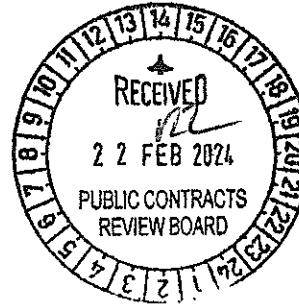


**Public Contracts Review Board
Notre Dame Ditch
Floriana FRN1601
Malta**

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 Evans Building (Valletta) Site as a Superior Quality Tourism Accommodation Establishment—Reference MSPP/02/2022 (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 Katari Hospitality JV (the “**Appellant**”) on 12 February 2024 (the “**Appeal**”).
2. The Contracting Authority strongly rebuts the Appellant’s Appeal and the grievances raised therein.

The ground of appeal raised by the Appellant ought to be rejected because the Successful Tenderer has submitted the highest yearly Concession Fee.

Further, the Contracting Authority maintains that the evaluation committee evaluated the Successful Tenderer’s proposal, including its financial offer, in line with the requirements in the RFP and the general principles of public procurement.

3. But, and before the Contracting Authority addresses the ground of appeal raised by the Appellant, the Contracting Authority would like to give context to the RFP.

A. The RFP

4. The Evans Building was identified by the Contracting Authority as an important site that can be rehabilitated and that can contribute towards strategic tourism and economic objectives.
5. Recognizing the importance of a comprehensive approach, the Government acknowledges that Valletta's regeneration must extend beyond its core and must include peripheral areas. The proposed regeneration must carefully balance the preservation of Valletta's historic fabric with the enhancement of its residential, cultural, and commercial facets.
6. The Contracting Authority has been tasked to seek the involvement of the private sector to regenerate the Evans Building in Valletta as an upmarket tourism accommodation and then to operate it as such for a period of 65 years.
7. The model chosen by the Contracting Authority is that of a works concession in terms of CCR. The CCR transpose the EU Concessions Directive.¹
8. 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 Evans Building. The concessionaire would be entitled, in consideration for the execution of the works, to commercially exploit those works by running an upmarket tourism accommodation.
9. 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".

¹ Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts.

10. The estimated value of this concession was just over €300 million (exclusive of VAT).² This value was calculated in accordance with the law.³
11. 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 Evans Building.
12. Now, and as part of the contractual framework, the eventual concessionaire was bound to pay an annual ground-rent of €146,000 per annum, but also a “Concession Fee”.

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 €302,000.

The eventual concessionaire will be duty bound to pay the ground-rent *and* the Concession Fee.

13. The RFP was subsequently published on ePPS on 27 November 2022.

² RFP, Section 1, Clause 1.10:

The estimated Concession Value for this works concession has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the estimated turnover is of three hundred million, twenty-five thousand, four hundred and twenty euro (€300,025,420) excluding VAT, for the duration of the contract. This figure has been calculated by the Contracting Authority in good faith, however Tenderers are still encouraged to carry out their independent calculations. The Contracting Authority will not be held responsible if the amount provided above does not tally with the calculations carried out by Tenderers.

³ CCR 53, Regulation 53:

The value of a concession shall be the total turnover of the concessionaire generated over the duration of the contract, net of VAT, as estimated by the contracting authority or the contracting entity, in consideration for the works and services being the object of the concession, as well as for the supplies incidental to such works and services.

See also Regulations 54 – 57 of the CCR.

14. The RFP generated market interest with over 7 tenderers submitting 8 proposals on the closing date of 28 April 2023.
15. On 31 January 2024, the Contracting Authority recommended the award of the RFP to “Valletta Luxury Projects”—a joint venture composed of Benny Ltd (C65709) and Eden Leisure Group Limited (C4529). Contemporaneously, the Contracting Authority submitted letters of rejection to the remaining tenderers.
16. On 12 February 2024, the Appellant lodged the Appeal.

B. The Ground of Appeal: Successful Tenderer has submitted the highest Yearly Concession Fee

9. In brief, and by means of this ground of appeal, the Appellant must be saying that the Successful Tenderer’s proposal was financially non-compliant given that the Successful Tenderer’s Grand Total indicated in its tender response format was €1,200,000.
10. The Contracting Authority submits that this ground is unfounded in fact and in law. Rather, it contends that the Successful Tenderer has submitted a financially compliant proposal and the highest Yearly Concession Fee of €1,200,000 per year.

This contention is corroborated by the RFP and the Successful Tenderer’s proposal, as shall be set out below.

11. *First*, the RFP had the following to say on the “financial offer”:
 - a. The RFP provided that “*The financial offer will be assessed **on the basis of the Concession Fee** offered by the tenderer.*”
 - b. The “Concession Fee” is defined as “*The **annual fee** payable by the Concessionaire to the Contracting Authority as determined **in accordance with the Proposal** submitted by the Concessionaire*”.
 - c. Tenderers were asked to submit: “*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)ⁿ}

The Financial Bid Form requested tenderers to submit a “Yearly Concession Fee” in cell C9 and automatically the form would *arithmetically calculate* the GRAND TOTAL in cell D10 using the following formula: “=SUM(C9*D9)”.

Cell D9 provided the duration of 65 years of the concession.

- d. Tenderers were also asked, when submitting the proposal on ePPS, to manually input the “Grand Total” in a specific field to this end. The purpose of this “Grand Total” is to be published as part of the “Summary of Tenders” when proposals were scheduled to be opened.

- e. The RFP also provided:

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.*

12. *Second*, and in the case of the Successful Tender’s proposal:

- a. The Successful Tenderer submitted a Yearly Concession Fee of €1,200,000 in cell C9 of its Financial Bid Form and this generated an arithmetical calculation of a GRAND TOTAL of €78,000,000.
- b. The Successful Tenderer in its “Tenderer’s Financial Projections”—which are commercially sensitive—indicated a Concession Fee of €1,200,000.
- c. The Successful Tenderer in the “Grand Total” on ePPS manually inputted the figure of €1,200,000.

13. Against this background, in particular, that the financial offer was meant to be assessed on the Yearly Concession Fee, the members of the evaluation committee came to the conclusion that it was likely that the Successful Tenderer committed a clerical error when it inputted the Yearly Concession Fee of €1,200,000 as the Grand Total on its Tender Response Format on ePPS.

14. The evaluation committee was also comforted by the fact that the Successful Tenderer indicated and restated the amount of €1,200,000 as a “Yearly Concession Fee” in 2 different locations in its proposal—its financial projections and its financial bid form.
15. The evaluation committee issued a request for the confirmation of an arithmetical correction, namely, that the Grand Total in the Successful Tenderer’s Tender Response Format should have been €78,000,000 and not €1,200,000. The Successful Tenderer confirmed the arithmetical correction and accepted that the Grand Total in the Tender Response Format should be €78,000,000 and not €1,200,000.
16. The evaluation committee also took the view that the general condition in the RFP stating that: *“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”* did not apply in this case given that the GRAND TOTAL of the financial bid form could be arithmetically worked out and/or corrected, as explained above in paragraph 11.c.
17. The Contracting Authority submits that the RFP was clear and unambiguous when it stated that: *“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”*, and therefore, the preceding *general condition* in the RFP was inapplicable in this case.
18. In any case, the Contracting Authority submits that the evaluation committee has acted correctly, prudently, diligently and consistent with the general principles of public procurement, in particular, self-limitation and proportionality.
19. The PPR are not intended to render the Contracting Authority into passive and dumb actors on the market which cannot act in their own best interests provided the actions performed by the contracting authorities do not alter the level playing field afforded to bidders. Quite to the contrary, contracting authorities are allowed and encouraged, as a matter of fact and law, to ask for arithmetical corrections in order to understand better fully compliant bids.
20. What the Appellant is pushing here is the absurd narrative that the Contracting Authority should have made a net loss of at least €37 million and discard a perfectly

valid and compliant bid simply by not asking for such simple and above board arithmetical correction.

21. That would indeed paint the Contracting Authority into a dumb and passive role and would as a matter of law push it into a direct violation of the overriding principle of good governance, transparency and the attainment of public goals for the common good.
22. In any case, the Contracting Authority submits that the evaluation committee has acted correctly, prudently, diligently and consistent with the general principles of public procurement, in particular, self-limitation and proportionality.

It is certainly not the case that the evaluation committee tried to “save” the Successful Tenderer’s proposal “at all costs”—this is a submission by the Appellant which is strongly refuted.

23. The evaluation committee’s decision to request a confirmation of an arithmetical correction from the Successful Tenderer and its subsequent assessment that the Successful Tenderer submitted a financially compliant proposal are correct and consistent with case-law of the Courts of Justice of the European Union and jurisprudence of Malta’s Court of Appeal.
24. This is because the request for a confirmation of the arithmetical correction:
 - a. *First*, did not lead to the submission of a new tender. This is so because an arithmetical correction does not lead to the submission of a new tender. Rather, it is predicated on information which is present in the proposal already submitted by the Successful Tenderer.
 - b. *Second*, did not unduly favour or disadvantage the Successful Tenderer. This is so because the arithmetical correction was not an opportunity to submit new information *ex post facto* i.e. after the Successful Tenderer has become aware of the financial bids submitted by its competitors in the RFP. The arithmetical correction was based on information which was already present in the Successful Tenderer’s proposal.
 - c. *Third*, did not result in any substantial amendments to the Successful Tenderer’s proposal. This is so because an arithmetical correction is not a

rectification, but a clarification based on the figures provided in the Successful Tenderer's proposal.

25. By means of this ground of appeal, the Appellant must also be suggesting that this Honourable Board completely disregards the principle of proportionality.
26. The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued and that when there exists a choice between several appropriate measures, recourse must be had to the least onerous one.
27. In this case, the Appellant seems to suggest that the evaluation committee should have opted for the most onerous choice of rejecting the Successful Tenderer's proposal and discard less onerous options which were more than appropriate to achieve the objective of the RFP—the award of the proposal with the best price-quality ratio.
28. The Appellant's suggestion that the Successful Tenderer's proposal is rejected is draconian and exceeds what is necessary to achieve the objectives of the RFP. The evaluation committee had at its disposal less onerous options. In this instance, and at this stage, the evaluation committee elected to request a confirmation of an arithmetical correction from the Successful Tenderer.
29. The Contracting Authority submits that this must have been right move by the evaluation committee, otherwise, the Appellant would not have predicted its use in its Appeal without having known what the evaluation committee did.
30. The Appellant's arguments that a confirmation of an arithmetical correction was not possible here is, respectfully, wrong. First, the obvious clerical error in question could have been arithmetically calculated by reference to the financial bid form and the financial projections. Second, the Rule 17.1 of the General Rules Governing Tenders does not provide for an exhaustive list of errors that may be so addressed, in fact, it reads: "*Without prejudice to other arithmetical errors which may be identified [...]*". In any case,
31. Therefore, the Contracting Authority submits that this Honourable Board should set aside this round of appeal.

C. Inadmissibility of the Fourth Demand

32. The Contracting Authority submits that the fourth demand requested by the Appellant is inadmissible at law and ought to be rejected.

33. That by means of the fourth demand the Appellant is requesting this Board to:

iv. jordna dawk l-azzjonijiet kollha neċessarji sabiex l-offerta ta' Katari Hospitality JV għas-sejha għall-proposti li ġgħib ir-riferenza MSPP/02/2022 tiġi aċċettata u l-konċessjoni tingħata lill-istess.

34. That this demand cannot be upheld by this Honourable Board since it exceeds its competence and powers. This Honourable Board is, as its name implies, a review board which reviews whether decisions taken by a contracting authority are legal or otherwise.

35. This Honourable Board considers "appeals" made by aggrieved bidders in terms of Regulation 106 of the CCR against a specific decision taken by a contracting authority, such as the rejection of a bid or the recommendation of award. This Honourable Board's assessment is limited to "accede or reject the appeal" which has to be strictly an application for the review of the contracting authority's decision after closing of bids—see Regulation 112(h) of the CCR—and it cannot evaluate bids and award public contracts since the responsibility of evaluation of bids, and quite frankly, the expertise and competence, lies with the evaluation committee and not with this Honourable Board.

36. Therefore, and for the above-mentioned reasons and others which may be brought during the proceedings, the Recommended Bidder demands that this Honourable Board declares that the fourth demand is inadmissible and ought to be rejected.

D. Procedural and Case Management Considerations

37. The Contracting Authority is lodging an application seeking case management directions from this Honourable Board ahead of the hearing on the following issues:

- a. The Appeal is to be heard with urgency;
- b. This Appeal is heard together with the appeal lodged by European School of English Limited;
- c. The proceedings are to be heard *exclusively* in person;

d. All witnesses are to be heard *viva voce* in person.

This application is being filed contemporaneously with this reply.

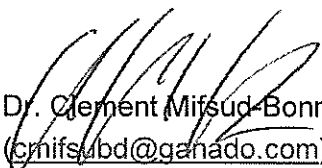
38. On a concluding note, the Contracting Authority will not object to the refund of the deposit paid by the Appellant if the Appeal is withdrawn in good time before the hearing to be scheduled by this Honourable Board.

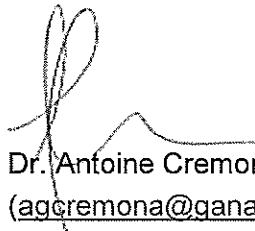
THEREFORE, the Contracting Authority humbly demands that this Honourable Board should:

- (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,
Ganado Advocates


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Dr. Galvin Calleja
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In the records of Case 412
relating to MSPP/02/2022 in the
names of:

Katari Hospitality JV

versus

**Malta Strategic Partnership
Projects Limited**

**URGENT APPLICATION of the contracting authority Malta Strategic Partnership
Projects Limited (the “Contracting Authority”)**

Humbly submits:

1. This is an application of the Contracting Authority for this Honourable Board to hear this case with urgency and to uphold the requests for case management directions set out in the next paragraph with the purpose of streamlining the urgent hearing of this objection.
2. The Contracting Authority humbly requests this Board to issue a decree ordering:
 - a. this case to be heard with urgency;
 - b. the Katari Hospitality JV appeal should be heard concurrently with the European School of English Limited appeal;
 - c. the proceedings to be heard *exclusively* in person; and
 - d. all witnesses to be heard *viva voce* in person.

(collectively the ‘**case management requests**’).

3. This application is being lodged in terms of Regulation 90(2) of the Public Procurement Regulations which enables the Board to determine the procedure for the hearing of an objection as it deems fit. This article of law is rendered applicable in the Concession Contracts Regulations under Regulation 52(2): *Regulations 80 to 99 of the Public Procurement Regulations shall mutatis mutandis apply to these regulations.*

The Need for Urgency

4. The estimated value of this concession is just over €300 million (exclusive of VAT). It is a concession for the rehabilitation of the Evans Building and its surroundings in Valletta, into a higher quality tourist accommodation with additional facilities. This is an important site that can contribute towards strategic tourism and economic objectives.
5. The commencement of this rehabilitation shall contribute to the regeneration of Valletta with the enhancement of its residential, cultural, and commercial facets. In addition, the concession will generate a significant number of employment opportunities and contribute to the country’s GDP.
6. The Contracting Authority is fully aware that this Board always hears and determines cases in a “rapid” manner, and is mindful of its challenging caseload. They humbly submit that this case, however, needs the Board’s priority.

Concurrent Hearing with ESE Appeal

7. As this Board is aware, two appeals have been filed with respect to the Contracting Authority's decision in relation to the RFP for the Evans Building concession with reference number MSPP/02/2022: the appeal filed by the Katari Hospitality JV (Case 412) and the appeal filed by the European School of English Limited (Case 411).
8. The Contracting Authority submits that it would be most expedient and pragmatic for the two appeals to be heard concurrently in order to make the best use of this Honourable Board's time.

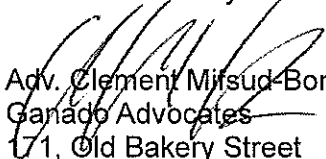
In-Person Proceedings and Witnesses

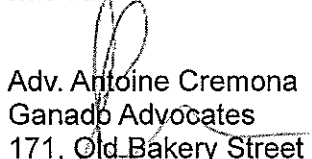
9. Lastly, the Contracting Authority requests this Board to order that any and all hearings and testimonies are held in person at the premises of the Board or at any other premises that this Board may deem fit for the purposes of these proceedings.
10. The significance of this Tender leaves little room for any other method of procedure. Hearing witnesses in-person is necessary to ensure equal access to justice for all parties concerned.
11. Through the onset of the COVID-19 pandemic, we witnessed a growing trend towards remote and virtual proceedings, aided by the desire for convenience and efficiency. Technology has certainly played a valuable role in ensuring continued access to justice, but aspects of the legal process such as the examination of witnesses in this case are best served when conducted in person.

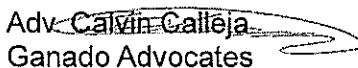
THEREFORE, for the above-mentioned reasons and others which may be brought in due course, the Contracting Authority humbly demands that this Honourable Board orders that:

- a. the proceedings are heard with urgency;
- b. the appeal filed by the Katari Hospitality JV is heard together with the appeal filed by European School of English Limited;
- c. the proceedings are heard *exclusively* in person; and
- d. all witnesses to be heard *viva voce* in person;

save for any declaration, order or decree it deems fit.


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**TODAY, 22 FEBRUARY 2024
VALLETTA, MALTA**