primarily responsible for preparation of the Proposal and all negotiations with the Client. COMPANY will submit the Proposal and any Best and Final Offer ("BAFO") or other supplemental material and data to the Client. COMPANY will identify CONDUENT as a proposed subcontractor under the Proposal. The parties will work together to develop a Proposal as follows:

A. Efforts COMPANY will exert reasonable, good faith efforts to prepare and submit a Proposal that may result in the award of the Prime Contract to COMPANY. Those efforts shall include, but not be limited to, any discussions and negotiations with Client concerning the Prime Contract and approval of CONDUENT as a subcontractor under the Prime Contract, as required. If COMPANY has an opportunity to make oral or written presentations to the Client concerning the Proposal, CONDUENT agrees to support those presentations, as requested by COMPANY.

B. Submission of Proposal Materials and Data COMPANY is relying on CONDUENT to timely submit proposal materials and data (including but not limited to technical, financial, and cost information) relevant to the portion of the Services that may be allocated to CONDUENT for inclusion in the Proposal, including any exceptions to and understandings or clarifications with respect to the terms and conditions of the Opportunity that are requested by COMPANY. Any materials and data provided by CONDUENT shall satisfy the requirements as documented by CONDUENT in the response to the Opportunity. CONDUENT agrees to provide materials and pricing in a timely manner so as to allow reasonable time for COMPANY to comment and work with CONDUENT to finalize the Proposal and to incorporate CONDUENT material and data (including but not limited to cost information) into the Proposal, responses to questions, or any BAFO. CONDUENT agrees to make reasonable and good efforts to support Proposal activities that may be reasonably requested by COMPANY in relation to that portion of the Proposal related to the Services provided CONDUENT. COMPANY will keep CONDUENT reasonably advised of changes in the requirements and the status of the procurement.

C. Availability of CONDUENT Personnel CONDUENT agrees to assist COMPANY with preparing that portion of the Proposal related to the Services to be provided by CONDUENT. CONDUENT agrees to make available qualified employees, agents, or consultants to participate in the preparation of the Proposal. CONDUENT shall also make available qualified personnel to assist with or participate in discussions, oral presentations, or negotiations with the Client, as requested by COMPANY. If any CONDUENT employees are identified as "key personnel" or otherwise required to perform under the Prime Contract, CONDUENT

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## Agreement

agrees to ensure the availability of those employees in accordance with the PQQ and resulting Prime Contract.

D. Cost Proposal The parties understand and agree that an adjustment in pricing of the services set out in Schedule A may be necessary in order to achieve the pricing or other Proposal objectives most favorable to an award of the Business Opportunity. If the Parties determine that an adjustment may be necessary, the Parties will negotiate in good faith to agree on changes in price, scope, or other factors. If the parties are unable to agree, and the Parties (acting reasonably), determine that a viable Proposal, BAFO, or Prime Contract, with the participation of CONDUENT, cannot be submitted to the Client, either Parties may terminate this Agreement without liability to either Party by providing written notice of termination to the other Party.

E. Change in Requirements Both parties recognize that the Client may amend the scope or pricing requirements during negotiation of a Prime Contract. If any amendment or other modification materially changes the services requested by Client, the parties agree to negotiate in good faith to revise the SOW set forth in Attachment A to this Agreement to correspond with the amendments of the Opportunity, to submit a BAFO (if required), and to take all reasonable actions to support the selection of COMPANY as the prime contractor and CONDUENT as a subcontractor under the Prime Contract.

### 8. AWARD OF PRIME CONTRACT

(a) If the prime contract is awarded to COMPANY, and COMPANY executes a prime contract resulting from the COMPANY'S Proposal, which proposal incorporates a subcontract with CONDUENT, the COMPANY will formalize the subcontract to CONDUENT.


CONDUENT will accept such Subcontract for the specific areas of responsibility set forth in the Statement of Work, Exhibit A, attached to this Agreement, to the extent they are included in COMPANY'S contract with the Client.

(b) It is agreed that if the prime contract is awarded to COMPANY, COMPANY and CONDUENT, together with any other COMPANY subcontractors, will act as an integrated team to accomplish the effort required. Changes to the prime contract which increase or decrease the scope of services outlined in the Statement of Work, Exhibit A, attached to this Agreement will be negotiated in good faith by both Parties.

9. **COMMUNICATION WITH CLIENT** COMPANY shall be responsible for communicating with the Client concerning the opportunity, the Proposal, any BAFO, the Prime Contract, and associated negotiations. CONDUENT agrees not to initiate any contact with the Client concerning any aspect of this Opportunity without the prior written consent of COMPANY. If contacted by the Client about any aspect of this Opportunity, CONDUENT shall promptly inform COMPANY about the contact.

10. **RIGHTS IN INVENTIONS** Unless otherwise required by the Prime Contract, any inventions shall remain the property of the originating party. If the Prime Contractor subcontract requires or results in any joint invention(s), the parties agree to engage in good faith negotiations to establish the respective rights of each party. Both parties understand and agree that the parties may be required to and shall grant licenses or other intellectual property rights to each other or to the Client in accordance with the Prime Contract.

11. **PROPRIETARY INFORMATION** The parties understand that, in the course of performance under this Agreement, either party may be required to disclose to the other party information of a confidential and proprietary nature including, but not limited to information provided by or developed for the Client ("Proprietary Information"). The parties agree that disclosure and protection of Proprietary Information under

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## Agreement

this Agreement shall be subject to the terms and conditions of the Nondisclosure Agreement between the parties dated June 15, 2020, which is incorporated in this Agreement by reference. Upon termination or expiration of this Agreement, the receiving party shall either return to the disclosing party or destroy all received Proprietary Information upon written request from the disclosing party, including copies, as directed by the disclosing party. The disclosing party may request written certification of destruction.

**12. INDEMNIFICATION FOR TORT AND PROPERTY DAMAGE CLAIMS** Each party agrees to defend, indemnify, and hold harmless the other party (and its successors, officers, directors, and employees) from any and all liabilities, claims, and expenses of whatever kind and nature for loss of or damage to any real or tangible personal property occurring in connection with or in any way incident to, arising under, or related to this Agreement, and to the extent caused by the negligent acts or negligent omissions of the indemnifying party. The indemnified party shall promptly notify the indemnifying party, in writing, of any claim and shall reasonably cooperate with the indemnifying party in the defense and settlement of the claim. This Section shall survive termination of this Agreement.

**13. INTELLECTUAL PROPERTY INDEMNITY (COMPANY)** COMPANY agrees to indemnify, defend, and hold CONDUENT (and its successors, officers, directors, and employees) harmless from any and all actions, claims, demands, costs, liabilities, expenses, and damages (including reasonable attorney fees) arising out of, related to, or in connection with, any claim that any of the materials or data furnished by COMPANY for use in the Proposal or BAFO submitted to the Client under this Agreement constitute an infringement or misappropriation of any confidential information, trade secret, patent, copyright, trademark, trade name, or other legal intellectual property right of any third party. This Section shall survive termination of this Agreement. Provided that such actions, claims, demands, costs, liabilities, expenses, and damages do not arise out of any action or inaction of CONDUENT.

**14. INTELLECTUAL PROPERTY INDEMNITY (CONDUENT)** CONDUENT agrees to indemnify, defend, and hold COMPANY (and its successors, officers, directors, and employees) harmless from any and all actions, claims, demands, costs, liabilities, expenses, and damages (including reasonable attorney fees) arising out of, related to, or in connection with, any claim that any of the materials or data furnished by CONDUENT for use in the Proposal or BAFO submitted to the Client under this Agreement constitute an infringement or misappropriation of any confidential information, trade secret, patent, copyright, trademark, trade name, or other legal intellectual property right of any third party. This Section shall survive termination of this Agreement. Provided that such actions, claims, demands, costs, liabilities, expenses, and damages do not arise out of any action or inaction of COMPANY.

**15. COST; RISKS; LIABILITIES** Each party shall bear all of the costs, risks, and liabilities incurred by that party arising out of its obligations and performance under this Agreement. Neither party shall have any right to reimbursement, payment, or other compensation of any kind from the other party under this Agreement for those costs, risks, or liabilities. Except to the extent of the indemnification provisions of Section 12, the intellectual property indemnification under Section 13 and 14, or any unauthorized use or disclosure of the other party's Proprietary Information, **NEITHER PARTY SHALL BE LIABLE TO THE OTHER PARTY UNDER ANY CIRCUMSTANCES FOR ANY ANTICIPATORY OR LOST PROFITS, LOST REVENUE, SPECIAL, CONSEQUENTIAL, PUNITIVE, EXEMPLARY, INCIDENTAL, OR INDIRECT DAMAGES OF ANY KIND RESULTING FROM THE PERFORMANCE OF ITS OBLIGATIONS UNDER THE AGREEMENT.**

**16. REMEDIES** All remedies available to either party for breach of this Agreement are and shall be deemed cumulative and may be exercised separately or concurrently. The exercise of a remedy shall not be an election of that remedy to the exclusion of other remedies available at law or in equity.

## Agreement

### 17. TERMINATION

A. Events Triggering Termination This Agreement shall terminate upon the first occurrence of any one of the following events ("Terminating Event"):


1. Cancellation of the Opportunity or any notice from the Client that a contract will not be awarded pursuant to the Opportunity;
2. Notice from the Client that a Prime Contract was definitively awarded to an entity other than COMPANY;
3. Written notice from the Client stating disapproval of the selection of COMPANY, and such notice is definitive.
4. Creation of the Subcontract between both parties;
5. Suspension or debarment of either party or any declaration by the Client that either party is ineligible to contract with or provide goods or services to the Client;
6. CONDUENT or COMPANY becomes ineligible, for any reason, to submit a proposal or to perform under the Prime Contract;
7. Mutual written consent of both parties, including agreement not to submit a proposal or BAFO;
8. Where the Parties are unable to successfully negotiate a subcontract in relation to the services indicated in Exhibit A.
9. Two (2) years after the Effective Date.

Right to Terminate In addition to the termination provisions of Sections 7(D) of this Agreement, either party may terminate this Agreement with no less than five (5) business days prior written notice to the other party if:

1. The other party jeopardizes the likelihood of a contract award by acts or omissions including, but not limited to failure to provide timely materials or data (including but not limited to cost information) for inclusion in the Proposal; loss of strategically-valuable employees; or violation of federal, state, or local laws or regulations;
2. breach of the provisions of the Agreement. The other party experiences substantial financial difficulties including, but not limited to the inability to pay salaries and benefits to employees, which, in the sole opinion of the terminating party, makes the other party's ability to perform a Prime Contract or Subcontract highly unlikely;
3. The other party becomes insolvent; makes a general assignment for the benefit of creditors; suffers or permits the appointment of a receiver for its business or assets; becomes subject to any proceeding under any bankruptcy or insolvency law; or has liquidated its business (voluntarily or otherwise); or
4. The parties, after negotiating in good faith and using all reasonable efforts to finalize a subcontract, are unable to reach agreement on the terms and conditions of a subcontract within forty-five (45) calendar days after receipt by COMPANY of a proposed subcontract from CONDUENT.

**18. ASSIGNMENT** This Agreement shall be binding on the parties and the successors and assignees of each party. Neither party may assign or otherwise transfer this Agreement (or any rights, duties, or obligations under this Agreement) except to a corporate parent, subsidiary, or affiliate without the prior written consent of the other party (which may not be unreasonably withheld), and any attempt to make an assignment without this required prior written consent shall be null and void.

Provided that any assignment of the present agreement or the rights emerging from this agreement to a

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## Agreement

subsidiary or group company shall not be deemed to constitute a breach of this clause.

**19. WAIVER OR FORBEARANCE** Any delay or failure of either party to insist upon strict performance of any obligation under this Agreement, or to exercise any right or remedy provided under this Agreement, shall not be a waiver of that party's right to demand strict compliance with the terms and conditions of this Agreement, irrespective of the number or duration of any delay(s) or failure(s). No term or condition imposed on either party under this Agreement shall be waived and no breach by either party shall be excused unless that waiver or excuse of a breach has been put in writing and signed by both parties. No waiver in any instance of any right or remedy shall constitute the waiver of any other right or remedy under this Agreement. Consent to or forbearance of any breach, nonperformance, or substandard performance of any obligation under this Agreement shall not constitute consent to modification or reduction of other obligations or the forbearance of any other breach.

**20. INDEPENDENT PARTIES** This Agreement shall not constitute, create, give effect to, or otherwise imply a joint venture, partnership, or other business organization of any kind. COMPANY and CONDUENT are independent parties and neither shall act as an agent for or partner of the other for any purpose, and the employees and agents of one party shall not be deemed the employees or agents of the other party. Each party shall be solely responsible for payment of all compensation owed to its employees, including payment of any taxes related to employment and workers compensation insurance. COMPANY shall be solely responsible for payments to any lower-tier subcontractors, consultants, or other persons providing goods or services to COMPANY under this Agreement or a Subcontract.

**21. NOTICES** Unless otherwise specified in this Agreement, all notices, requests, or consents required under this Agreement to be given in writing shall be delivered by hand, first class mail (postage prepaid), or express delivery service to the person indicated below, unless either party notifies the other party, in writing, of a change in the designated addressee:

**To CONDUENT:**

Attn:  
Conduent State & Local Solutions, Inc.  
12410 Milestone Center Drive, Fifth Floor  
Germantown, MD 20876

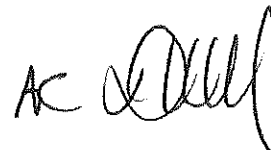
**To COMPANY:**

Attn:  
Malta Gozo Fixed Link Limited  
Warehouse 7, St. Bernard Street,  
Marsa, Malta

**22. COMMITMENTS** Nothing in this Agreement shall grant to either party any right to make commitments, beyond what is set out in the present agreement, related to this "opportunity" of any kind for or on behalf of the other without the prior written consent to the other party.

**23. NONSOLICITATION AND NON-HIRE** Neither party shall knowingly solicit, recruit, hire, or otherwise employ or retain as a consultant or advisor any employee of the other party who has worked on the PQQ in relation to the Business Opportunity that is the subject of this Agreement after the Effective Date of this Agreement and for one (1) year following termination or expiration of this Agreement without the prior written consent of the other party. However, this Section shall not restrict the right of either party to solicit or recruit generally in the media, and shall not prohibit either party from hiring, without prior written consent, any current or former employee of the other party who answers any advertisement or who otherwise voluntarily applies for hire without having been personally solicited or recruited by the hiring party.

**24. SEVERABILITY** If all or part of any term or condition of this Agreement, or the application of any



## Agreement

term or condition of this Agreement, is determined by any court of competent jurisdiction to be invalid or unenforceable to any extent, the remainder of the terms and conditions of this Agreement (other than those portions determined to be invalid or unenforceable) shall not be affected, and the remaining terms and conditions (or portions of terms or conditions) shall be valid and enforceable to the fullest extent permitted by law. If a judicial determination prevents the accomplishment of the purpose of this Agreement, the invalid term or condition (or portions of terms or conditions) shall be restated to conform to applicable law and to reflect as nearly as possible the original intention of the parties.


**25. HEADINGS** The HEADINGS used in this Agreement are for reference only. The HEADINGS have no independent legal meaning and impose no obligations or conditions on the parties.

**26. GOVERNING LAW AND VENUE** This Agreement shall be governed by, interpreted, construed, and enforced solely and exclusively in accordance with the laws of MALTA, without reference to the principles of conflict of laws, and all disputes shall be adjudicated or otherwise decided solely and exclusively in the Courts of Justice of Malta.

## **28. REPRESENTATIONS AND WARRANTIES**

The Parties hereby represent and warrant that:

- (a) They are duly organized, validly existing and in good standing under the Applicable Laws;
- (b) The undersigned have the power to sign and deliver this Agreement and any other documentation relating thereto and have taken all necessary actions to authorize such execution, delivery and performance and to exercise their rights and perform their obligations under this Agreement and that the signatories of this Agreement have all necessary corporate authorizations;
- (c) To the best of their knowledge, such execution, delivery and performance do not violate or conflict with any applicable law, decree, rule or regulations;
- (d) To the best of their knowledge, there is no pending or threatened action, suit or arbitration or proceeding at law before any court, tribunal, governmental body, agency that is likely to affect the ability of the Parties to perform their obligations under this Agreement.
- (e) Each Party represents and warrants to the other Party that, (i) neither it nor any of its employees or officers is an official, employee, or active member of the armed services of Malta; or an official or employee of the government of Malta, an official of a political party of the Malta, or a candidate for Malta political office; and (ii) as of the date of execution of this Agreement and during the term of this Agreement, no government official of Malta, and no official of any government agency of Malta or instrumentality is or will become associated with, or will own or presently owns an interest, whether direct or indirect, in the Party or has or will have any legal or beneficial interest in this Agreement.
- (f) The performance of this Agreement shall be subject to all applicable laws of the State of Malta. Each Party also represents and warrants that it shall not take any action or permit or authorize any action which may possibly render the other Party liable for a violation for offering, giving or promising to offer or give, directly or indirectly, money or anything of value to any official of a government, or any employee in the public and private sector, in order to assist that Party in obtaining or retaining or securing an improper advantage in business. In addition, each party is required to making and keeping books, records, and accounts in reasonable detail to accurately and fairly reflect the business of that party.

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## Agreement

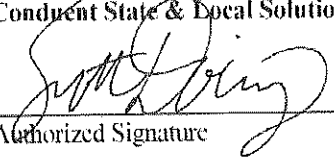
(f) Regularly and continuously inform the other Party of any requirements under any applicable law in the territory that directly or indirectly will affect this Agreement.

(g) Neither Party nor persons or subcontractors performing services hereunder shall appear on any of the following lists, administered by the United States Government: 1. Bureau of Industry and Security, U.S. Department of Commerce, Denied Persons List; 2. Bureau of Industry and Security, U.S. Department of Commerce, Unverified List; 3. Defense Trade Controls -- List of Debarred Parties; and 4. Specially Designated Nationals, Terrorists, Narcotics Traffickers, Blocked Persons and Vessels List; 5. Bureau of Industry and Security, Department of Commerce, The Entity List. If either Party or any such subcontractor or person is found on such a list, then notwithstanding any other term above, this contract may be terminated immediately without any further obligation to the other Party.

**29. ENTIRE AGREEMENT** The contents of this Agreement (including Attachment A and any other documents specifically incorporated by reference in this Agreement) constitute the entire understanding and agreement between the parties and supersede any prior agreements, written, or oral, that are not specifically incorporated by reference in this Agreement. The terms and conditions of this Agreement shall not be amended except by written agreement signed by both parties.

**IN WITNESS WHEREOF**, the undersigned authorized representatives of COMPANY and CONDUENT have executed this Agreement.

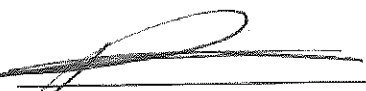
Conduent State & Local Solutions, Inc.

  
\_\_\_\_\_  
Authorized Signature

Scott Doering  
Printed Name

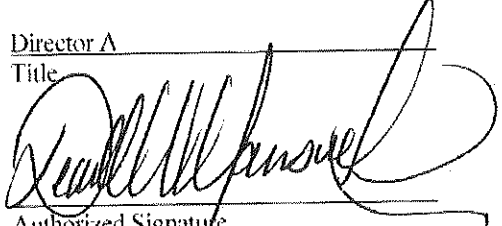
Vice President  
Title

Malta Gozo Fixed Link Limited

  
\_\_\_\_\_  
Authorized Signature

AARON CHETCUTI  
Printed Name

Director A  
Title

  
\_\_\_\_\_  
Authorized Signature

DEAN MANSUETO  
Printed Name

Director B  
Title

## Agreement

### Attachment A

#### STATEMENT OF WORK

This SoW is based on the information provided by the COMPANY to CONDUENT, regarding the COMPANY's requirement for CONDUENT to supply and maintain a Vehicle Passenger Detection System (VPDMS) to support the operation of a new tunnel that will be built by the COMPANY to connect the islands of Malta and Gozo; effectively replacing the current ferry connection between the two. It is proposed to be constructed as a single tube tunnel with one lane per direction. In part the toll fee will depend on the number of occupants of the vehicle. It is within this context that the following SoW is defined.

By default, the system will provide the following data to the client:

- Classification Type: The number of occupants determined by the system
- Classification Confidence: % of confidence in the result of the algorithm
- Classification Identification: ANPR read-out of vehicle's license plate
- Time and date: Exact time and date of the vehicle's passage
- System ID: Unique system identifier
- Location ID: Unique location identifier
- Direction ID: Unique direction identifier
- Lane ID: Unique lane identifier
- Images: The actual images used for classification as evidence of the transaction; 1 front and 1 side image.

CONDUENT SoW consists of:

- Implementing the VPDS system to determine the number of occupants in cars; excluding trucks, busses and heavy goods vehicles. This in accordance with local regulation, technical feasibility and the client.
- Provide site-assessment, installation, configuration/setup and support services during and for the duration of the project.
- Provide the required interfaces to connect the VPDS unit(s) to the COMPANY's back-office.

What is not included in the SoW:

- CONDUENT is not responsible for the actual post-processing of the collected transactions. It is the sole responsibility of the COMPANY to:
  - o determine the identity of the vehicle owner
  - o calculate the toll charge based on the provided information
  - o ensure the road-user is charged accordingly

Note: The hand-off point is the delivery of the transaction records to the COMPANY's back office system.



**MEMORANDUM OF UNDERSTANDING**

This Memorandum of Understanding ("MOU") is entered into as of <sup>rd</sup> 3 June 2020 (the "Effective Date"), by and between:

- MALTA GOZO FIXED LINK Ltd., having its registered office at Warehouse No. 7, St. Bernard Street, Marsa, Malta, (hereinafter referred to as "MGFL"); and
- BAM International B.V., having its registered office at Prinses Beatrixlaan 5, 2595 AK The Hague, The Netherlands, (hereinafter referred to as "BAM")

MGFL and BAM are hereinafter referred to individually as a "Party" and collectively as the "Parties".

Whereas the Agency Infrastructure Malta on behalf of the Ministry for Transport, Infrastructure and Capital Projects of Malta published on 9 January 2020 a Pre-Qualification Questionnaire (the "PQQ") in connection with a competitive process for the award of a concession for the design, construction (including the supply and installation of all mechanical and electrical equipment for the entire works, as well as the connection of roads to existing infrastructure), maintenance and operation of a tunnel between Malta and Gozo (the "Project"). The PQQ includes certain parameters and requirements to be met either directly by the candidates, or indirectly through third entities.

Whereas MGFL intends to submit a response to the PQQ ("PQQ Response") which has to include all the information relating to the entities providing each requirement under the PQQ, in order to allow the candidate to be shortlisted; to such extent, MGFL entered into, and/or is finalizing, preliminary arrangements with specialized entities for the provision, by such entities, of certain financial and technical requirements under the PQQ.

Whereas MGFL wishes to include in the PQQ Response – in addition to the ones summarized above – credible references for immersed tunnels and considers BAM as its preferred partner to such extent.

Whereas BAM has credible references for immersed tunnels.

Whereas the Parties wish to set forth the process and principles of their collaboration with relation to the PQQ, subject to the terms and conditions set forth herein.

**NOW, THEREFORE**, in consideration of the mutual covenants and agreements set forth herein, the Parties agree as follows:

1. Each Party shall be responsible for and bear all its own costs and expenses incurred by it under or in connection with this MOU, except and unless otherwise agreed in written form by the Parties.
2. MGFL shall, at its own expense, provide all the requirements established in the PQQ.
3. BAM shall, at its own expense, provide its credible references for immersed tunnels for the entire duration of the competitive process under the PQQ.
4. In the event MGFL is admitted to the shortlist at the end of the PQQ process, the Parties will analyse and assess the specifications of the bidding process before they continue negotiations or assume any

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commitment further to the ones of this MOU. Any agreement subsequent to this MOU will be signed at each Parties' own and sole discretion, with no obligation for a Party to enter into any future agreements. In case the Parties do agree to continue with the ITPD stage, an agreement must be signed before proceeding with the ITPD stage.

If for any reason, including due to a mistake and/or the negligent act and/or omission of any Party, the PQQ submission should fail, no Party shall be liable to the other Party for any direct or indirect loss, damage, cost or expense incurred.

5. For the entire duration of this MOU, the Parties undertake to collaborate on an exclusive basis in relation to the PQQ. If a Party decides to terminate this MOU under Section 11, such Party will not make any proposals to or agreements with any other person, firm, legal entity or third parties regarding the Project, directly or indirectly, without prior written approval of the other Party.
6. This MOU and any information shared between the Parties shall be held in confidence by the Parties and not disclosed by any Party to any other party without the prior written approval by the non-disclosing Party. The obligations of confidentiality do not apply to information disclosed (i) to affiliates, related companies, directors, officers, employees, bankers, accountants, attorneys or other professional or financial advisors of a Party (the "Authorised Persons") on a need-to-know basis in connection with this MOU provided that such Party informs each Authorised Persons of the confidential nature of the MOU and that each such Authorised Person agrees to keep this MOU and any information confidential, and (ii) in connection with the PQQ Response.
7. No Party shall have any liability to the other Party based upon, arising from or related to this MOU, except for the provisions set forth in Sections 5 (exclusivity), 6 (confidentiality) and 8 (compliance). In no event shall any Party be liable to the other Party for any indirect or consequential damages, such as loss of profits, loss of business, loss of production, loss of reputation or opportunities or for any special, indirect, incidental, consequential or punitive damages arising under or related to this MOU.
8. It is expressly prohibited for the Parties, their employees or their representatives to provide (or offer to provide) any type of gift, favour, promise, benefit or offering to any person or company, local or foreign authorities or government workers, or international organisations, with the aim of persuading them to act or abstain from acting in the carrying out of their public or private functions to obtain or maintain agreement, or other irregular benefit, in favour of any Party. The Parties state that, in all aspects concerning the development and performance of this MOU, they shall act in accordance with the OECD Guidelines as well as their own Code of Conduct and, likewise, shall require the observance of such principles by their employees and the persons dependent on them.
9. No Party may assign nor transfer, either totally or partially, in any way any of its rights or obligations under this MOU without the prior written consent of the other Party, which will not be unreasonably withheld or delayed.
10. The invalidity, illegality or unenforceability of any provision of this MOU under any jurisdiction shall not affect the validity, legality or enforceability of any other provision hereof.
11. This MOU shall be effective from the Effective Date and it shall remain into effect until 31 December 2020. This MOU is automatically terminated where either of the following circumstances occur:
  - If MGFL is not shortlisted at the end of the PQQ process, or
  - If the Parties enter into an agreement to proceed with ITPD stage.

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12. This MOU shall in all respects be governed by and construed in accordance with the laws of Malta. Any dispute or difference between the Parties arising out of or in connection with this MOU shall be notified by one Party to the other Party. The Parties shall first undertake to resolve the dispute amicably and in good faith. If the dispute cannot be resolved by the Parties within two months from the notification of the dispute by one Party to the other Party, the dispute shall be finally settled in accordance with the Rules of Arbitration of the ICC by the person appointed by the President of FIDIC. The place of arbitration shall be Geneva, Switzerland, and the language of the proceedings shall be English.

IN WITNESS WHEREOF, the Parties hereto have caused this MOU to be executed by their respective authorised representatives to be effective as of the date first set forth above.

MALTA GOZO FIXED LINK Ltd

BAM International BV

Signature: \_\_\_\_\_

Signature: \_\_\_\_\_

Name: Aaron Chetcuti

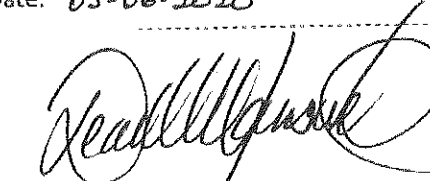
Name: LEO VAN DERHEVEN

Title: Director

Title: DIRECTOR 3D

Date: 03-06-2020

Date: 03-06-2020

  
DEAN MANSUETO  
DIRECTOR  
03-06-2020

*Be*