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21st February, 2024

Public Contracts Review Board

Notre Dame Ravelin,

Floriana,

Malta



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In the acts of the objection filed by the European School of English Limited (C-19714) (TID:000191574/000191575/000191573/000191572) in connection with *MSP/02/2022 – Works Concession for the Regeneration and Design, Management, Operation, Maintenance and Handback of the Evans Building (Valletta) Site as a Superior Quality Tourism Accommodation Establishment* [“the Tender Procedure”]

Reasoned reply by the Recommended Bidder Valletta Luxury Projects (‘the Recommended Bidder’ or “VLP”):

Respectfully submits

A. Introduction

By means of the present, the Recommended Bidder will be replying to the Letter of Objection submitted by the European School of English Limited (*proprio* as a member of Iconic Hotel Malta – Nobu consortium) [“ESE” or “the Appellant”] from the decision communicated to it by Malta Strategic Partnership Projects Limited [“the Contracting Authority”] on the 31 January, 2024 [the “Decision”] by virtue of which Appellant was

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informed *inter alia* that (i) the Appellant had been disqualified from the tender process and (ii) the above-captioned tender was being recommended for award to bidder TID000191554 – Valletta Luxury Projects. This reasoned reply is being submitted without prejudice to submissions made in the Recommended Bidder’s reply to the other objection separately filed by Katari Hospitality JV.

ESE’s appeal is based on four grievances related to the following matters:

- i. The disqualification of Appellant based on the alleged misinterpretation of the selection criteria;
- ii. The Authority’s adjudication of VLP’s bid. In this regard, ESE contends that VLP’s offer of a concession fee of € 1,200,000 should be considered the “grand total” for the whole concession period, and should therefore have been ranked accordingly and not recommended for award;
- iii. Corrections and Amendments to Katari Hospitality’s Financial Statements which, according to ESE, were irregularly done during extensions to the deadline;
- iv. The scores which, according to ESE, are not sufficiently motivated, justifying the cancellation of all the scores.

While reserving its right to make further submissions on each of the grievances during an eventual hearing, the Recommended Bidder will be focussing on the second and fourth grievances – in the case of the second, because it is directed specifically at VLP’s bid, and in the case of the fourth, because it is aimed at attacking the validity and reliability of the whole evaluation process and therefore, by implication, also VLP’s scoring. For this reason, as stated, VLP will be specifically addressing these two grievances in the present reply without renouncing to the right to make further submissions, including on the other grievances

This reply will be structured as follows.

- (i) The Recommended Bidder will first raise a preliminary procedural defence referring to the juridical interest of the appellant;
- (ii) It will then address the second grievance, first by providing the factual context to the matter and then by explaining why the grievance is unfounded in fact and in law;
- (iii) Finally, the Recommended Bidder will briefly address the fourth grievance.

B. Preliminary procedural defence

Prior to entering into the merits of the grievances mentioned above, VLP notes that ESE or – to be more exact – the JV of which ESE forms part, has been excluded for not meeting the Selection Criteria. While VLP acknowledges that ESE has raised a specific grievance on this matter, the fact remains that unless and until this grievance is upheld, the JV of which ESE forms part does not qualify to participate in the running for the contract, not having met the administrative and selection criteria.

It is submitted that a party may only have an interest in contesting the award if it may derive any utility from its objection. There is no utility in attacking a tender procedure if, the objector, is ultimately not in a position to be awarded the contract. It follows that if the first grievance is not upheld and/or the JV of which ESE forms part is not in a position to be awarded the contract, then the necessary legal and juridical interest to contest the Decision is missing and ESE's objection should be rejected.

Furthermore, it is unclear how ESE *proprio* can appeal the Decision *as a member of the JV*, rather than *in representation of the JV*. The participant in the Tender Proceedings was not ESE *proprio* but the JV of which it forms part and it follows that it is the JV (rather than one of its members) which would have the necessary *locus standi* to file an objection.

It is submitted that for the reasons set out above the objection is procedurally inadmissible.

C. Submissions on the Second Grievance

In its second grievance, ESE essentially states that VLP's "original offer", declared by the Contracting Authority on the opening of the bids to amount to € 1,200,000, should apply for the entire term of the Concession and hence does not lend itself to being translated or understood in any other manner. ESE contends that the Contracting Authority acted "gratuitously and irregularly" when it "presupposed" that the offer of € 1,200,000 should be multiplied by the entire concession period of 65 years. It also complains that, if any clarification/correction was sought from VLP about this, it should have been made public in the interests of transparency. VLP rejects these arguments as unfounded for the reasons which will be set out in this section of the reasoned reply.

C.1 Factual Context

The Tendering Process is meant to lead to the award of a concession contract for the regeneration of Evans Building, and its conversion into a superior quality tourism accommodation establishment. The RFP envisages that this property will be granted to the Recommended Bidder on a temporary emphyteusis of sixty-five (65) years. The Recommended Bidder, as concessionaire, would then have the obligation to develop the property and, once the regeneration/development of the building is ready, to operate it for the remaining term of the emphyteusis. Upon termination of the term, the property will then be transferred back to Government, with all its appurtenances at the time.

The RFP establishes that those tenderers which meet the administrative and selection criteria, would then be assessed according to their technical and financial proposal. The choice of the Recommended Bidder depends on which tender achieves the best “price/quality ratio” (BPQR), such that the technical ranking has a weighting of 60% and the financial ranking has a weighting of 40%.

The financial offer is composed of two elements – a yearly ground-rent of € 146,000 imposed on the emphyteutical deed, and a yearly concession fee which each tenderer had to propose. Both elements have to increase in terms of the Harmonised Index of Consumer Prices over the term of the Concession. The RFP states as follows:

The financial offer shall consist of:

(i) A Concession Fee, paid annually in advance by the Concessionaire to the Contracting Authority, the amount of which shall be not less than three hundred and two thousand euro [€302,000]. The Concession Fee shall be due and payable, for the first year, on the signing of the Concession Agreement and on such date each year. The Concession Fee shall be increased on an annual basis in accordance with changes in the Harmonised Index of Consumer Prices for Malta as published by Eurostat, or any other such index which may enter into use as a substitute for it; or (ii) the rate of one *per centum* (1%); whichever is the highest. (Note 3)

(ii) The annual ground rent paid annually in advanced by the Concessionaire to the Lands Authority, is to be fixed at one hundred and forty-six thousand [€146,000]. The annual ground rent shall be due and payable, for the first year, on the signing of the Emphyteutical Deed and on such date each year. The annual ground rent shall be increased on an annual basis for subsequent years in the concession term, in accordance with changes in the Harmonised Index of Consumer Prices for Malta as published by Eurostat, or any other such index which may enter into use as a substitute for it; or (ii) the rate of one *per centum* (1%); whichever is the highest. (Note 3).

For the avoidance of doubt, the Concessionaire’s obligation to pay the Concession Fee to the Contracting Authority is separate and distinct from the Concessionaire’s obligation to pay the ground-rent or any other dues to the Lands Authority in terms of the Emphyteutical Deed.

(iii) A filled-in Financial Bid Form (as per document available to download online from www.etenders.gov.mt) as per Tender Response Format.(Note 3)

The financial offer will be assessed on the basis of the Concession Fee offered by the tenderer. No financial offer will be made on the ground rent payable to the Lands Authority and no additional or other financial offers will be evaluated.

In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail.

This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable.

VLP submitted a financial bid form in which it clearly showed that it was offering a **yearly** concession fee of € 1,200,000. (Dok **VLP1** – attached) There was no doubt that the tenderer was referring to an offer of € 1,200,000 **per year** which, multiplied by 65 (that is, the number of years of the concession) gives a total of seventy-eight million Euro (€ 78,000,000¹). So much is also clear from the financial projections and cash flows supplied to the Contracting Authority as part of the offer. There should therefore be no doubt in anybody's mind that VLP's offer is, by far, the highest one – much higher, in fact, from the second highest bid, which is in the total amount of € 40,707,030, just over half VLP's offer.

In the “*xml tender response format*” VLP inputted the amount of € 1,200,000 rather than the concession fee multiplied by 65. It eventually transpired that the Contracting Authority expected the total in the “tender response format” to reflect the total for 65 years. However, VLP's approach is understandable, given that the Tender Response Format was rather ambiguous in that:

- o At the top it indicates a “year 0” which infers that it refers to the annual sum payable in the first year;

¹ It should be clarified that in reality, none of the tenderers can indicate exactly the total concession fee which would eventually have been paid over the term of the concession, since in terms of the RFP the fee needs to be adjusted yearly for inflation and therefore cannot be calculated *a priori*.

- The text “Grand total including Concessions Fees covering the Contract Period, but Exclusive of VAT” is also misleading. i.e. if this is meant to be the cumulative concession fee, why does it indicate a “grand total including concession fees”?
- “Contract Period” is not a defined term in the tender documents (which, in all other instances, refers to “*Concession Period*”

Criteria	Value	Full Price
Grand total including Concessions Fees covering the Contract Period, but Exclusive of VAT		
Total Values for Envelope		
Total Value	1,200,000.00 eur	Total Value
		1,200,000.00 eur

This led to a situation where, once the tenders were opened and the concession fees offered by the tenders were published, it appeared that VLP had offered “only” € 1,200,000. This, however, was not the case, since from the financial bid form and the projections and cash flows it was amply clear that the sum of € 1,200,000 is a yearly concession fee and not, as suggested by ESE, for the whole term of the emphyteusis.

ESE alleges that the Contracting Authority “gratuitously...presupposed” that it should multiply the concession fee of € 1,200,000 by 65. It asserts that this could not be the case as in the case of discrepancy between the Financial Bid Form and the grand total in the *tender response format*, “the latter shall prevail”. This argument, however, is misguided or, at best, disingenuous. VLP reiterates first of all that the Evaluation Committee had the benefit of access to the Financial Bid Form, and the financial projections and estimated cash flows, and was fully aware from the outset that the offer of € 1,200,000 was a yearly one. In other words, the Contracting Authority did not “presuppose” or capriciously interpret the offer in VLP’s favour. Quite the opposite, in fact. The Contracting Authority would have acted wrongly and capriciously had it rejected the offer

as “undervalued” when it was abundantly clear that VLP’s offer was for a total of €78,000,000 – by far the highest concession fee offered by any of the tenderers.

Furthermore, the RFP itself, as well as the *General Rules Governing Tenders*² provide a solution where **the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable**. This results from the RFP as well as from Clause 17.1(e) of the *General Rules* which state:

17.1 Admissible tenders will be checked for arithmetical errors by the Evaluation Committee. Without prejudice to other arithmetical errors which may be identified, the following errors will be corrected as follows:

....

(e) where there is an error in addition in the Grand Total, the evaluation committee will adjust with the correct amount.

Clause 17.3 of the *General Rules* further establishes:

17.3 The amount stated in the tender will be adjusted by the Evaluation Committee in the event of error, and the tenderer will be bound by that adjusted amount. In this regard, the Evaluation Committee shall communicate the revised price to the tenderer through a confirmation request via the ePPS. If the tenderer does not accept the adjustment within five (5) working days, his/her tender will be rejected and his tender guarantee forfeited (if applicable).

Faced with a situation where the tenderer evidently had not multiplied the **yearly** concession, the Evaluation Committee followed this procedure, and request VLP to confirm/clarify as follows:

² Version 4.5, which was applicable at the time of the commencement of the Tender Procedure.

Select	Clarification ID	Request for	Title of Request	Question Attachment	Description	Answer Attachment	Date
○	12	Clarification	Clarification Financial		Reference is made to the procurement in caption, and to your offer submission to same. The Evaluation Committee noted the following Arithmetic Error/s with regard to your submission: While the Financial Bid Form provides for a "Yearly Concession Fee" of €1,200,000 which when multiplied by the variable of 65 years in the form itself gives a "Grand Total" of €78,000,000, the Grand Total inputted in the Tender Response Format provides for €1,200,000. In line with Clause 5 of Section 1 - instructions: "In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail. This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable.", the Grand Total in the Tender Response Format should be €78,000,000 and not €1,200,000. Kindly confirm this arithmetical correction and your acceptance of the revised Grand Total in the Tender Response Format. Please be advised that if you do not accept this arithmetical correction your offer will be rejected. In terms of Note 3 to Clause 5 of Section 1 - Instructions to Tenderers, you are hereby being given the opportunity to confirm this arithmetical correction within five (5) working days. The requested information is to be submitted through the appropriate Electronic Public Procurement (ePPS) module. This confirmation opportunity is being sent without any commitment whatsoever on the part of the Contracting Authority and does not imply that your offer will be accepted as it may still be deemed administratively, technically or financially non-compliant during the evaluation process.		23/01/2024 09:42:51
○	4	Clarification	Validity of Offers Concession		To the attention of all Tenderers. On behalf of Evaluation and Adjudication Committee Reference is made to the Request for Proposals, Section 1.7. Validity. In line with this Section, all Tenderers are hereby being requested to extend the validity period of their offers till the 31st January 2024. Kindly		25/10/2023 19:44:30

VLP replied to this request by confirming (even though this was obvious from the outset) that its offer was, indeed, for a total concession fee of € 78,000,000.

On this basis, VLP was correctly deemed to have made (by far) the highest offer, and was therefore awarded the full score allocated to the financial offer (40%). It also results that VLP provided the best technical offer (at 98 points), such that, applying the "price/quality ratio" VLP emerged as the Recommended Bidder.

C.2 Legal Considerations

Having provided the factual context, VLP will now present legal submissions on the matter.

VLP has already explained in the previous section that the concession fee which it offered was clearly that of € 1,200,000 per year (and not the total over the term of 65 years). There are several factors which confirm this, including:

- (a) The fact that this is stated clearly in the financial bid form, and in the cash flows and financial projections;
- (b) The fact that an offer of € 1,200,000 over 65 years is much lower than the minimum indicated in the RFP – no tenderer would have knowingly proposed a concession fee which would clearly lead to disqualification;
- (c) In any event, VLP was requested to confirm its offer, in terms of a procedure which is envisaged both in the RFP and in the General Rules Governing Tenders.

ESE however contends that if – indeed any clarification/correction was allowed – this should be deemed to be irregular since it was not formally notified to all bidders. In support of its position, it refers to Clause 6 of the General Rules Governing Tenders which states:

6.2 Questions and answers, alterations and corrigenda to the tender document will be published as a clarification note on the Malta Enterprise website within the respective tender’s workspace. Clarification notes will constitute an integral part of the tender documentation, and it is the responsibility of tenderers to visit this website and be aware of the latest information published on the Malta Enterprise website prior to submitting their tender.

A reading of this clause however, shows that this clause is irrelevant to the point at issue. Clearly, Clause 6.2 is not referring to clarifications or confirmations requested from specific tenderers during the evaluation process, but rather to clarifications requested by the tenderers *from* a Contracting Authority with respect to the tender document prior to the closing of the bidding period. This is why the clause mentions “alterations and corrigenda to the tender document”, and why it requires publicity –clarifications **about the tender document** are relevant to all prospective tenderers since they “constitute an integral part of the tender documentation”.

This, however, does not apply to clarifications and/or rectifications and/or information requested from tenderers during the evaluation process. The suggestion by ESE that there is or should be some procedure whereby, as part of the evaluation process, “*other bidders...should have the opportunity to assess and question whether the said amendment was legitimate or not*” is, frankly, a legal fantasy with no basis in law or in actual procurement practice.

It is submitted that contrary to ESE’s allegations of irregularities, the Contracting Authority acted correctly and in line with the concept of proportionality, which requires that an offer should not be lightly discarded on the basis of a mistake or on the basis of missing information, when this can be remedied by referring to the rest of the tenderer’s offer and/or by virtue of a clarification and/or, as specifically permitted in this particular case, by having the Evaluation Committee make the correct arithmetical calculation³.

In this regard, VLP observes as follows:

- (i) The “Grand Total” can be easily calculated by multiplying the concession fee by the number of years of the Concession. This is no “supposition”, “conjecture” or “interpretation” but simply a mathematical exercise **based on information which is easily available in the bid itself** (including the Financial Bid Form, and the cash flows and financial projections);
- (ii) The sum shown as a “grand total” is clearly the yearly concession fee as expressed in other parts of the offer. There should be no doubt in the minds of the evaluators, the Contracting Authority or, for that matter, the members of this Honourable Board, that the lack of multiplication was a genuine mistake and not, say some machination on the part of the bidder to quote two different prices and then choose

³ *Schembri Barbros Limited et v Il-Korporazzjoni għas-Servizzi tal-Ilma, Id-Direttur Ġenerali (Kuntratti) u Rockcut Limited; Pharma.MT Limited v Direttur tal-Kuntratti et*, Court of Appeal (Superior), 30.03.22

what works better. Indeed, rectifications in the financial offer are generally disallowed when they permit the bidder to change its offer through a supposed “clarification” which is actually tantamount to a change in the financial bid. This is clearly not the case here, for the reasons already explained.

- (iii) It is precisely for this reason that the RFP (as well as the General Rules) permit such a correction when the total “can be arithmetically worked out”.

This Board has itself delivered several decisions where, on the basis of the principle of proportionality, it allowed corrections and/or clarifications in such situations, as long as it was clear that the bidder was not seeking some undue advantage from the situation. Reference is made, for instance to the decision in Case Number 1444 (Professional Services of a Contracts Manager for the L-Ikkin Local Council)⁴. Significantly, in Case Number 1689, the Board accepted in principle the possibility of an arithmetical correction, but found that the bidder in question (in contrast to the present case) did not accept the calculation of the Evaluation Committee and, instead, tried to change its financial offer.

It is therefore submitted that the decision of the Contracting Authority in this respect was correct, fair and in line with applicable legal principles.

D. Submissions on the Fourth Grievance

Through its fourth grievance, ESE is claiming that the scores given to the various bidders are not sufficiently motivated and the methodology used does not provide the transparency required.

⁴ 22 May, 2020;

Considering that ESE's offer did not pass the initial stages, and was therefore never assessed on its technical and financial merits, it is clear that ESE's complaint under the fourth grievance does not and cannot refer to the adjudication of its offer but it is, rather, directed at the objectivity of the criteria as set out in the tender document.

This complaint however is, in the first place, procedurally inadmissible. If ESE (or the JV of which it forms part) had any issue with the criteria set out in the RFP, then it should have sought a remedy by raising a pre-contractual concern in terms of Regulation 98 *et sequitur* of S.L. 601.09, which is expressly quoted in the RFP, rather than by filing an objection *after* the award.⁵ This principle has been confirmed in judgments of our Courts, for instance in *Truevo Payments Limited v Direttur tal-Kuntratti et*⁶ where the Court also relied on a decision of the ECJ to support this position, confirming that where concerns regarding the contents of an RFP could have been addressed through a pre-contractual remedy available to the a bidder, then this should have been resorted to. This has also been the position adopted by this Honourable Board⁷.

The fact the ESE (or, rather, the JV of which it forms part) chose to participate in the Tender Procedure, confirms that it acquiesced to the "rules of the game" and cannot now cry foul simply because its offer was not successful. Indeed, beyond a generic complaint, ESE has not shown in any way that the criteria for the scoring were applied unfairly or discriminatorily. They were not. On the contrary, the criteria as set out in the RFP ensured a level playing field for all tenderers.

⁵ Although, as stated at the outset, VLP is not, at this stage, making any submissions in writing regarding ESE's Third Grievance, it should be noted that this argument (i.e. that ESE could and should have sought a pre-contractual remedy rather than file an appeal post-award) also applies to the Third Grievance.

⁶ Court of Appeal, Superior Jurisdiction, 30.06.2021

⁷ *Vide* Case No. 1768: Falzon Services Limited v Wasteserv Malta Ltd, 16 August, 2022

Without prejudice to the above, while the Recommended Bidder is not privy to the evaluations of the other tenders, it has been provided with details of its scoring, from which it results that the Evaluation Committee applied the criteria set out in the RFP, and allocated marks according to the parameters pre-established in the tender documents. While the members of the Evaluation Committee are likely best placed to explain how they conducted the evaluation, there is nothing which raises any reasonable doubts about the way in which the evaluation was conducted. This Honourable Board should be wary of any attempts by the Appellant to embark on a “fishing expedition” with the sole aim of finding fault with the process at all costs. Indeed, it has been stated in several decisions of the PCRB and the Courts that, in order to be admissible, an appeal must clearly state “*specific points... to justify any doubts and suspicions on how the evaluation process was carried out or on the technical offer submitted by the preferred bidder*” (vide for instance decision in **Case 1873, 29th May, 2023**). In the absence of specific and well-founded concerns, the Appellant has no right to request a “rerun” of the evaluation process in the vague hope of finding any inconsistency or shortcoming justifying the cancellation of the award.

E. Conclusion

In conclusion, and while the Recommended Bidder reserves the right to make further submissions and bring any evidence it deems necessary, it is submitted that the Appellant’s objections should be rejected and the deposit paid in conjunction with the same should be forfeited, and that the Decision recommending the award to VLP should be confirmed



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Financial Offer		
Title	REQUEST FOR PROPOSALS FOR A WORKS CONCESSION FOR THE REGENERATION AND DESIGN, MANAGEMENT, OPERATION, MAINTENANCE AND TRANSFER BACK OF THE EVANS BUILDING SITE (VALLETTA) AS A SUPERIOR QUALITY TOURISM ACCOMODATION ESTABLISHMENT	
Ref. No.	MSPP/02/2022	
Description of Services	Rate Excluding VAT PER YEAR (€)	Concession duration of 65 years
Yearly Concession Fee*	€1,200,000.00	65
GRAND TOTAL		€ 78,000,000.00
<p>*The Yearly Concession Fee should be not less than three hundred and two thousand euro (€302,000). Any offers less than three hundred and two thousand euro (€302,000) will lead to the automatic disqualification of the Bid. The Concession Fee shall increase by the annual rate of inflation for subsequent years in the concession term, either: (i) in accordance with changes in the Harmonised Index of Consumer Prices for Malta as published by Eurostat, or any other such index which may enter into use as a substitute for it; or (ii) the rate of one per centum (1%); whichever is the highest.</p>		

