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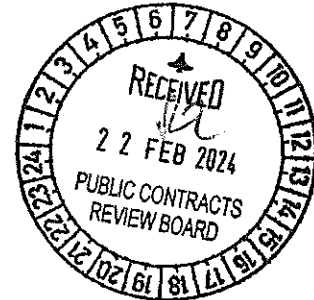
Fil-Bord ta' Revizjoni Dwar Kuntratti Pubbliċi

Notre Dame Ravelin,

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Fl-atti tal-oġġezzjoni mressqa minn Katari Hospitality JV rigward *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*

Risposta tal-offerent rakkomandat Valletta Luxury Projects ('L-Offertant Rakkomandat' jew "VLP"):

Jissottometti bir-rispett

A. Introduzzjoni

Bil-preżenti, l-Offertant Rakkomandat se jjer iwieġeb għall-oġġezzjoni mressqa minn Katari Hospitality JV ["**Katari**" jew "**L-Appellanti**"] mid-deċiżjoni tal-awtorit kontraenti Malta Strategic Partnership Projects Limited [**L-Awtorit Kontraenti**], datata 31 ta' Jannar, 2024 li biha l-Appellanti għet mgħarrfa (i) illi "*the offer submitted by your company was not successful since it was not the bid with the Best Price Quality Ratio (BPQR)*" u (ii)

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the above-captioned tender is being recommended for award to bidder TID000191554 – Valletta Luxury Projects for the yearly concession fee of £ 1,200,000.00 excluding VAT, this being the offer with the Best Price Quality Ratio (BPQR).

Ir-risposta qiegħda titressaq bil-Malti, billi hija l-lingwa wżata minn Katari fl-oġġezzjoni tagħha (*separatament, VLP qed tressaq risposta bl-Ingliż għall-appell separat imressaq minn European School of English b’rabta mal-istess sejħa għall-offerti*).

Meta wieħed jaqra l-oġġezzjoni ta’ Katari, wieħed jifhem illi l-aggravju tagħha huwa, fl-añħar mill-añħar, wieħed biss, u çjoe’ illi, skontha, l-offerta ta’ VLP qatt ma setgħet tkun dik bl-añħar *price quality ratio* u dan għaliex, jekk wieħed iqis biss *it-tender response format (xml tender structure)* il-*Concession Fee* offerta minn VLP kienet l-aktar waħda baxxa, fl-ammont ta’ miljun u mitejn elf Euro (€ 1,200,000) fuq medda ta’ hamsa u sittin (65) sena. Katari tgħid illi l-Awtorit Kontraenti qieset illi l-offerta ‘ miljun u mitejn elf Euro hija *yearly concession fee*, meta din “*mhi xejn għajr konġettura u ma tirriflettix – lanqas bl-akbar tiġbid t’immaġinazzjoni – l-offerta kif sottomessa mill-offerent rakkomandat*”.

VLP issostni illi l-oġġezzjoni ta’ Katari hija nfondata fil-fatt u fid-dritt u ser tressaq ir-raġunijiet tagħha għal dan. Ser tibda billi l-ewwel tispjega l-kuntest fattwali, u mbagħad tgħaddi biex tagħmel is-sottomissjonijiet tagħha fuq l-aspett legali.

B. Sfond fattwali

Is-sejħa għall-offerti mertu ta’ dawn il-proċeduri għandha twassal għall-għoti ta’ konċessjoni għall-iżvilupp u riġenerazzjoni tal-Evans Building u l-konverżjoni ta’ din il-binja pubblika fi stabbiliment turistiku ta’ kwalità għolja. L-RFP tipprospetta illi l-binja tingħata lill-oblatur rakkomandat b’çens temporanju ta’ hamsa u sittin (65) sena. L-

offerent magħżul ikollu l-obbligu li jiżviluppa l-binja u, ladarba l-iżvilupp tagħha jkun lest, joperaha għall-perjodu rimanenti taċ-ċens. Fl-aħħar tat-terminu taċ-ċens, il-proprjet tirriverti lura għand il-Gvern bil-benefikati kollha tagħha.

Is-sejha għall-offerti tistabilixxi illi dawk l-offerenti illi jgħaddu mill-evalwazzjoni amministrattiva u mill-evalwazzjoni tas-*Selection Criteria*, jiġu mbagħad evalwati skont il-proposta teknika u l-proposta finanzjarja tagħhom. Kif tajjeb osservat Katari, l-offerent rakkomandat għandu jkun dak li jmur l-aħjar skont il-prinċipji ta' *best Price/Quality Ratio* (BPQR), b'dan illi r-rizultat tekniku għandu *weighting* ta' sittin fil-mija (60%) u dak finanzjarju erbgħin fil-mija (40%).

Fir-rigward tal-offerta finanzjarja, din tikkonsisti fil-*concession fee* illi kull offerent offra u intrabat illi jhallas lill-Gvern ta' kull sena u dan oltre ċ-ċens ta' € 146,000 fis-sena impost mill-Gvern fuq il-kuntratt t'emfitewzi. Skont is-sejha għall-offerti:

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.

Issa f'dan il-każ, VLP issottomettiet *financial bid form* illi fiha wriet b'mod mill-aktar ċar illi hija kienet qed toffri *concession fee* ta' € 1,200,000 **fis-sena** (Dok **VLP1** anness). Ma kien hemm ebda dubbju illi l-offerenti kienet qed tirreferi għal flas ta' *concession fee* **fis-sena**, illi jekk tiġi multiplikata b'ħamsa u sittin (ċjoe għal kull sena taċ-ċens) twassal għal total ta' tmienja u sebghin miljun Euro (€ 78,000,000¹). Dan jirrizulta wkoll mill-*financial projections* u *cash flows* sottomessi mill-Offertant Rakkomandat. Dan ifisser illi l-offerta ta' VLP hija l-ogħla waħda – ferm ogħla, fil-fatt, mit-tieni l-ogħla offerta, li hija fl-ammont totali ta' € 40,707,030, ftit iżjed minn nofs dak li offriet VLP.

Fit-tender response format VLP reġgħet niżżlet dan l-istess ammont ta' € 1,200,000 u mhux il-*concession fee* multiplikata b'ħamsa u sittin. Eventwalment irrizulta però illi l-Awtorità Kontraenti kienet qed tistenna illi t-total fit-tender response format jirrifletti t-total ta' 65 sena. Wieħed jista' jifhem għalfejn VLP interpretat dan ir-rekwiżit mod ieħor, billi t-Tender Response Format kien kemmxajn ambigwu, fis-sens illi:

¹ Għal kull bwon fini, jingħad illi t-total korrett tal-*concession fee* fil-verita' ma seta' jaħdmu hadd mill-offerenti, u dan għaliex is-sejha għall-offerti trid illi l-*concession fee* tiżdied skont l-għoli tal-hajja li, ovvjament, ma jistax jiġi mbassar minn issa.

- Fuq nett jindika “year 0”, li jagħti x’jifhem illi it-“total” jirreferi għas-somma pagabbli fl-ewwel sena;
- Id-diçitura “Grand total including Concessions Fees covering the Contract Period, but Exclusive of VAT” hija wkoll mhux ċara għal kollox, għaliex jekk kien mistenni li wieħed juri t-total għal 65 sena, għalfejn hemm referenza għal “grand total including concession fees?”
- “Contract Period” mhijiex frażi definita fl-RFP (illi fi bnadi oħra jirreferi għal “Concession Period” u mhux “Contract Period”)

Year 0		
Criterion	Value	Unit
Grand total including Concessions Fees covering the Contract Period but Exclusive of VAT	1,200,000	€
Total Values for Envelope		
Total Value	1,200,000.00	€

Dan wassal biex meta infethu l-offerti u ġew ippubblikati l-*concession fees* rispettivi tal-partijiet, deher illi l-offerta ta’ VLP kienet biss ta’ € 1,200,000. Dan però ma kienx il-każ, għaliex mill-*financial bid form* u l-*projections/cash flows* jirriżulta ċar illi dan l-ammont kien qed jiġi offert għal kull sena u mhux, kif issostni Katari, matul il-medda tat-terminu taç-ċens.

Katari ssostni illi kien biss “skont l-Awtorità Kontraenti” illi l-*concession fee* ta’ € 1,200,000 kienet waħda annwali u li din ma kinitx hliet “konġettura”. Iżżid tgħid illi f’kull każ, skont is-sejha għall-offerti stess, f’każ ta’ diskrepanza bejn l-informazzjoni mogħtija fil-Financial Bid Form u l-*grand total fit-tender response format*, “the latter shall prevail”. Għalhekk, tgħid Katari, l-Awtorità Kontraenti ma għandha ebda għażla għajr li tqis l-offerta ta’ € 1,200,000 bħala waħda “anqas mill-minimu” u għalhekk, “miżera u skwalifikabbli”.

Il-fatti però juru mod ieħor. Jibda biex jingħad illi l-Kumitat t'Evalwazzjoni kellu quddiemu il-*Financial Bid Form* li kien jagħmilha ċara illi l-offerta ta' € 1,200,000 kienet **fis-sena** kif ukoll il-*projections*. Għalhekk, mhux il-każ illi l-Awtorità Kontraenti "interpretat" l-offerta kif dehrilha jew "fehmet l-offerta" a favur l-offerent rakkomandat. Għal kuntrarju, għal min kien qed jevalwa l-offerta kellu jkun ċar mill-bidunett illi t-total fit-*tender response format* kien jirreferi għal *concession fee* ta' sena, b'dan illi jekk l-Awtorità Kontraenti riedet tara t-total għal 65 sena, il-*concession fee* ta' sena (€ 1,200,000) kellha tiġi multiplikata b'65.

B'żieda ma' dan, kemm l-RFP innifsu, kif ukoll il-*General Rules Governing Tenders*² jippermettu soluzzjoni f'każ fejn: **the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable**. Dan jirriżulta mill-RFP, kif ukoll minn Klawżola 17.1(e) tal-*General Rules* illi jgħidu:

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.

Klawżola 17.3 tal-*General Rules* imbagħad tispeċifika:

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).

² Verżjoni 4.5, applikabbli għal din is-sejħa għall-offerti partikolari.

Huwa proprju dak li għamlet l-Awtorità Kontraenti f'dan il-każ fejn, iffaċċjata b'sitwazzjoni fejn kjarment l-*concession fee* ta' sena ma għetx multiplikata, talbet konferma/kjarifika lil VLP kif ġej:

Select	Clarification ID	Request for	Title of Request	Question Attachment	Description	Answ Attac
<input type="radio"/>	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.	
<input type="radio"/>	4	Clarification	Validity of Offers Extension		"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 30th January 2024. Kindly	

VLP irrispondiet għal din it-talba għal konferma billi kkonfermat (anke jekk dan kien ovvju mill-bidunett), illi l-offerta tagħha tassew kienet ta' € 78,000,000.

Fuq din il-baži, l-offerta ta' VLP kienet kjarment l-ogħla waħda b'dan illi hija hadet il-punti massimi taht l-offerta finanzjarja (40%). Jirrizulta illi mil-lat tekniku, l-offerta tagħha wkoll kienet l-aħjar waħda (b'98 punt), biex b'hekk, b'applikazzjoni tal-*price/quality ratio*, VLP hija fuq quddiem nett.

C. Sottomissjonijiet legali

Mogħti l-isfond fattwali tal-vertenza, VLP sejra issa tagħmel xi sottomissjonijiet ta' natura legali.

VLP ġja spjegat fit-taqsima preċedenti illi:

- (i) Il-*concession fee* offerta minnha kienet kjarment ta' € 1,200,000 fis-sena (u mhux fuq medda ta' 65 sena). Dan jirriżulta ċar minn numru ta' fatturi fosthom
 - (a) il-fatt illi dan jingħad b'mod mill-aktar ċar fil-*financial bid form*
 - (b) il-fatt illi offerta ta' € 1,200,000 fuq medda ta' 65 sena tant hija baxxa illi hija ferm anqas mill-minimu mitlub fis-sejha għall-offerti – ma kien jagħmel sens għal ebda offerent li jagħmel offerta li jaf li mhux ser tikkwalifika.
- (ii) F'kull każ, hija ġiet mitluba tikkonferma dan, ai termini ta' proċedura li hija prevista kemm fl-RFP kif ukoll fil-*General Rules Governing Tenders*.

Katari, madanakollu, issostni illi l-offerta ta' VLP kellha tiġi mwarrba, taht il-prinċipju ta' *self-limitation*. F'dan ir-rigward, hija tikkwota d-deċiżjoni tal-Qorti tal-Appell fil-każ tal-NQUAYMT. Madanakollu, il-fattispeċji ta' dik il-kawża kienu ferm differenti minn dawk illi għandu quddiemu dan il-Bord illum. Fil-każ ta' NQUAYMT, il-problema kienet illi għal darba, tnejn, tlieta l-offerent ma tax dak li ġie espressament mitlub, anzi, skont il-Qorti, pprova jżerżaq informazzjoni ġdida meta huwa kien intalab espressament kjarifika fuq informazzjoni ġja mogħtija:

Wara li l-konsorzju appellat, fl-offerta oriġinali, indika proġett hażin tas-sub-kuntrattur minnu magħżul, l-awtorita` kontraenti ppermettiet lill-konsorzju appellat ir-rettifika fuq din il-kwistjoni. Iżda l-konsorzju appellat ma ndikax kif mitlub l-esperjenza li allegatament kellu s-sub-kuntrattur magħżul fuq xogħlijiet ta' "*soil consolidation using vertical drains*". L-awtorita` kontraenti talbet kjarifika sabiex jispjega fejn fl-ESPD tista' tinstab l-informazzjoni mitluba fuq din l-esperjenza. Il-konsorzju appellat hareġ b'żewġ dati li ma kinux imdahħla fid-dokumenti. Għalhekk, għamel sew il-bord ta' evalwazzjoni li ma aċċettax l-offerta tal-konsorzju appellat.

Il-punt tal-Qorti kien illi Awtorit  Kontraenti, m'għandhiex issalva offerta akkost ta' kollox billi tibqa' titlob kjarifiki *ad infinitum*.

Fil-każ odjern pero, għandu semmai japplika l-prinċipju ta' proporzjonalita', kuncett illi fl-ambitu tal-kuntratti pubbliċi g e rikonoxxut kemm il-darba kemm mill-Qorti Ewropeja tal-Ġustizzja, kif ukoll minn dan il-Bord ta' Reviżjoni u mill-Qorti tal-Appell. F'dan ir-rigward, l-Appellanti tagħmel referenza għad-deċiżjoni "klassika" fl-ambitu Malti, u  joe *Schembri Barbros Limited et v Il-Korporazzjoni għas-Servizzi tal-Ilma, Id-Direttur Ġenerali (Kuntratti) u Rockcut Limited* ³ i da wkoll o rajn, b hal *Pharma.MT Limited v Direttur tal-Kuntratt et*⁴.

Il-prinċipju ta' proporzjonalita' jitlob illi offerta m'għandhiex tiġi mwarrba jekk l-informazzjoni korretta tista' tinkiseb minn band'o ra fl-istess offerta u/jew tramite kjarifika u/jew, kif permess f'dan il-każ, billi sar kalkolu aritmetiku korrett mill-Awtorit  Kontraenti.

F'dan ir-rigward, VLP tagħmel l-osservazzjonijiet li  ejjin:

- (i) Il-*Grand Total* jista' jiġi kalkulat faċilment billi wiehed jimmultiplika l-*concession fee* bin-numru ta' snin ta - ens. Dan mhijiex "konġettura" jew, fi kliem Katari, "interpretazzjoni", i da sempliciment e ercizzju matematiku ibba at **fuq informazzjoni faċilment disponibbli fl-offerta nfisha** (speċifikament, fil-*Financial Bid Form* u l-projections);
- (ii) L-ammont muri b hala *grand total* fil-fatt huwa kjarament il-*concession fee* annwali kif murija fi bnadi o ra fl-offerta. M'għandu jkun hemm ebda dubbju

³ Qorti tal-Appell (Superjuri) 31.01.19

⁴ Qorti tal-Appell (Superjuri) 30.03.22

f'moħħ l-*Evaluation Committee*, l-Awtorità Kontraenti u, jekk niġu għal dan, f'moħħ il-membri ta' dan il-Bord, illi n-nuqqas ta' multiplikazzjoni tal-*concession fee* kien żball ġenwin u mhux, ngħidu aħna, xi manuvra biex l-offerenti jikkwota żewġ prezzijiet differenti biex eventwalment jagħzel dak li jaqbillu. Korrezzjonijiet fl-offerta finanzjarja huma ġeneralment projbiti proprju meta jippermettu lill-offerent biex ibiddel l-offerta tiegħu tramite support "kjarifika" li fil-verita' twassal għal bidla fl-offerta. Dan pero' żgur mhux il-każ hawnhekk, għar-raġunijiet li ġa ġew spjegati.

- (iii) Huwa proprju għalhekk illi l-RFP innifsu (kif ukoll il-*General Rules*) jippermettu korrezzjoni fejn it-total "can be arithmetically worked out".

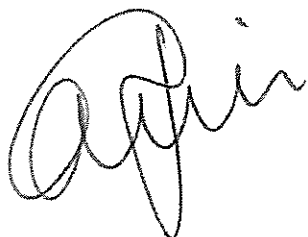
Dan il-Bord stess ta' numru ta' deċiżjonijiet fejn, abbażi ta' prinċipju ta' proporzjonalità iippermetti korrezzjonijiet u/jew kjarifiċi f'sitwazzjonijiet simili, dment illi irriżultalu ċar illi l-offerent ma kienx qed jipprova jieħu xi vantaġġ indebitu mis-sitwazzjoni kif intqal. Issir referenza, ngħidu aħna għad-deċiżjoni numru 1444 (Professional Services of a Contracts Manager for the L-Iklin Local Council)⁵. Sinjifikanti wkoll il-każ 1689, fejn il-Bord aċċetta bħala prinċipju l-possibilità ta' korrezzjoni, iżda sab illi l-offerent in kwestjoni (b'differenza mill-każ odjern) ma kienx aċċetta l-korrezzjoni kif proposta mill-*Evaluation Committee* iżda minflok ipprova jibdel l-offerta tiegħu.

Huwa għalhekk sottomess illi d-deċiżjoni tal-Awtorità Kontraenti kienet korretta, ġusta u in linea mal-prinċipji legali viġenti.

⁵ 22 ta' Mejju, 2020;

D. Għeluq

Għalhekk, VLP bħala l-Offerent Rakkomandat, filwaqt illi tiriserva illi tagħmel sottomissjonijiet ulterjuri u tressaq provi relevanti waqt is-smiegħ, tissottometti illi l-oġġezzjoni ta' Katari għandi tiġi miċhuda u li d-deċiżjoni li biha VLP giet identifikata bħala r-*Recommended Bidder* għandha tiġi konfermata.



Joseph Camilleri

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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>		

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