



Public Contracts Review Board
Notre Dame Ditch
Floriana FRN1601
Malta

22 February 2024

Dear Sirs,

Re: Request for Proposals for the Concession for the Regeneration and Design, Management, Operation, Maintenance and Transfer Back of the Ex-Chalet Site, Sliema Promenade, Tower Road, Sliema as a Superior Quality Catering and Entertainment Establishment—Reference MSPP/01/2022 (the “RFP”)

1. We have been instructed by **Malta Strategic Partnership Projects Limited (C64764)** (the “**Contracting Authority**”) to lodge this reply in terms of Article 112(c) of the Concession Contracts Regulations (the “**CCR**”) in connection with the above-captioned RFP and in response to the appeal lodged by the Carmelo Stivala Group [TID Number 189143] (the “**Appellant**”) on 12 February 2024 (the “**Appeal**”).
2. The Contracting Authority disqualified the Appellant because it failed to submit any information to address these mandatory sub-criteria under Clause 3 of Section 6.3: Evaluation Grid on page 23 and 24 of the RFP:
 - b. Point 3B: *The Food & Beverage Manager will have a minimum of MQF level 5 (or equivalent) qualification or a minimum of 3 years’ experience working in an establishment of a similar class and The Head Chef has a minimum of MQF level 5 (or equivalent) qualification or a minimum of 3 years’ experience working in an establishment of a similar class (the “**First Mandatory Criterion**”); and*
 - c. Point 3C: *The personnel to be engaged in the operation of the establishment will receive induction training and periodic training to ascertain a customer-*

oriented service of an optimum level. Provide a write-up delineating such a training programme (the "Second Mandatory Criterion").

3. The Contracting Authority strongly rebuts the Appeal and the grievances raised therein. As a preliminary housekeeping point, an inadmissibility plea shall be raised with regard to the first to the fourth grounds given that such grievances should have been raised via a pre-contractual remedy.
4. The Contracting Authority's rebuttal shall take this sequential order:
 - a. the first ground of appeal: an inadmissibility plea followed by an admission on the grievance raised with respect to the add-on criteria, followed by a rebuttal on the merits given that the Appellant failed to satisfy the Mandatory Criteria, even when given the opportunity to submit a clarification in this respect (see **Section B**).
 - b. the second ground of appeal: an inadmissibility plea followed by a rebuttal on the merits given that the Appellant's understanding of selection criteria and award criteria is outdated (see **Section C**).
 - c. the third ground of appeal: an inadmissibility plea followed by a rebuttal on the merits given that the Mandatory Criteria are linked to the subject-matter of the contract (see **Section D**);
 - d. the fourth ground of appeal: an inadmissibility plea followed by a rebuttal on the merits given that the Mandatory Criteria are not performance conditions (see **Section E**).
 - e. the fifth ground of appeal: rebuttal on the merits given that the evaluation committee's behaviour was proportionate (see **Section F**).
 - f. the sixth ground of appeal: rebuttal on the merits given that the appeal does not justify the revocation of the RFP's cancellation (see **Section G**).
5. Before addressing these 6 grounds, the Contracting Authority shall give context to the RFP.

A. The RFP

6. The ex-Chalet site on the Sliema Promenade, Tower Road, Sliema was identified by the Contracting Authority as a site for potential re-development contributing towards the enhancement and embellishment of the area, positively impacting national strategic tourism and economic objectives.
7. The Contracting Authority has been tasked to seek the involvement of the private sector in undertaking this re-development initiative as a Superior Quality Catering and Entertainment Establishment.
8. The model chosen by the Contracting Authority in furtherance of the above is that of a works concession in terms of the CCR which transpose the EU Concessions Directive.
9. According to the concession model proposed by the Contracting Authority, and accepted by all tenderers, the eventual concessionaire would be entrusted with the execution of the works on the ex-Chalet site. The concessionaire would be entitled, in consideration for the execution of the works, to commercially exploit those works by running a Superior Quality Catering and Entertainment Establishment.
10. According to this model, it was the concessionaire who had to bear the operational risk, as defined under EU and Maltese law, of exploiting the works.

So much so that, the RFP provided that "no revenue, or any form of financial assistance, will be forthcoming from the Contracting Authority or the Government of Malta".
11. The estimated value of this concession was just over €140 million (exclusive of VAT). This value was calculated in accordance with the law.
12. As part of the contractual framework, the eventual concessionaire was expected to enter into a Concession Agreement with the Contracting Authority governing *inter alia* the entrustment of the works and the exploitation of the same, but also into an Emphyteutical Deed with the Contracting Authority and the Lands Authority granting a temporary emphyteutical title over the ex-Chalet site.

13. Now, and as part of the contractual framework, the eventual concessionaire was bound to pay an annual ground-rent of €97,000 per annum, but also a “Concession Fee”.
14. The tenderers were invited to submit their best, meaning the highest, Yearly Concession Fee as a financial offer. However, tenderers could not submit a Yearly Concession Fee which was lower than €125,000.
15. The eventual concessionaire will be duty bound to pay the ground-rent and the Concession Fee.
16. On 29 October 2022, the concession notice relating to the RFP was published on the Official Journal of the European Union. The RFP was subsequently published on ePPS on 31 October 2022.
17. One proposal was received in response to the Request for Proposals.
18. On 31 January 2024, the Contracting Authority recommended the cancellation of the call after the only tenderer’s proposal, that of the Appellant, was deemed non-compliant with the RFP’s requirements.
19. On 12 February 2024, the Appellant lodged the Appeal.

B. REPLY TO THE FIRST GROUND OF APPEAL

20. By means of the first ground of appeal, the Appellant alleges that its proposal has been wrongfully evaluated by the evaluation committee. In doing so, it raises a number of claims: that the award criteria it failed to satisfy did not require the submission of any mandatory document, that the award criteria in question are ambiguous, that it should have been awarded at least minimum marks, and that no rectification was sought in this respect.
21. The Contracting Authority notes that the Appellant has not yet determined which line of attack to adopt to overturn the Contracting Authority’s decision of 31 January 2024. It has marshalled a number of arguments, but the Contracting Authority states with respect that none of these hold water. It shall explain why below.

Part I. The Inadmissibility of the First Ground of Appeal: the Appellant cannot raise claims related to the drafting of the RFP's clauses, whether on ambiguity or otherwise.

22. The Appellant feels aggrieved by the drafting of the RFP requirements. It makes particular reference to the alleged 'contradiction' between the section on Key Experts, which is marked as Note 2, and the rest of the Technical Offer which is marked as Note 3.
23. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge allegedly contradictory terms up to one day before the lapse of the tender submission period.
24. This application would have been more commercially sensible for the Appellant since no charge is levied for exercising the pre-contractual remedy in terms of Regulation 98. Rather, the Appellant chose to harbour its reservations and only flagged them to the Contracting Authority by filing this appeal *ex post facto* and paying the necessary deposit of €50,000 in terms of Regulation 109 of the CCR.
25. The Appellant also laments that the First Mandatory Criterion is couched in ambiguous terms. While rebutting this allegation, the Contracting Authority pleads that such a claim cannot be raised after the award stage has been concluded.
26. Once again, the Appellant had every opportunity, in terms of Regulation 98 of the CCR, to challenge allegedly ambiguous terms up to one day before the lapse of the tender submission period.
27. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.
28. The Court of Appeal has delivered judgements which hit squarely upon the issue of ambiguity raised by the Appellant:

Ma kellhiex l-appellanti tiffà l-offerta tagħha u ukoll thalli li jingħalaq il-proċess tal-evalwazzjoni tal-offerti qabel ma tfittex rimedju jekk dehrilha li dak il-proċess kien milqut b'ambigwitàjiet.¹

¹ *AIB Insurance Brokers vs Awtorità dwar it-Trasport ta' Malta et*, Court of Appeal (27 October 2021) [Ref. 237/2021/1] para. 16.

29. In *Truevo Payments Limited vs Direttur tal-Kuntratti et*, the Court of Appeal similarly deemed inadmissible grievances relating to an alleged procedural irregularity of a procurement procedure which were known to the aggrieved bidder before the closing date for the submission of bids.²
30. The Appellant could have exercised its remedies at law *inter alia* under Regulation 98, but it *never* did. Once the closing date lapsed, and the Appellant's bid submitted and opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.
31. Therefore, the Contracting Authority submits that this Honourable Board should set aside this first ground of appeal, irrespective of the merits of the issue.

Part II. Reply to the Add-On Criteria Grievance: The Appellant should have been awarded an additional 2 points under the add-on criteria.

32. Under paragraph 1.5.3 of the Appeal, the Appellant laments the evaluation committee's decision to award nil points for the add-on criteria in Point 2B (the "**First Add-On Criterion**") and Point 3A (the "**Second Add-On Criterion**") of the Evaluation Grid (together the "**Add-On Criteria**").
33. The RFP splits the BPQR criteria into 2: mandatory criteria and add-on criteria. It goes a step further, and clearly delineates the different rules applicable to either.
34. On the one hand: "*Unless otherwise being stated in the table itself, all criteria are mandatory and the scoring shall take place across a range of points from '0' to 100%*". The rules on the Evaluation Grid go on to say that: "*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' is allotted to any of the criteria the bid shall be disqualified*".
35. On the other hand: "*For Add-on criteria, the scoring shall take place across a range of points from '1%' to 100%. 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. The minimum score that can be allotted for such criteria is 1% and thus the bid shall not be disqualified*".

² (30 June 2021) [Ref. 95/21/1] para. 7.

36. Point 2B required tenderers to include effective methods of alternative energy generation in their business plans. Point 3A required tenderers to submit strategies for obtaining quality assurance certificates.
37. As stated in its letter of rejection, the Appellant was disqualified because it failed on a number of mandatory criteria. It was not disqualified because of its failure to satisfy add-on criteria, for instance, because its business plan did not cater for effective methods of alternative energy generation, or because it did not provide a strategy for obtaining quality assurance certificates.
38. With that being said, the Contracting Authority looked into the allegation the evaluation committee had accorded nil points to the Appellant's proposal in terms of these 2 Add-On Criteria because no submissions were made in relation thereto.
39. It confirmed that no points were awarded for either add-on criterion. The Appellant should have been awarded 1 point each for a total of 2 extra points under the Add-On Criteria in accordance with the instructions laid down in Section 6.3: Evaluation Grid.
40. While holding fast its rebuttal of the remaining points raised under the first grievance, the Contracting Authority will, by way of revision to the letter of rejection, address this.
41. Even though the Appellant is right in this respect, this does not pave the way for a re-evaluation of the entire proposal.

Part III. Reply to the First Ground of Appeal: The Appellant failed to satisfy the Mandatory Criteria, even when given the opportunity to submit a clarification in this respect.

42. The Appellant starts off by saying that the evaluation committee wrongly interpreted the Mandatory Criteria because there was no requirement for mandatory documentation.
43. With respect, the Contracting Authority cannot but comment on the illegibility of this argument. It is a non sequitur, because there is no requirement either in the

CCR or Directive 2014/23³ (the "**Concessions Directive**") for award criteria to compulsorily demand the submission of supporting documentation.

44. What **was** requested of tenderers was the inclusion of information on the Food & Beverage Manager and the Head Chef in the executive summary and business plan portion of the proposal, and a write-up delineating the training programme for staff members.
45. Tenderers were given explicit instructions in Section 6.3: Evaluation Grid that if the mandatory requirements are not met, then a score of '0' will be allotted to that particular criterion and the proposal would be disqualified. The Appellant was disqualified on both counts.
46. This decision is proportionate as shall be explained in the Contracting Authority's reply to the fifth ground of appeal.
47. The Appellant argues that it should not have been disqualified even though the Mandatory Criteria were marked as Note 3. In supporting its argument, the Appellant draws a parallel with the Key Experts section of the RFP which is a Note 2 matter. Without prejudice to the preliminary plea raised in this respect, the Appellant's gripe is not with the manner in which this RFP was drafted, but rather with the drafting of procurement documents in Malta generally.
48. The general rule is that the Technical Offer Form is a Note 3 matter, with the exception of the Key Experts section. This is even acknowledged in Procurement Policy Note #40 issued in July 2023 and cited by the Appellant which on page 5 explains that: *Rectification Requests in relation to Key Experts are the only part of the Technical Offer per se that may be rectified.*
49. Nor is the Appellant correct to say that no clarification request was made on the reasons for rejection. Even though it was not bound to do so, the evaluation committee provided the opportunity to the Appellant to clarify where in the proposal submitted the information on the Mandatory Criteria could be found (see the clarification request sent on 27 November 2023 marked as "**Document CS1**"):

³ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

Can the Economic Operator kindly indicate specifically to the EAC, the part in his submissions, if present, that correspond to the following criteria in the RFP document Award criteria section:

“Mandatory criteria b. Upper Management engaged to operate the establishment”

“Mandatory criteria c. Human resources management”

50. As acknowledged in the Appeal itself, the Appellant replied:

Whilst confirming in its entirety the proposal, it is hereby additionally confirmed that the persons engaged for the contract are in full compliance with the minimum mandatory requirements, both for Upper management and for human resources management criteria.

51. This reply does *not* address the query raised by the evaluation committee in its request. It does *not* identify where in the Appellant’s proposal the information on the Mandatory Criteria is located.

Rather, the Appellant’s reply provided *new* information by means of a purported ‘additional confirmation’ that the personnel engaged are compliant with the mandatory requirements. The Appellant, in so doing, attempted to *substantially amend* its proposal through a clarification request.

52. It is not allowed to submit new information in response to a clarification request. This principle has been developed by the EU Courts of Justice⁴ over the years, leading to its inclusion in the latest version of the Classic Directive. This is also confirmed in the Procurement Policy Note #40⁵ which states:

*Contracting Authorities / Entities are being notified that any required mandatory information / documentation which was not originally submitted with the Procurement / Concession Submission will disqualify the bidder unless the said information / documentation is subject to Note 2, thus, rectifiable. Therefore, **through the Clarification / Rectification Request,***

⁴ *MA.T.I SUD SpA*, Joined Cases C-523/16 and C-536/16, judgement delivered by the Court (Eighth Chamber) on 28 February 2018, para. 46 to para. 49.

⁵ The Procurement Policy Note#40 is being cited for illustrative purposes only given that it does not apply to the RFP which was issued prior to the issue of this PPN.

bidders should not be given the opportunity to modify / add information to their Procurement / Concession Submission with the scope of presenting a compliant bid (emphasis added). In addition, it is not permissible to request a 'Yes or No Response' which might lead bidders to provide the expected answer.

53. The Contracting Authority submits that this is what the Appellant attempted to accomplish here. It attempted to make up for its failure to include information on the Mandatory Criteria in its original proposal by submitting new information in the clarification response.
54. In doing so, the Appellant remained in default. It did not give information which would have enabled the evaluation committee to allocate scoring accordingly for the First Mandatory Criterion which clearly implemented a scoring scale. 2 points each would have been allocated had the Food & Beverage Manager and/or the Head Chef satisfied the minimum requirements, while 6 points would have been allocated if the personnel possessed qualifications and experience higher than the minimum requirements.
55. Nor did the Appellant provide a write-up delineating a training programme for staff in terms of Point 3C, or pinpoint upon the evaluation committee's request, where such information could be found in its proposal. The first time that the Appellant attempts to identify where such information is provided is in this Appeal under paragraph 1.5.2.3.
56. Even if such clarification had been provided in a timely manner, it would have fallen short of the Second Mandatory Criterion which explicitly asked for a "write-up delineating such a training programme". What was clearly expected of the tenderer is the submission of a singular, condensed piece of information which specifically addressed the induction training and periodic training programme to be provided by the eventual contractor.
57. The inclusion in its Appeal of 4 sporadic references to the term "training" spread across a 218-page proposal is not what the RFP requested. It is clear that these 4 references are the result of a quick CTRL + F search conducted by the Appellant *ex post facto* after it received the letter of rejection on 31 January 2024.

These do not address the Mandatory Criteria, which the Contracting Authority was within its rights to require.⁶

58. The Appellant submits that it should have been given another opportunity to clarify any confusion on the training measures to be provided. The Contracting Authority does not agree with this suggestion.
59. Therefore, the Contracting Authority submits that this Honourable Board should set aside this first ground of appeal.

C. REPLY TO THE SECOND GROUND OF APPEAL

60. By means of the second ground of appeal, the Appellant alleges that the RFP contains award criteria which served the function of selection criteria and ultimately led to its disqualification. It maintains that this is not possible at law.
61. The Contracting Authority shall be replying to this ground of appeal twofold.
62. It is not within the scope of an appeal lodged in terms of Regulation 106 of the CCR to deal with matters which have existed since the publication of the RFP. These fall within the scope of Regulation 98 which provides a specific remedy prior to the closing date of a call for competition.
63. Nor is the Appellant correct to say that once it passed the selection criteria, then it gets a carte blanche and cannot be disqualified on the basis of mandatory award criteria.

Part I. The Inadmissibility of the Second Ground of Appeal: the Appellant cannot, at this stage, raise grievances related to the unlawfulness or otherwise of mandatory award criteria.

64. The Appellant feels aggrieved because it alleges that it could not have been disqualified once it passed the selection criteria. In this respect, the Appellant claims that the Mandatory Criteria are wrongly designated in the RFP as award criteria when they are serving the function of selection criteria. It described this designation as 'not permissible'.

⁶ See: (a) Recital 66 to the Concessions Directive and (b) Recital 94 to the Classic Directive. Both shall be cited in the Contracting Authority's reply to the second ground of appeal on the merits.

65. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge any alleged unlawfulness up to one day before the lapse of the tender submission period.
66. The selection criteria and the award criteria have been clearly established in the RFP since day one of its publication, that is, 31 October 2022.
67. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.
68. Relevant judgements delivered by the Court of Appeal in this regard have already been cited in paragraphs 28 and 29 of this reply: *AIB Insurance* and *Truevo Payments*.
69. The Appellant could have exercised its remedies at law *inter alia* under Regulation 98, but it *never* did. Once the closing date lapsed, and the Appellant's proposal submitted and opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.
70. Therefore, the Contracting Authority submits that this Honourable Board should set aside this second ground of appeal, irrespective of the merits of the issue.

Part II. Reply to the Second Ground of Appeal: the Appellant's understanding of selection criteria and award criteria is outdated.

71. The Appellant's understanding of the interplay between selection criteria and award criteria was the state of play under the predecessor Directive 92/50,⁷ and remained so under the 2004 procurement directives (together referred to as the "**Old Directives**"). The judgement cited by the Appellant in *Gebroeders Beentjes BV versus State of the Netherlands* was delivered in 1988, even before the enactment of the predecessor of the Old Directives.
72. The Old Directives maintained a strict distinction between selection and award criteria. The former regulated the admission of bidders to the race, serving as prerequisites for the eventual evaluation of the tenders. Award criteria, on the

⁷ Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts.

other hand, could only be used to evaluate the tender, in the sense of assigning scores thereon.

73. This rigid understanding of the criteria, with no room for cross-influence between the two, was endorsed by CJEU jurisprudence, particularly in the 2008 judgement of *Lianakis*.⁸
74. This is no longer the case.
75. The traditional understanding of these criteria changed with the promulgation of the Classic Directive and the Concessions Directive in in 2014 (together referred to as the “**New Directives**”). In fact, one of the drivers behind the introduction of the New Directives was the need to address the interpretation of *Lianakis*.⁹
76. The New Directives have not maintained the strict separation between selection criteria and award criteria.
77. The Classic Directive brought in the possibility of award criteria requiring certain qualifications and experience of the staff assigned to contractual performance. Article 67(2)(b) of the Classic Directive, which was not present in the Old Directives, allows award criteria to comprise:

organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

78. The justification behind the introduction of this new article is explained in Recital 94 to the Classic Directive:

Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect

⁸ *Lianakis and Others*, Case C-532/06, judgement delivered by the Court (First Chamber) on 24 January 2008.

⁹ Sue Arrowsmith, *Modernising the European Union's Public Procurement Regime: A Blueprint for Real Simplicity and Flexibility* (2012) in 21(3) Public Procurement Law Review.

the quality of contract performance and, as a result, the economic value of the tender.

79. The Concessions Directive is not as strict on contracting authorities as the Classic Directive. As explained in Recital 68 to the former, the reason is that concessions are “*usually long-term complex arrangements*” and consequently, more flexibility is required “*to define and organise the procedure leading to the choice of the concessionaire*”.
80. Unlike its counterpart,¹⁰ the Concessions Directive does not require contracting authorities to procure on the basis of MEAT. It establishes general rules in Article 41 for the formulation of award criteria so as to enable the contracting authority “*to identify an overall economic advantage*”.
81. The rule in Article 67 of the Classic Directive to permit award criteria on staff-specific qualifications and experience only “*wherever the quality of the staff employed is relevant to the level of performance of the contract*” is not applicable to concessions such as the RFP in question.
82. The Concessions Directive also expressly stipulates that the Contracting Authority was entitled to ask for a staff training programme as an award criterion in accordance with its Recital 66:

Measures aiming at the protection of health of the staff involved in the process of performance of the concession, [...] or training in the skills needed for the concession in question can also be the subject of award criteria or concession performance conditions provided that they relate to the works or services to be provided under the concession.

83. It is now well-established that the weighting accorded to award criteria can generate the same output as selection criteria: disqualification. The Appellant’s argument that the selection and award criteria are two watertight processes may have found some comfort pre-2014. It no longer does so today.
84. Therefore, the Contracting Authority submits that this Honourable Board should set aside this second ground of appeal.

¹⁰ Article 67(1) of the Classic Directive obliges contracting authorities to procure on the basis of the most economically advantageous tender (MEAT) which is then explained in Article 67(2).

D. REPLY TO THIRD GROUND OF APPEAL

85. By means of the third ground of appeal, the Appellant alleges that the Mandatory Criteria are not linked to the subject-matter of the contract. Again, the Contracting Authority shall be raising a preliminary plea to this and delivering a rebuttal on the merits.

Part I. The Inadmissibility of the Third Ground of Appeal: the Appellant cannot post-mortem raise allegations which attach to the unlawfulness or otherwise of the Mandatory Criteria.

86. The Appellant claims that the Mandatory Criteria are not linked to the subject-matter of the contract. Although the Appellant makes reference to Article 67 of the Classic Directive, the correct reference point is Article 41(2) of the Concessions Directive:

The award criteria shall be linked to the subject-matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. They may include, inter alia, environmental, social or innovation-related criteria.

87. The Mandatory Criteria have existed as a state of fact in the public eye since the publication of the RFP in October 2022. However, the Appellant only chose to lament their alleged unlawfulness after it learnt of its disqualification.
88. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge any alleged unlawfulness up to one day before the lapse of the tender submission period.
89. Instead, the Appellant voluntarily submitted a proposal without raising any objection. In doing so, it accepted the contents of the RFP in their entirety as stated in Rule 9.4 of the General Rules Governing Tenders which complement the RFP.¹¹
90. This rule also requires tenderers to “*examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document*”. The Contracting Authority submits that it cannot be held

¹¹ See Clause 1.2 on page 40 of the RFP document.

accountable for any failure by the Appellant to carefully peruse the RFP documentation prior to the submission of its proposal.

91. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.
92. Relevant judgements delivered by the Court of Appeal in this regard have already been cited in paragraphs 28 and 29 of this reply: *AIB Insurance and Truevo Payments*.
93. The Appellant could have exercised its remedies at law *inter alia* under Regulation 98, but it *never* did. Once the closing date lapsed, and the Appellant's proposal submitted and opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.
94. Therefore, the Contracting Authority submits that this Honourable Board should set aside this third ground of appeal, irrespective of the merits of the issue.

Part II. Reply to the Third Ground of Appeal: The Mandatory Criteria are linked to the subject-matter of the contract.

95. The Contracting Authority has already explained in its reply to the second ground of appeal how the applicable legal regime here is the Concessions Directive and not the Classic Directive.
96. This is not a formalistic point for its own sake, but helps to delineate which rules are applicable to the Mandatory Criteria. As already stated in paragraphs 80 to 98 of this reply, there is no equivalent to Article 67(1) and (2) cited by the Appellant in the Concessions Directive.
97. The Mandatory Criteria do not have to pass through the test in Article 67(2) of the Classic Directive, that is, they are not only allowed as award criteria "*where the quality of the staff assigned can have a significant impact on the level of performance of the contract*".
98. *In arguendo*, the Contracting Authority submits that the Mandatory Criteria satisfy even the Classic Directive rule. The need for a highly qualified and experienced Food & Beverage Manager and Head Chef ties in with the purpose of this

concession to revitalise the Ex-Chalet Site into a “**Superior Quality Catering** (emphasis added) *and Entertainment Establishment*”.

99. The Appellant is correct to say that the Mandatory Criteria must be linked to the subject-matter of the concession. This is the requirement in Article 41(2) of the Concessions Directive.
100. The subject-matter of the concession is clear from the title page of the RFP:

REQUEST FOR PROPOSALS FOR
A WORKS CONCESSION FOR THE REGENERATION AND DESIGN, MANAGEMENT, OPERATION,
MAINTENANCE AND TRANSFER BACK OF THE EX-CHALET SITE, SLIEMA PROMENADE, TOWER
ROAD, SLIEMA AS A SUPERIOR QUALITY CATERING AND ENTERTAINMENT ESTABLISHMENT

101. It calls for a works concession which is not simply limited to the construction phase of the contract, but also expressly “*the management, operation, maintenance and transfer back*” of the Site.
102. The Appellant's allegation is that the Mandatory Criteria should not be there because they are not related to construction, but to operation. What the Appellant is trying to do is to create a superficial division between the execution of the works and the contractor's right to exploit the works for profit.
103. The definition of a “works concession” cannot be split into two to suit the purposes of the Appellant. It must be taken as a whole, that is, it is equally: (a) the entrustment of the execution of works and (b) the right to exploit the works being the consideration derived by the contractor from the contract.
104. It is difficult to understand why the Appellant is arguing against its own right to generate revenue by the operation of the Site. The Contracting Authority submits that the operation is linked to the subject-matter of the contract.
105. The draft Concession Agreement was made available to prospective Tenderers on e-PPS alongside the RFP document. Clause 11 of the former specifically regulates the “**Maintenance, Operation and Management**” (emphasis added) of the Site. In particular, Clause 11.4 entitles the Concessionaire:

for the duration of the Concession Period, [...] to collect, receive and retain any revenue, which is directly or indirectly related to the operation and

management of the Site as a Superior Quality Catering and Entertainment Establishment.

106. Clause 10 of the Concession Agreement also requires the concessionaire to undertake partial and complete re-investment over the Concession duration of 65 years in order to ensure that the Site keeps its classification as a Superior Quality Catering and Entertainment Establishment.
107. The Mandatory Criteria are geared towards the same purpose, that is, to ensure that the Site is operated as a **superior quality catering and entertainment establishment** (emphasis added).
108. It follows that the Mandatory Criteria are sufficiently linked to the subject-matter of the contract and that the Appellant's grievance in this respect is unfounded.
109. Therefore, the Contracting Authority submits that this Honourable Board should set aside this third ground of appeal.

E. REPLY TO THE FOURTH GROUND OF APPEAL

110. By means of the fourth ground of Appeal, the Appellant argues that the Mandatory Criteria and the add-on criterion in Point 3A¹² are performance conditions and should not have been taken into consideration by the evaluation committee.
111. The Contracting Authority shall once again be raising a preliminary plea to this ground of appeal. It shall be replying to the ground on the merits in the subsequent section.

Part I. The Inadmissibility of the Fourth Ground of Appeal: the Appellant should have exercised its pre-contractual remedy to question the classification of the Mandatory Criteria.

112. The Appellant claims that the Mandatory Criteria are not award criteria but contract performance conditions.

¹² For the purposes of the reply to the fourth ground of appeal, the reference to Mandatory Criteria shall be taken to include Point 3A of Section 6.3: Evaluation Grid of the RFP.

113. The Mandatory Criteria have existed as a state of fact in the public eye since the publication of the RFP in October 2022. However, the Appellant only chose to question their classification after it learnt of its disqualification.
114. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge the classification of the Mandatory Criteria up to one day before the lapse of the tender submission period.
115. Instead, the Appellant voluntarily submitted a proposal without raising any objection. In doing so, it accepted the contents of the RFP in their entirety as stated in Rule 9.4 of the General Rules Governing Tenders which complement the RFP.¹³
116. This rule also requires tenderers to “*examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document*”. The Contracting Authority submits that it cannot be held accountable for any failure by the Appellant to carefully peruse the RFP documentation prior to the submission of its proposal.
117. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.
118. Relevant judgements delivered by the Court of Appeal in this regard have already been cited in paragraphs 28 and 29 of this reply: *AIB Insurance* and *Truevo Payments*.
119. The Appellant could have exercised its remedies at law *inter alia* under Regulation 98, but it *never* did. Once the closing date lapsed, and the Appellant’s proposal submitted and opened, the Appellant’s remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.
120. Therefore, the Contracting Authority submits that this Honourable Board should set aside this fourth ground of appeal, irrespective of the merits of the issue.

¹³ See Clause 1.2 on page 40 of the RFP document.

Part II. Reply to the Fourth Ground of Appeal: the Mandatory Criteria are not performance conditions.

121. The Appellant does not substantiate its allegation that the Mandatory Criteria amount to performance conditions. It has failed to satisfy the *onus probandi* required in adversarial proceedings, which by itself is sufficient to enable the Honourable Board to dismiss the fourth ground of appeal.
122. It is difficult to follow the logic of the Appellant. Under the third ground of appeal, it argues that the Mandatory Criteria fall short of the Article 67 rule in the Classic Directive. This rule expressly recognises that award criteria can be based on the qualifications and experience of staff to be employed in the performance of the contract.
123. It is now arguing that the Mandatory Criteria are performance conditions. This is not the case.
124. The Concessions Directive retains more flexibility and discretion for contracting authorities. Subject to the rules contained therein, it allows them to cater for their requirements either in terms of award criteria or concession performance conditions.
125. In drafting the Mandatory Criteria, the Contracting Authority has exercised its discretion in a proportionate and transparent manner. As the Maltese Courts have consistently held, it is not for the bidder to dictate what contracting authorities buy from the private market.¹⁴
126. The Classic Directive helps to understand the distinction between award criteria and performance conditions. According to Recital 104:

Contract performance conditions are for laying down specific requirements relating to the performance of the contract. Unlike contract award criteria which are the basis for a comparative assessment of the quality of tenders, contract performance conditions constitute fixed objective requirements that have no impact on the assessment of tenders. Contract performance conditions should be compatible with this Directive provided that they are not directly or indirectly discriminatory and are linked to the subject-matter of the

¹⁴ Court of Appeal, *Krypton Chemists Limited vs Central Procurement and Supplies Unit* (15 February 2024) [Ref. 538/23/1] para. 24 and 25.

contract, which comprises all factors involved in the specific process of production, provision or commercialisation. This includes conditions concerning the process of performance of the contract, but excludes requirements referring to a general corporate policy.

127. This comparison lends no credence to the fourth ground of appeal. Scoring was assigned to the Mandatory Criteria depending on the quality of the proposal received. For instance, tenderers would have obtained 2 points if their Head Chef satisfied the minimum requirements, but up to 6 points if their qualifications and experience exceeded the latter.
128. They certainly had an impact on the assessment of the Appellant's tender, and would have formed the basis for a comparative assessment had more than one proposal been received.
129. The efforts made by the Appellant to support this ground of appeal are, with respect, half-hearted. The caselaw cited is anachronistic because it relates to a tender governed by the Old Directives.
130. Nor is the Appellant correct to say that the RFP requested documentation to prove the experience and qualifications of the Food & Beverage Manager and the Head Chef. What the Contracting Authority requested was information in this respect and not supporting documentation.
131. Therefore, the Contracting Authority submits that this Honourable Board should set aside this fourth ground of appeal.

F. REPLY TO THE FIFTH GROUND OF APPEAL: the evaluation committee's behaviour was proportionate.

132. By means of its fifth ground of appeal, the Appellant alleges that its disqualification is a misapplication of the proportionality principle.
133. The Contracting Authority disagrees. The Mandatory Criteria in question fall under the 'Executive Summary and Business Plan' portion (the "**Business Plan Section**") of the '2. Facilities and Capital Investments' part of the Technical Offer. The Business Plan Section is clearly marked as Note 3 on page 13 of the RFP document, as is the Technical Offer itself on page 10.

134. Note 3 is explained on page 18 as: *3. No rectification shall be allowed. Only clarifications on the submitted information may be requested.*

This contrasts with Note 2 which is explained as: *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.*

135. It is an uncontested matter of fact that the Mandatory Criteria were marked as Note 3 with the invariable consequence that they were matters incapable of rectification. The evaluation committee took the decision not to request a rectification from the Appellant on this basis.
136. With that being said, the Contracting Authority is aware that the Court of Appeal has at times dispensed with the need for hard adherence to the Note 3 vs Note 2 rule, and instead looked at the substance of the irregularity through the lens of proportionality.¹⁵
137. The proportionality test as laid down in *Ballut Blocks*¹⁶ requires that the criterion be suitable for the purpose of achieving the desired objective and to not go beyond what is necessary to achieve it. The Contracting Authority submits that the decision not to go for a rectification request withstands this test too.
138. The objective of the RFP is to concede the ex-Chalet site (the "Site") for transformation into a **superior quality catering** and entertainment establishment. The purpose of the First Mandatory Criterion is to ensure a minimum level of qualifications and experience "*in an establishment of a similar class*" for higher management, while the purpose of the Second Mandatory Criterion is to ensure proper staff training in providing "*a customer-oriented service of an optimum level*".
139. The Contracting Authority submits that the Mandatory Criteria are very much necessary to achieve the purpose of the RFP. It stands by the evaluation committee's decision not to request a rectification from the Appellant in this respect. Even by definition, a rectification can only be requested to rectify information that already exists, which is not the case here.

¹⁵ *Polaris Marine Services Co Ltd vs Direttur Ġenerali tal-Kuntratti et*, Court of Appeal (29 August 2023) [Ref. 329/23/1].

¹⁶ *Ballut Blocks Services Limited vs Onerevoli Ministru għar-Riżorsi u l-Affarijiet Rurali et*, Court of Appeal (4 March 2014) [Ref. 440/2012/2].

140. The evaluation committee went a step further and requested clarification from the Appellant to identify the information relating to the Mandatory Criteria in its proposal. The Appellant failed to do so. Having taken all this into account, the evaluation committee took the decision to disqualify the Appellant.
141. The Contracting Authority submits that this decision stands the proportionality test as devised in our jurisprudence. On the contrary, a rectification request would have failed the test devised by the CJEU. The possibility to request rectifications rests on a number of conditions, *inter alia* that such rectification cannot result in substantial amendments to the tender or be tantamount to the submission of a new one.¹⁷
142. In the *Cassar Petroleum* judgement cited by the Appellant, the bidder had failed to submit a copy of the relevant licence and had bartered away its right to sub-contract in its original bid. The Court of Appeal concluded that allowing the appellant to submit the relevant licence, which belonged to its sub-contractor, would have been tantamount to changing the terms of the offer. It went on to reject the appeal.
143. Similarly, the Appellant in this case failed to submit information in relation to the Mandatory Criteria. The Contracting Authority cannot accept the introduction of any new material after the closing date of submissions. Doing so would lead to a change in the original proposal which is not permissible at law.
144. Therefore, the Contracting Authority submits that this Honourable Board should set aside this fifth ground of appeal.

G. REPLY TO THE SIXTH GROUND OF APPEAL: the appeal does not justify the revocation of the RFP's cancellation.

145. By way of the sixth ground of appeal, the Appellant maintains that the cancellation of the RFP is not justified because its proposal is qualitatively and financially worthwhile.
146. The Contracting Authority reiterates that cancellation was the invariable consequence of the non-compliance of the Appellant's proposal. Since no other

¹⁷ *MA.T.I SUD SpA*, Joined Cases C-523/16 and C-536/16, judgement delivered by the Court (Eighth Chamber) on 28 February 2018, para. 46 to para. 49.

economic operator submitted a proposal, the Contracting Authority had no choice other than to cancel the RFP.

147. Therefore, the Contracting Authority submits that this Honourable Board should set aside this sixth ground of appeal and confirm the Contracting Authority's decision to cancel the RFP.

148. On a concluding note, the Contracting Authority will not object to the refund of the deposit paid by the Appellant if the Appeal is withdrawn in good time before the hearing to be scheduled by this Honourable Board.

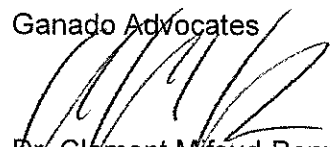
THEREFORE, the Contracting Authority humbly demands that this Honourable Board should:

- (i) reject the Appeal in its entirety;
- (ii) orders the deposit paid by the Appellant not to be refunded;

subject to any declaration or order that it deems fit and opportune.

Yours Sincerely,

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