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6 November 2023

The Secretary  
Public Contracts Review Board  
Notre Dame Ditch  
Floriana

Reasoned Letter of Objection

**Re: CT3039/2022 – Tender for the Mapping, Re-engineering and Documenting the Business Processes of the Justice Entities within the Ministry for Justice (the “Tender Procedure”)**

Dear Sir, Madam,

**1. Introduction**

- 1.1 We are instructed by Deloitte Advisory and Technology Limited (“**Deloitte**”) with reference to the letter dated 27<sup>th</sup> October 2023 (the “**GT Award Letter**”) from the Department of Contracts, managing the Tender Procedure for the benefit of the Ministry for Justice (the “**Contracting Authority**”), pursuant to which Deloitte was informed that it was not successful because its offer was not the offer with the Best Price Quality Ratio (BPQR), and that the tender was recommended to be awarded to Grant Thornton.
- 1.2 Our client respectfully considers the decision to be wrong, both in fact and at law. In accordance with regulation 270 of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the “**PPR**”), Deloitte is hereby submitting this objection before the Public Contracts Review Board (the “**Board**”) in relation to the decision of the Contract Authority to award the contract to Grant Thornton (the “**Objection**”).
- 1.3 Deloitte shall set out hereunder the reasons for its Objection. Enclosed as Annex 1 is evidence of payment of the amount of €7,000 by way of deposit.

**2. Factual Background**

- 2.1 The Tender Procedure is for award of a services contract for the mapping, re-engineering and documenting of the business processes of the justice entities within the Ministry for Justice (the “**Project**”).
- 2.2 The Project is financed through EU funds – Next Generation EU Funds (the “**Tender Document**”).
- 2.3 On 1<sup>st</sup> September 2023, Grant Thornton received a letter informing it that its tender was not successful since it was deemed technically non-compliant, and that the contract was recommended to be awarded to Deloitte (the “**GT Disqualification Letter**”).
- 2.4 On 11<sup>th</sup> September 2023, Grant Thornton filed an objection (the “**GT Objection**”).
- 2.5 In the GT Objection, Grant Thornton makes references to rectification requests received on 14<sup>th</sup> June 2023, 3<sup>rd</sup> July 2023 and 17<sup>th</sup> July 2023 (the “**GT Rectifications**”).
- 2.6 Deloitte never received any rectification requests.



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- 2.7 On 18<sup>th</sup> September 2023, Deloitte filed a reply in relation to the GT Objection.
- 2.8 On 21<sup>st</sup> September 2023, the Department of Justice within the Ministry for Justice, and the Department of Contracts filed a joint reply in relation to the GT Objection pursuant to which it stated, amongst other things, that:

*“7. Following this objection, it then transpired that this evaluation process may have been left bereft of some pertinent details involving a misinterpretation of the evaluation grid arising from the structure of the bid specific material as submitted.”*

*8. For this reason the defendant through this reply is officially filing an admission to the pleas of the appellant in order for the defendant to be placed in a position where it can repropose its evaluation conclusion to be able to issue any fresh recommendations.*

*9. This without prejudice to the rights for remedy to the bidders following any fresh recommendation for this tender.”*

- 2.9 Deloitte, faced with a reply which was convoluted and ambiguous, filed an additional reply on 22<sup>nd</sup> September 2023, stating that:
- 2.9.1 in terms of Regulation 276(e) of the PPR, an oral hearing will need to be set by the secretary of the Board to decide the GT Objection; and
- 2.9.2 the reply was vague and unclear and therefore respectfully requested the Board to request that this is clarified in anticipation of the hearing.

- 2.10 On 27<sup>th</sup> September 2023, Grant Thornton filed a reply stating the Board should (after observing procedure laid out in the PPR) proceed to uphold the pleas in the GT Objection.

- 2.11 On 28<sup>th</sup> September 2023, the Department of Justice within the Ministry for Justice, and the Department of Contracts filed an additional reply pursuant to which they stated:

*“9. The defendant has no objection that this procedure is closed without a sitting as he has no further points to submit to the Board.”*

- 2.12 On 28<sup>th</sup> September 2023, the Board resolved as follows:

*“The Public Contracts Review Board, having noted by letter dated 28<sup>th</sup> September 2023 that the Contracting Authority, the Ministry for Justice intends to re-evaluate the tender resolves:*

*That it will not consider the Objection of Grant Thornton Ltd any further.”*

- 2.13 On 27<sup>th</sup> October 2023, Deloitte received the GT Award Letter. Deloitte also received scores of Grant Thornton, Corpus Juris Consortium and Nouv MT Technology Ltd.

### **3 First Grievance: Best Price Quality Ratio**

- 3.1 Deloitte submits that, as is evident from the facts as outlined above and as explained in detail hereunder, the evaluation process undertaken by the Contracting Authority breaches the provisions of the PPR and the Tender Document.

- 3.2 The criteria for award in this case was the Best Price/Quality Ratio (BPQR), with a significant emphasis on the technical aspect (weighted at 60%). In view of the nature and importance of



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the Project (since it is for justice entities), priority in the Tender Document was therefore given to the quality of the technical proposal rather than the price.

3.3 Marks were to be awarded out of a range of a maximum of 100 marks, in accordance with the technical criteria and any sub criteria outlined in the evaluation grid. Tenderers were required to achieve a minimum average technical score of sixty (60). The average technical score is arrived at by adding the individual weighted scores of each evaluator divided by the number of evaluators. Those tenderers that would not obtain the minimum set average technical score would be eliminated.

3.4 In addition, the Tender Document provided as follows:

*"..... the scoring shall take place across a range of points from '0' to 100%. If the contents of the documentation **meets and exceeds all minimum requirements** thus, **offering a higher quality bid, higher points will be allotted up till 100% (Full Score)**. Such points shall be awarded in such a manner to **reflect in a proportionate manner the level of effort undertaken to exceed the minimum requirements**. Also, the submissions will be evaluated in terms of **appropriateness and relevance of the proposed approach with a conciseness, internal coherence and with a level of detail**.*

*It is up to the bidder to identify the most appropriate length of the writeup/description in respect of each criterion below, as applicable, with the proviso that the write-up/description should address all requirements accordingly.*

*The content of the documentation must meet all minimum requirements as detailed in the Terms of Reference and the BPQR Award Criteria Table as well as the Organization and Methodology Requirements. **If the minimum requirements are not met, the offer will be deemed as Technically not-Compliant and disqualified. In this respect, a '0' score shall be allotted** if the requested documentation is not submitted and/or the content of the documentation submitted does not meet all minimum requirements. **If a score of '0' shall be allotted the bid shall be disqualified.** [emphasis added]*

3.5 The purpose of the BPQR is to ensure best value for money, as opposed to awarding the contract to the cheapest priced tenderer meeting the minimum requirements. The BPQR recognises that works and services are not homogeneous and that they differ in, *inter alia*, quality, delivery and several other factors. The BPQR therefore uses an equation (based on weighting) which includes price and technical (quality) of the relevant tender to determine which tender offers best value for money.

3.6 Reference is made to Procurement Policy Note #8 published by the Department of Contracts in relation to the BPQR (attached hereto as "Annex 2"), which requires each evaluator to award a score **out of a maximum of 100 points** in accordance with the technical criteria and any sub-criteria. The aggregate final score is arrived at by calculating the arithmetical average of the individual final score of each evaluator. Each evaluator **must also list the strengths and weaknesses** of each bidder for **each criterion**.

3.7 It is submitted, with respect, that it is inconceivable that a number of tenderers obtain full or close to full marks in several criteria, even more so in a tender of this nature – this would imply that technical offers of multiple tenders offer a higher quality than what is required, which higher quality is equivalent in all tenders and exceeds the minimum requirements to the same extent, therefore having identical strengths and weaknesses.



- 3.8 The subject-matter of the Tender Procedure is a tailor-made solution for the mapping, re-engineering and documenting of the business processes of the justice entities and each tenderer would have had to analyse the requirements set out in the Tender Document (Section 3 – Terms of Reference), including the current processes, objectives and expected results, and come up with a bespoke solution to implement the Project.
- 3.9 The nature of the Project was such that, inevitably, proposals would have different characteristics, including in terms of methodology, approach, skills, personnel involved, technologies used and processes applied.
- 3.10 In this case, it is evident that the evaluation committee misunderstood the requirements of the Tender Document – simply assessing compliance but not technical merit and quality – rendering the decision of the Contracting Authority to opt for the BPQR as opposed to the cheapest technically compliant offer absolutely futile.
- 3.11 The Board has, on several occasions, had the opportunity to assess the manner in which tenders which were awarded on the basis of BPQR were evaluated. In particular, the Board has highlighted the need for a proper evaluation of each criterion with scoring varying depending on the qualitative features of the tender in question.
- 3.12 However, notwithstanding the above, the evaluation committee awarded essentially the same technical score (difference between them is negligible) to most (at least four (4)) tenderers, in breach of the principles of equal treatment, non-discrimination and transparency, as well as the principle of self-limitation.
- 3.13 The Contracting Authority in fact gave the following average technical scores:
- |        |                         |                  |
|--------|-------------------------|------------------|
| 3.13.1 | Nouv MT Technology Ltd  | <b>96.15/100</b> |
| 3.13.2 | Grant Thornton          | <b>99/100</b>    |
| 3.13.3 | Deloitte                | <b>100/100</b>   |
| 3.13.4 | Corpus Juris Consortium | <b>100/100</b>   |
- 3.14 Indeed, in relation to Grant Thornton, only one (1) point was deducted and this was because the ICT Expert nominated by it did not have a Master’s qualification in Systems Analysis and Design, ICT or digitization at minimum MQF/EQF Level 7 (therefore, no view needed to be expressed but simply a tick the box exercise which resulted in a point deduction). On the other hand, Nouv MT Technology Ltd was deducted few points for failing to address certain requirements (and not for addressing all requirements but having a lower quality proposal).
- 3.15 In terms of justifications for awarding full marks the Contracting Authority simply stated:
- “Compliant”**
- 3.16 Each evaluator had to identify and list the strengths and weaknesses of each tenderer for each criterion (see Procurement Policy Note #8, Annex 2, amongst others). In this case, the evaluators simply assessed compliance and proceeded to award full marks.
- 3.17 It is evident that the Contracting Authority did not carry out its evaluation in accordance with the requirements set out in the Tender Document and the PPR, which required the evaluation to be based on the award criteria (the BPQR) in order to identify the best-value-for money. The technical offers had to be scored on the basis of their strengths and weaknesses and not on the



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basis of compliance, as would be done if the award criteria was the cheapest technical compliant tender.

- 3.18 Most of the criteria required write-ups from each tenderer on its understanding of the requirements of the Project, its risk analysis and mitigation, the intended implementation of the Project, its strategy, its quality control procedures and the timing of its activities. These are all tailor-made by each tenderer for the Project and require an element of discernment and judgement from the evaluation committee in scoring which of the tenderers exceeded the requirements set out therein. Marks would then need to be awarded depending **on the extent to which such requirements were exceeded** (including level of effort made by the tenderer in this respect, appropriateness and relevance of the proposed approach, conciseness, internal coherence and level of detail of proposal).
- 3.19 None of these are simply tick the box criteria and the evaluation committee had to carry out a rigorous evaluation of the tenders and score each of them accordingly, not give full marks for simply being "compliant". Higher quality tenders had to be awarded a higher number of points, up to 100% (Full Score). This was not done by the Contracting Authority and its actions constitute a clear breach of the Tender Document and the PPR.
- 3.20 The Board, on at least two (2) recent occasions deciding cases with almost identical facts, considered such actions to breach the PPR and tender document as explained hereunder:

**Case 1616 – CT 2292/2020** – *Tender for the Provision and Distribution of Meals to Eligible Persons living within the Community – Meals on Wheels* decided 22<sup>nd</sup> September 2021:

3.20.1 In this case, the appellant company argued that, in a tender to be awarded on the basis of the Best Price Quality Ratio (BPQR), the contracting authority must necessarily consider the quality of the tenders submitted and not simply whether they comply with the minimum requirements. Similar to this present case, marks were to be awarded on the basis of a range of points from 0 to 100.

3.20.2 The Board concluded, *inter alia*, that the evaluation of all bids was flawed because the evaluation committee had awarded full marks simply because a tender was compliant (provided all the minimum requirements). The Board stressed that, if the evaluation committee was required to give full marks to tenderers which met the minimum requirements, "**the tender would not have been a BPQR tender but one where the cheapest compliant bidder would be awarded such a tender.**" The Board also highlighted the need for the evaluation committee to perform a **thorough evaluation of the bids received to allocate marks on the relevant spectrum (from 0 to 100 depending on the quality of the bid).**

3.20.3 In view of the above, the Board decided, *inter alia*:

*"To order the contracting authority to re-evaluate all the bids received for this tender through a newly constituted Evaluation Committee composed of members which were not involved in the original Evaluation Committee."*

**Case 1818 – CT2074/2022** – *Tender for the Provision of Care Workers at the Independent Living Residence in Qrendi for Agenzija Support* decided 12<sup>th</sup> December 2022:



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3.20.4 In this case, the evaluation committee ignored the fact that the award criteria was the Best-Price-Quality Ratio, as well as the fact that it was required to award marks within a range of 0 to 100 and awarded 0 or 100 depending on whether the tender was compliant or not with the relevant requirement.

3.20.5 The Board concluded as follows:

*"In short, what the Evaluation Committee did, is render this BPQR tender into a cheapest compliant bidder winning the tender. This goes **totally contrary to the purposes and objectives of a BPQR tender**, whereby economic operators are encouraged to submit offers with a **higher technical value and quality**. In fact, it may truly result from a BPQR tender that the cheapest offer is not awarded the tender, if another tenderer with a higher bid (financially) is offering something which is **technically superior**."*

*In the opinion of this Board, the tender document is **clear and totally unambiguous**.*

*..... it is specifically stated that "**Points shall be allotted within a range from 0 up to 100%. A score of '0' shall be allotted if this documentation is not submitted. If a '0' score shall be allotted this bid shall be disqualified**" (bold underline emphasis added).*

*.....*

***The Evaluation Committee failed to do so and gave full marks if the minimum requirements were duly supplied**. Same applies to all the other criteria where this statement is present.*

*Even though, this Board has on multiple occasions stated that Evaluation Committees, when assessing a BPQR tendering procedure, are to be afforded an element of 'leeway', this statement also goes on to state that ".....the Evaluation Committee still must proceed with the appropriate diligence in full cognisance of its rights, powers, **duties and obligations**." (bold & underline emphasis added).*

*By not correctly understanding how the Evaluation Grid was to be assessed and points allotted, **this Evaluation Committee went against its duties and obligations imposed on it**." [emphasis added]*

3.21 Deloitte respectfully submits that the facts of this present case are even clearer and more unambiguous than the facts of the two cases referred to above. In this case, Tender Document did not in any circumstance state that full marks are to be awarded but expressly provided that the marks were to be given based on the quality of each bid, with higher marks awarded for higher quality bids up to a maximum of 100 (page 9 of Tender Document provides "*If the contents of the documentation meets and exceeds all minimum requirements thus, offering a higher quality bid, higher points will be allotted up till 100% (Full Score).*").

3.22 In view of the above, it is submitted with respect that the evaluation committee has failed to comply with its obligations both in terms of the Tender Document and at law.



#### 4 Second Grievance: Technical Non-Compliance of Grant Thornton

4.1 Deloitte also submits that Grant Thornton's tender was not compliant with the requirements set out in the Tender Document and ought to be disqualified.

##### A. Failure to comply with minimum requirements

4.2 Firstly, in the GT Disqualification Letter, the attachment thereto provides as follows in relation to A.4. in the column "Justifications":

*"Bidder ignored the 1st part of the question regarding Section 3 – Terms of Reference Article 2.3 (Deliverables Expected) and 4.2 (Specific Activities) and only answered the part about Section 2 Article 14.3 (Intellectual Property Rights)."*

4.3 Section A.4., as clearly set out in the Evaluation Grid and Technical Offer form, covers the information gathered in "fulfilment of the contract obligations as specified in Section 3 – Terms of Reference Articles 2.3 and 4.2 and in Section 2 – Special Conditions Article 14.3 ....."

4.4 The response should have therefore addressed all of Section 2 Article 14.3 and Section 3 Articles 2.3 and 4.2, in their entirety. The Contracting Authority clearly stated that Section 3 (Articles 2.3 and 4.2) was not addressed at all.

4.5 The Tender Document expressly states as follows:

*"The content of the documentation must meet all minimum requirements as detailed in the Terms of Reference and the BPQR Award Criteria Table as well as the Organization and Methodology Requirements. **If the minimum requirements are not met, the offer will be deemed as Technically not-Compliant and disqualified.** In this respect, **a '0' score shall be allotted if the requested documentation is not submitted and/or the content of the documentation submitted does not meet all minimum requirements. If a score of '0' shall be allotted the bid shall be disqualified.**" [emphasis added]*

4.6 The Contracting Authority, in accordance with the principles of equal treatment and self-limitation, therefore had no option but to allot a score of "0" and disqualify Grant Thornton if it only replied to one (1) of three (3) of the minimum requirements set out in A.4. The wording in the Tender Document is clear; if a tenderer does not meet "**all minimum requirements**":

4.6.1 a score of '0' **shall be allotted**, and

4.6.2 the bid **shall be disqualified**.

4.7 The use of the word "shall" in the Tender Document imposes a positive obligation to disqualify, in accordance with the principle of self-limitation

##### B. Technical offer form

4.8 In addition to the above, a technical offer form was attached to the Tender Document. This form provided as follows (below is taken verbatim, including bold and underline):

*"A technical offer is to be provided by the Economic Operator in response to Terms of Reference. The submission shall be in a structured form **and is to be in the same sequence as listed hereunder for ease of reference and evaluation.**"*



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- 4.9 The form included the same criteria and sub-criteria as set out (in same order) in the Evaluation Grid. Therefore, for example, in A.1. tenderers had to limit themselves to that requested in Evaluation Grid and Technical Offer form for A.1. and Contracting Authority had to allocate, from the marks indicated therein, such number of marks as it considered appropriate, specifying the relevant strengths and weaknesses of each response to A.1.
- 4.10 In paragraph 2.2 of the GT Objection, Grant Thornton claimed that all requested information was provided. Grant Thornton failed to attach the relevant sections of its technical offer which addressed the deficiencies identified. Deloitte is therefore not in a position to address, in this reply, certain matters of fact related thereto.
- 4.11 However, Grant Thornton states (in paragraph 2.2.2 of the GT Objection):

*“The Appellant’s tender bid submission in this respect clearly fully responded to the Tender Section requirements included and also made reference to **other sections of the Tender** specifically on page 4 and 5 of the document marked A4 where the information requested in A4 of Articles 2.3 and 4.2 of the Tender document had been provided through text and graphic flowcharts, illustrations and representations .....*”

- 4.12 As explained above, the Technical Offer required each tenderer to address each section independently in the manner set out therein. This is not simply a formality but is required in order for the Contracting Authority to, in accordance with the principles of equal treatment and transparency, score each section on the basis of the mark set out therefor in the Evaluation Grid. Each section deals with different matters and therefore there should not have been matters relating to one section included in other sections of Grant Thornton’s offer. Grant Thornton’s statements in this respect are, in and of themselves, evidence of the fact that it failed to demonstrate full understanding of the Tender Document.
- 4.13 In addition, the Technical Offer form was clearly marked as **Note 3** – that is, not subject to any rectification – and it included a note in **bold and underlined** (to further highlight the importance thereof and ensure that tenderers give it due importance) which stated that the submission had to be structured in the same sequence as listed therein.
- 4.14 It is immediately apparent, from the GT Objection itself, that Grant Thornton did not comply with the requirements in the Technical Offer form and the Tender Document. This is evident from the following statements:

*“Information about the software used is also included in Section C3 and C4.”* (para. 2.2.2 of GT Objection)

*“However, the requisite information was already provided elsewhere.”* (para. 2.2.2 of GT Objection)

*“..... the bidder made clear reference to the actual full information which it had already submitted in earlier sections of its bid submission.”* (para. 2.2.3 of GT Objection)

*“..... the published Tender Document requirements did not specify the particular format as to how a bidder was expected to provide the requisite information. The Appellant was left the freedom to determine of its own accord the mode and format in which to provide the requisite information and this included, of course, cross-reference to other*





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*articles of the Appellant's own submission". (para. 2.2.4 of GT Objection)*

*".... the Published Tender itself **does not prescribe or even contemplate at all any such specific mode or format.**" (para. 2.2.4 of Objection)*

*".... the Appellant's bid was **indeed in technical compliance with the published Tender requirements when it supplied the requested information within the abovementioned other parts of its Tender Submission bid.**" (para. 2.2.7 of GT Objection)*

- 4.15 Deloitte respectfully submits that all these statements are admissions of non-compliance.
- 4.16 In addition, several of these statements (relating to the fact that Tender Document did not prescribe or contemplate specific format for responses) are unfounded in fact and at law.
- 4.17 Firstly, as a matter of fact, the Tender Document attached thereto a Technical Offer form which clearly set out the manner and sequence in which each criterion ought to be answered. The score for each criterion must necessarily be based on the answer provided in relation to the specific section and not on information in other sections.
- 4.18 All of the above statements clearly show that, at best, Grant Thornton did not address each criterion in the appropriate section. At worst, it did not address certain criteria at all. Irrespective of which of these is factually correct, there can be no doubt that Grant Thornton failed to understand and comply with the requirements set out in the Tender Document.
- 4.19 It is respectfully submitted that Grant Thornton's own admission that the relevant information was included in other parts of its Tender Submission bid ought to be sufficient for the Board to uphold Deloitte's Second Grievance as set out in this Section 4.
- 4.20 Secondly, also as a matter of fact, Tender Document did specify how certain responses had to be formulated, such as by specifying in the Evaluation Grid and the Technical offer form: namely, a write-up, a description, a diagrammatic representation and a 4-year Gantt Chart.
- 4.21 In relation to A4. Grant Thornton had to provide information (400 words approximately). The GT Disqualification Letter states that the information was missing in its entirety. Grant Thornton itself confirms in the GT Objection that the information was not provided in the relevant section but (allegedly) in other sections.
- 4.22 Thirdly, the jurisprudence on the matter confirms that tenderers must comply with the Tender Document and cannot capriciously choose how to formulate their tender.
- 4.23 The Court of Justice of the European Union (the "CJEU") has consistently emphasised the above-mentioned principles of equal treatment and transparency:

*"The principle of transparency therefore implies that all technical information relevant for the purpose of a sound understanding of the contract notice or the tendering specifications must be made available as soon as possible to all the undertakings taking part in a public procurement procedure in order, first, to **enable all reasonably well-informed and normally diligent tenderers to understand their precise scope and to interpret them in the same manner and, secondly, to enable the contracting authority actually to verify whether the***



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tenderers' bids meet the criteria of the contract in question".<sup>1</sup>

- 4.24 The Board has also consistently emphasised that a tender document constitutes a contract between the contracting authority and any interested persons, and the resulting requirement that each of them abides by what is stated therein (the principle of self-limitation), such as in<sup>2</sup>:

Case 1107, where the Board held that:

*"In considering this issue, this Board would like to refer to the importance of the Tender Dossier and its contents. Apart from the basic fact that the Tender Document is a contract, the Bidder should also appreciate and accept that each clause and condition contained in the document must be strictly adhered to throughout the Tender Period, yet at the same instance, the Local Council must ensure that, throughout the Evaluation Process, same clauses and conditions are respected so that the Evaluation Committee is obliged to safeguard all the conditions dictated in the Tender Document during their deliberations." [emphasis added]*

Case 1245, where the Board held that:

*"This Board would respectfully point out that the technical specifications are not capriciously dictated and they are stipulated in accordance with the exigencies of the Authority. At the same instance, the technical specifications serve as an effective tool to treat all offers on a level playing field, so that they form the core of what is actually being requested by the Contracting Authority.*

*This Board would also point out that the principle of self-limitation must be respected and adhered to by both the Contracting Authority and the prospective Bidder as such basic principles ensure the application of the principle of transparency." [emphasis added]*

- 4.25 The Board has also held, time and time again, that tenderers cannot decide whether or not to comply with the requirements in the tender documents, including in<sup>3</sup>:

Case 1252, where the Board held that:

*"First and foremost, this Board would respectfully point out that the Evaluation Committee, in their deliberations, are bound to adhere to the principles of equal treatment, transparency and self-limitation. At the same instance, the Evaluation Committee can only assess an offer on the submissions made by the Bidder, who is ultimately responsible for his own submissions and who has to ensure that what he submits is in accordance with what has been mandatorily requested in the Tender Dossier." [emphasis added]*

Case 1410, where the Board held that:

*"As has been emphasized on so many occasions, this Board would point out that, whilst it is the responsibility and obligation of the bidder to abide by the stipulated requirements of the tender document, it is also the duty and obligation of the Evaluation Committee to*

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<sup>1</sup> Case T-50/05 *Evropaïki Dynamiki - Proigmena Systimata Tilepikoinonion Pliroforikis kai Tilematikis AE v European Commission*

<sup>2</sup> See also Case 1117 and Case 1114.

<sup>3</sup> Reference is also made to Case 1082 and Case 1241.



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abide by the principle of self-limitation so as to ensure that equal treatment and level playing field prevail. [emphasis added]

Case No. 195, where the Board held that:

"tenderers do not have the right to pick what they consider to be pertinent but, simply, they are required to abide by tender conditions 'sine qua non'";

Case No. 236 and Case No. 240, where the Board held that:

"This Board cannot tolerate an instance wherein a participating tenderer decides, arbitrarily, what to insert or not in a tender document duly submitted to a contracting authority";

Case 265, where the Board held:

"the Public Contracts Review Board also opines that it cannot overlook the non-submission of mandatory documentation and that the evaluation committee was certainly not expected to deliberate as to whether a mandatory requirement might have been satisfied, in spirit or otherwise, elsewhere in the tender documentation".

4.26 In view of the above, Deloitte respectfully submits that Grant Thornton's tender (including by its own admission) did not comply with the Tender Document and did not include the information relating to each criterion within the relevant section relating to the said criteria. It's tender should therefore be disqualified.

C. *Clarifications, Rectifications; Principles underlying PPR*

4.27 In terms of the Tender Document, and in line with the principles of equal treatment, non-discrimination and transparency, rectifications are only permitted in specific circumstances as disclosed at the outset in the Tender Document.

4.28 In particular, as clearly set out in the "Notes to Clause 5":

4.28.1 Note 2: *"Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification."*

4.28.2 Note 3: *"No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification."*

4.29 The Rectifications are, in and of themselves, evidence of the fact that the tender submitted by Grant Thornton contained a number of deficiencies. Indeed, no rectifications or clarifications were required in relation to the tender submitted by Deloitte.

4.30 In accordance with the principles of equal treatment, non-discrimination, transparency and self-limitation, the Contracting Authority could not request a rectification (whether described as such or disguised as a clarification) in relation to the matters outlined above.

4.31 The principle of proportionality would also not permit it to do so in this case. In a nutshell, this principle provides that one should not adopt a measure which exceeds the limits of what is



necessary in order to attach the objectives pursued and that where there is a choice between several appropriate measures recourse must be had to the least onerous.<sup>4</sup>

- 4.32 The key wording underpinning the principle of proportionality is therefore that the contracting authority must have a choice between several appropriate measures. In this case, there was no choice as explained above, and only one measure was contemplated – allocating a score of ‘0’ and disqualifying the tender.
- 4.33 In this case, a clarification could not be made since Grant Thornton simply ignored certain minimum requirements – there was nothing to clarify. Any clarification would have (a) breached the principles of equal treatment, non-discrimination and transparency, and the corollary thereof being the principle of self-limitation, and (b) resulted in a rectification of the technical offer, in breach of Note 3.
- 4.34 It is submitted, with respect, that any other interpretation of the clear and unambiguous rules set out in the Tender Document would set an extremely dangerous precedent. Contracting Authorities cannot be permitted to ignore mandatory, clear and unambiguous rules of the game set out in an express manner prior to tender submission. Allowing this would result in a complete loss of faith in the entire public procurement system which is there to ensure that all bidders are treated fairly and equally – accepting anything other than disqualification in cases which expressly require disqualification would allow a contracting authority to, depending on outcome it desires, either (a) close an eye and invoke principle of proportionality to rectify non-rectifiable matters, or (b) follow the letter of the law (the tender document) rigorously and disqualify a tenderer, favouring one tenderer over another.
- 4.35 The Board has, in a case where there was only one tenderer and therefore no other tenderer could have been prejudiced by the clarification (or rectification), insisted on the principle of self-limitation. In Case 1410 of 2020, the Board was faced with a minor issue – that is, the tenderer had submitted the financial bid form published with the tender document, not the revised financial bid form published pursuant to a clarification. There was no substantive change in the second bid form; it simply requested that the price for maintenance support is split into local and manufacturer support, rather than one price for both. However, both local and manufacturer support were committed items (therefore, the contracting authority was not in any way prejudiced by the failure to split the price into two). The appellant argued that a clarification was justified here since the price had been provided and the contracting authority simply wanted to dissect it further (by splitting it into two). The Board however concluded that since this form was subject to Note 3, any clarification thereof would be tantamount to a rectification. The Board held:

*“As has been emphasized on so many occasions, this Board would point out that, whilst it is the responsibility and obligation of the bidder to abide by the stipulated requirements of the tender document, it is also the duty and obligation of the Evaluation Committee to abide by the principle of self-limitation so as to ensure that equal treatment and level playing field prevail.*

....

*“At the same instance, this Board would point out that the financial offer could not be rectified to comply with the conditions laid out in the revised financial bid. In this regard,*

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<sup>4</sup> *Tideland Signal v Commission*, T-211/02 paragraph 39.



CAMILLERI PREZIOSI  
ADVOCATES

*Appellants alleged request for a clarification would have amounted to a rectification, which goes against the basic principles of Public Procurement.*

4.36 The Court of the Justice of the European Union, in Case C-599/10<sup>5</sup>, held as follows:

*“To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment.” [emphasis added]*

4.37 Similarly, in this present case, the Tender Document provides that if not all the minimum requirements are addressed the bid will be scored '0' for that criterion and disqualified. Any clarification cannot rectify the fact that Grant Thornton did not include, either at all in its tender or in the relevant sections of its technical offer, the information mandatorily required to be inserted in such sections as per technical offer form attached to the Tender Document and marked Note 3. Only a rectification would do so, and a rectification is not permitted.

4.38 Deloitte therefore respectfully requests the Board to uphold its Second Grievance.

## 5 Conclusion

5.1 In view of the above, Deloitte respectfully requests the Board to:

- 5.1.1 cancel and revoke the recommendation made in terms of the Award Letter;
- 5.1.2 confirm that Grant Thornton tender is technically non-compliant;
- 5.1.3 confirm that the evaluation process carried out by the evaluation committee does not comply with the requirements of the Tender Document and the PPR and order a fresh evaluation:
  - (a) by evaluators who have the necessary expertise (including in relation to the specific nature of the services procured),
  - (b) by evaluators, chairperson and secretary who were not involved in the evaluation committee(s) which carried out any previous evaluations in relation to the Tender Procedure,
  - (c) in accordance with the requirements of Tender Document and PPR, and
  - (d) taking into account the Board's findings on the above grievances; and
- 5.1.4 order that the deposit paid by Deloitte is reimbursed.

5.2 Without prejudice to any further submissions that Deloitte may be allowed to make during the proceedings relating to the appeal forming the subject-matter of this Objection.

Yours faithfully,

Steve Decesare

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<sup>5</sup> SAG ELV Slovensko a.s., FELA Management AG, ASCOM (Schweiz) AG, Asseco Central Europe a.s., TESLA Stropkov a.s., Autostrade per l'Italia SpA, EFKON AG, Stalexport Autostrady SA v Úrad pre verejné obstarávanie, intervening party: Národná diaľničná spoločnosť a.s..



CAMILLERI PREZIOSI  
ADVOCATES

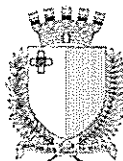
List of Witnesses

1. All members of the evaluation committee(s) involved in the Tender Procedure
2. Personnel of the Contracting Authority involved in connection with the Tender Procedure
3. Personnel of the Department of Contracts, in its capacity as Central Government Authority, involved in connection with the Tender Procedure
4. Representatives of Grant Thornton who were involved in connection with the Tender Procedure
5. Representatives of Deloitte

DIPARTIMENT TAL-KUNTRATTI

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Directorate Policy Development and Programme Implementation

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## Procurement Policy Note # 08

### Utilisation of the Best Price Quality Ratio (BPQR) – Previously known as MEAT

(Previous Title: Utilisation of Most Economically Advantageous Tender (MEAT) as award criteria)

Date issued: 18.08.2014

#### 1 Purpose

The policy of this department has always been to use very cautiously the Most Economically Advantageous Tender (MEAT) as an award criteria in public tenders. First and foremost it is of utmost importance that before tenders are drafted and published using the MEAT, adequate training for officials drafting such tenders has been given as the use of MEAT requires specialised training on its use in order to draw up measurable and objective criteria.

Through this procurement policy note, this Department intends to open up its position provided that the Contracting Authority is in a position to demonstrate they are able to define clearly and in great detail how points will be awarded for the technical aspect of the tender so that evaluation can be carried out objectively, transparently and fairly.

#### 2 Organisational Scope

This is a Government-wide policy. It shall apply to all Entities/Departments/Ministries falling under Schedule 2 of the Public Procurement Regulations – L.N. 296/2010.

#### 3 Definitions

Current Local Thresholds published through the Department of Contracts:

- Locally-funded tenders: above €120,000 exc VAT
- EU co-funded tenders: above €47,000 exc VAT (as per Contract Circular 13/2010)

#### 4 Policy Content and Guidelines

The MEAT award criteria, both for Departmental Tenders and Department of Contracts' Tenders, can be used only if the criteria and the relative scorings have been approved by the Director General (Contracts).

The following steps must all be followed in order to publish and award a tender utilising MEAT:

##### **STEP 1: Establishing the MEAT Weightings.**

The MEAT is established by weighing technical quality against price on a [...] basis respectively for example 60/40, 70/30, 80/20, always adding up to 100.

##### **STEP 2: Drawing up of the Technical Award Criteria and Weightings.**

The table indicating technical award criteria and relative weighting and scorings must be broken down as much as possible.

An example of such criteria and its subdivision is as follows:

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
A. Project Management Process	Project Master Plan <ul style="list-style-type: none"> <li>* Detailed Gantt Chart / Program of work</li> <li>* Description of work plan</li> <li>* Detailed description of deliverables</li> <li>* Dependencies and assumptions</li> <li>* Monitoring and controlling of plan</li> </ul>	
	Total	<b>2</b>
	Communication and Reporting Strategies <ul style="list-style-type: none"> <li>* Proposed internal and external communication strategies</li> <li>* Detailed organograms and/or flowcharts of Communication and Reporting strategies</li> <li>* Proposed communication of project developments</li> <li>* Proposed means and frequency of communication</li> <li>* Reporting and approval procedure</li> </ul>	
	Total	<b>2</b>
	Configuration management Strategy <ul style="list-style-type: none"> <li>* Proposed identification of documentation</li> <li>* Proposed communication of latest documentation/drawings</li> <li>* Proposed updating of other dependent documentation / drawings</li> <li>* Proposed issue and change control procedure</li> </ul>	
	Total	<b>1</b>
	<b>Total for Section A</b>	<b>5</b>



EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
B. Administrative Capabilities	Supplementary Warranty and after sales services: <ul style="list-style-type: none"> <li>* Proposed Warranty period (over and above the required as per Special Conditions – Article 71)</li> <li>* Proposed Inclusions and exclusions (conditions) of warranty (over and above the required as per Special Conditions – Article 71)</li> </ul>	
	Total	<b>2</b>
	Staff Training Programmes: <ul style="list-style-type: none"> <li>* Proposed Training programme for educational team</li> <li>* Proposed Training programme for maintenance team</li> </ul>	
	Total	<b>2</b>
	Project Feasibility and Risk	<b>1</b>
	Assessment: <ul style="list-style-type: none"> <li>* Proposed Projects risks and mitigation</li> </ul>	
	<b>Total for Section B</b>	<b>5</b>
C. Proposal alignment with NISC Core Ideology Manual	Core Ideology embedded in proposal reflecting the following:	
	<ul style="list-style-type: none"> <li>* Making science attractive for the target audiences</li> </ul>	<b>2</b>
	<ul style="list-style-type: none"> <li>* Highlighting of social issues</li> </ul>	<b>2</b>
	<ul style="list-style-type: none"> <li>* Providing a fun, enjoyable environment</li> </ul>	<b>2</b>
	<ul style="list-style-type: none"> <li>* Ignite questioning, investigation and discovery</li> </ul>	<b>2</b>
	<ul style="list-style-type: none"> <li>* Giving the opportunity for the visitor to be creative and imaginative</li> </ul>	<b>2</b>
	<b>Total for Section C</b>	<b>10</b>

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
D. Exhibition Proposal	Exhibition Floorplan concept (Physical, social and personal dimensions reflected in proposal, and state how these dimensions are addressed)	3
	Exhibits match (overall) the General Learning Outcomes identified in Zone Content	2
	Exhibits portrait science relevant to everyday life	2
	Exhibition contains elements relevant to the Maltese geographical and cultural context	2
	Exhibition includes focal point elements for the different areas	2
	Interactivity - a mixture of hands on, physical and multimedia exhibits	2
	Exhibits Fit into building: <ul style="list-style-type: none"> <li>* Use of height</li> <li>* Consideration of ventilation</li> <li>* Consideration of natural lighting</li> <li>* Positioning of exhibits</li> <li>* Suitability of materials used</li> </ul>	3
	Examples of proposed use of graphics: <ul style="list-style-type: none"> <li>* Integration into the floorplan</li> <li>* Suitability / fit for purpose</li> </ul>	2
	Floor layout proposal to address Health and Safety issues such as: <ul style="list-style-type: none"> <li>* Visitor flow</li> <li>* Wheelchair accessibility</li> </ul>	2
	Exhibits Encourage Active Prolonged Engagement	2
	Enquiry based learning exhibits	2
	Open Ended Exhibits	2
	Evidence of assuring Accuracy of Scientific information particularly in relation to exhibits set in a Maltese context	2
	Compliance to relevant sections of Access to All and Smithsonian guidelines	2
	Aesthetics: <ul style="list-style-type: none"> <li>* Deliberate amalgamation of elements (Shape, colour typography)</li> <li>* Aesthetics addressing target audiences</li> </ul>	2
<b>Total</b>	<b>32</b>	

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
E. Technical Assessment	Evidence of your strategy in relation to design, fabrication and control of risk in the process	5
	Access for maintenance in the exhibit design	3
	Health and Safety of exhibits * Elimination of hazards * External certification (exhibits to be certified safe to be used by the public by an external independent officer)	3
	Installation Plan * Logistics * Compliance with architectural building issues * Flexibility in relation programme * Protection following installation	5
	Durability of exhibits * Suitability of materials chosen * Future proofing * Standardisation of parts * Continuity of supplies	3
	Quality assurance * Controlling quality in process during concept design and fabrication * External certification	4
	<b>Total</b>	<b>23</b>
F. Exhibit Examples	Proposals for Prototyping	5
	Proposals for Testing methodology * Testing with target audience	6
	Proposals for Sustainability of exhibit examples containing: * Energy ratings * Cost and frequency of replacement of consumables and spareparts * Sustainability of material chosen	4
	Submission of a Health and Safety Risk Assessment of Exhibit	4
	Submission of Operations and Maintenance Manuals for: * A Mechanical exhibit * An exhibit containing an electrical element * An exhibit which contains a multimedia element/game or a multimedia combined with a mechanical element	6
	<b>Total</b>	<b>25</b>
<b>Total</b>		<b>100</b>

### **STEP 3: Evaluation – Technical Offer**

As can be noted from this example, after assessing the administrative compliance of the offers received, when evaluating technical offers, each evaluator awards each offer a score **out of a maximum of 100 points** in accordance with the technical criteria and any sub-criteria as outlined. The **aggregate final score** is arrived at by calculating the arithmetical average of the individual final score of each evaluator. **Each evaluator must also list the strengths and weaknesses of each bidder for each criterion.**

An average score threshold for the technical part **MUST** be specified in the tender document clearly stating that only tenders with average scores of at least < X number > of points will qualify for the financial evaluation.

Out of the tenders reaching this minimum threshold, the best technical offer is awarded 100 points. The others receive points calculated using the following formula:

$$\text{Technical score} = \frac{\text{final score of the technical offer in question}}{\text{final score of the best technical offer}} \times 100$$

### **STEP 4: Evaluation – Financial Offer**

The financial offers for tenders which were not eliminated during the technical evaluation i.e. those which have achieved the average score threshold specified are to be evaluated.

The Evaluation Committee after checking the financial offers for any arithmetical errors, the tender with the lowest financial offer receives 100 points. The others are awarded points by means of the following formula:

$$\text{Financial score} = \frac{\text{lowest financial offer}}{\text{financial offer of the tender being considered}} \times 100$$

### **STEP 5: Ranking of the Most Economically Advantageous Tender**

The ranking is then established by weighing technical quality against price on the [...] basis which would have already been stated. The ranking is established by multiplying:

- \* the technical scores awarded to the offers by [X/...]
- \* the financial scores awarded to the offers by [.../X]

The overall score is finally arrived as follows:

$$\text{Overall Score} = (\text{Technical score} \times [X/...]) + (\text{Financial Score} \times [.../X])$$

The above is also clearly explained with the templates available for download on [www.contracts.gov.mt](http://www.contracts.gov.mt) and [www.etenders.gov.mt](http://www.etenders.gov.mt)

**5 Effective**  
Immediate.

**6 Legislative Compliance**  
Regulation 28 of the Public Procurement Regulations 2010

**7 References**  
NIL

**8 Appendices**  
NIL

**9 Other related policy notes published**  
NIL

**i** The status for payment 16646QG018WB is: Forward dated instruction received by bank

### Debit account

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Pay from	A_Deloitte Current MT MTHBMTCA016-251472-001 EUR
Debit currency	EUR

### Payment details

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Value date	Mon 06 Nov 2023
Payment service	SEPA Credit Transfer
Your payment reference	IB11540

### Transactions

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Entry	Beneficiary	Payment on behalf of	Payment details	Amount (EUR)
1	Beneficiary name: Cashier Malta Government IBAN: MT55MALT011000040001EURCMG 5001H SWIFT-BIC: MALTMTMT Reference: IB11540	NO	Remittance information: Deloitte Advisory and Technology Limited paym of Ref no: CT3039/2023 - TID: 192137, Date 27th October 2023	7,000.00

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Total entries: 1 | Batch amount: EUR 7,000.00