

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 MSP/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 European School of English Limited proprio as a member of Iconic Hotel Malta – Nobu Consortium (the “**Appellant**”) on 12 February 2024 (the “**Appeal**”).
2. The Contracting Authority strongly rebuts the Appellant’s Appeal and the grievances raised therein. The 4 grounds of appeal raised by the Appellant ought to be rejected as follows:
 - a. Inadmissibility of the Appeal: The Appellant’s Appeal is inadmissible because the Appellant could not lodge this Appeal alone (see Section B);
 - b. Inadmissibility of the First Ground of Appeal: The Appellant’s grievance is inadmissible at law because it has no utility to the outcome of this Appeal (see Section C);
 - c. First Ground of Appeal: The Appellant’s Proposal did not satisfy the Gearing Ratio (see Section D);
 - d. Second Ground of Appeal: Successful Tenderer has submitted the highest Yearly Concession Fee (see Section E);

- e. Inadmissibility of the Third Ground of Appeal: The Appellant's grievance is inadmissible at law because the Appellant has acquiesced to any extensions to the deadline and the remedy at law is now extinguished (see Section F);
 - f. Third Ground of Appeal: The extension of the deadline was necessary and was not motivated by any advantage to any bidder (see Section G);
 - g. Inadmissibility of the Fourth Ground of Appeal: The Appellant's grievance is inadmissible at law because the Appellant has acquiesced to the procurement documentation and the remedy at law is now extinguished (see Section H);
 - h. Fourth Ground of Appeal: The award methodology in the RFP exceeds the minimum requirements in the law (see Section I);
 - i. Inadmissibility of the Eighth Demand (see Section J).
3. Before the Contracting Authority addresses the various grounds 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

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

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. The property will revert to Government upon the termination of the Concession.
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”.

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.

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.

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 would be duty bound to pay the ground-rent *and* the Concession Fee.

13. The RFP was subsequently published on ePPS on 27 November 2022.
14. The RFP generated market interest with over 7 tenderers submitting 8 proposals by 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. Inadmissibility of the Appeal: The Appellant’s Appeal is inadmissible because the Appellant could not lodge this Appeal alone

17. The Appeal is inadmissible because it has been lodged in the name of the Appellant *only* and Maltese law requires that ALL economic operators to a joint venture exercise the remedy in terms of Regulation 106 of the CCR.
18. The Appellant *ex admissis* exercised the remedy in terms of Regulation 106 of the CCR “*proprio as a member of Iconic Hotel Malta – Nobu Consortium*”. The Appellant has not exercised this right for and on behalf of the consortium and/or for and on behalf of the other member to the consortium—Arrigo Group of Hotels Limited (C3895).
19. The Contracting Authority submits that where a bid was submitted by a group of economic operators in a temporary form, such as a joint venture, the proposal is the property of all economic operators to the joint venture. Therefore, and if the remedy in terms of Regulation 106 of the CCR is to be exercised, it must be exercised in the name of ALL economic operators forming part of the joint venture.

20. Where only one member of a joint venture appeals a contract authority's decision taken after the closing date for submission of tenders, the other members of that joint venture have tacitly accepted that contracting authority's decision if they are not party to the appeal because the remedy in terms of Regulation 106 of the CCR is no longer available to them.
21. The Contracting Authority further submits that Maltese law requires that any one partner cannot decide to lodge an appeal in terms of Regulation 106 of the CCR without the other partners in the joint venture, or at the very least, without the authority to represent those other partners in the exercise of that remedy.

This is also because the remedy, if it is eventually successful, will have a material effect on the other partners in the joint venture who agreed to joint and several liability with the partners.

22. The Contracting Authority submits that this is evident from the jurisprudence of the Maltese courts.
23. In ***Signal 8 Security Services Malta Limited vs Bonnici Bros. Ltd et al***,⁴ the First Hall Civil Court held that:
- a. First, joint ventures within the context of public procurement do not have separate legal personality.
 - b. Second, that the name attributed to the joint venture, in this case BM Tunnel Joint Venture, was just a trade name.
 - c. Third, at least within the context of a debt recovery claim by a supplier engaged by one of the members of the joint venture, that ALL members of the joint venture, in this case MDM Costruzione Generali srl and Bonnici Brothers Contractors Ltd had to be sued.

On the third, and last point, the Court said:

*24. Judicial proceedings filed against a consortium in the said circumstances cannot be filed **without also involving the members that form part of the said consortium** because as we have seen the consortium does not have separate legal personality. [...]*⁵

⁴ (19 October 2023) [Ref. 937/2016/RGM].

⁵ "Proċeduri ġudizzjarji kontra konsorzju f'tali ċirkostanzi ma jistgħux jiġu istitwiti mingħajr ma jkunu wkoll imsejha l-membri li jikkomponu tali konsorzju u dan għaliex kif rajna il-konsorzju m'għandux persunalità ġuridika distinta. [...]"

A contrario sensu, since judicial proceedings should be filed against ALL members of such a joint venture because it does not have separate juridical personality, then as a matter of Maltese law, judicial proceedings ought to be filed by ALL such members.

24. In the same vein, in ***Bonnici Bros Projects Limited et vs Ministeru għas-Saħħa***,⁶ the Court of Appeal rejected a plea that the appeal application was null where the appeal before the PCRB and then before the Court of Appeal was correctly filed. The appeal application was filed in the name of ALL economic operators forming part of the joint venture SP BB International JV—Bonnici Bros Projects Ltd and Shapoorji Pallonji (Malta) Limited. The Court had the following to say on the issue:

*8. If the consortium does not have legal personality the name SP BB International JV is only a firm, or a trade name: the name by means of which a person does business. In the present case SP BB International JV is a firm name that Bonnici Bros. Projects Limited and Shapoorji Pallonji (Malta) use to run a joint business. **The persons who run the business, and who bind themselves with obligations are those two companies and not the firm name which is just a name that identifies to the two companies together.***

9. Consequently, when the appeal application states that the application being filed by SP BB International JV, what is really being stated is that it is being filed by the two companies jointly, and not by an entity that does not have legal personality, because the name is only used to identify the person, and in the present case the name is used to identify two members of the consortium. The fact that the parties to those proceedings are Bonnici Bros. Projects Limited and Shapoorji Pallonji (Malta) emerges clearly from the names indicated in the application, which also clearly shows that SP BB International JV is a firm through which the two companies are known for the purposes of this business.

*10. **This means that the appeal application was done properly, and there isn't the nullity that CMC is claiming there is.***⁷

⁶ (30 July 2018) [Ref. 235/2018].

⁷ 8. *Jekk il-konsorzju ma għandux personalità guridika l-isem SP BB International JV huwa biss ditta, jew trade name: l-isem li bih persuna tinnegozja. Fil-każ tallum SP BB International JV huwa d-ditta li biha Bonnici Bros. Projects Limited u Shapoorji Pallonji (Malta) jmessu n-negozju li għandhom flimkien. Il-persuni li jmessu n-negozju, u li jiksbu u jintrabtu b'obbligazzjonijiet, huma dawk iż-żewġ soċjetajiet u mhux id-ditta li hija biss isem li tidentifikahom it-tnejn flimkien.*

25. In **Anthony Bezzina noe vs Direttur tal-Kuntratti**,⁸ the Court of Appeal held that: (i) the consortium had no separate juridical personality; and (ii) if the “consortium” wanted to lodge a public procurement remedy, the case should have been brought by both parties to the Consortium Agreement—in this case Bezzina Maritime Services Ltd and Hydrobudova SA,—and definitely not by the director of Bezzina Maritime Services Ltd in the name of the consortium:

Since -the “Bezzina-Hydrobudowa Consortium” is an entity that never existed, it does not have legal personality and neither can it have juridical interest and locus standi to file the lawsuit in its name. In fact if there were some rights which were violated, they were not the rights of the -“Bezzina-Hydrobudowa Consortium” but the rights of Bezzina Maritime Services Ltd and of Hydrobudova SA, which were the two companies that presented the documents for prequalification separately from each other (although every company had specified its intention to enter into a joint venture with the other company) and therefore the case had to be filed if anything by these two companies and not by “Bezzina-Hydrobudowa Consortium” because these two individual companies have the juridical interest required by law.⁹

26. The Contracting Authority further submits that by application of the established principles of Maltese civil procedural law, *inter alia* that of the requisite *integrità tal-gudizzju*, ALL economic operators forming part of a joint venture must submit the appeal.

9. Għalhekk, meta fir-rikors tal-appell jingħad illi r-rikors qiegħed isir minn SP BB International JV, li qiegħed jingħad hu illi qiegħed isir miż-żewġ soċjetajiet flimkien, u mhux li qiegħed isir minn entità li ma għandhiex personalità, għax l-isem huwa biss dak li bih tiġi identifikata l-persuna, u filkaż tallum l-isem qiegħed jidentifika liż-żewġ membri tal-konsorzju. Li fil-fatt il-partijiet f’dawn il-proċeduri huma Bonnici Bros. Projects Limited u Shapoorji Pallonji (Malta) jidher ċar mill-occhjo tar-rikors, li juri wkoll ċar li SP BB International JV huwa d-ditta li biha huma magħrufa ż-żewġ soċjetajiet għall-għanijiet ta’ dan in-negozju.

10. Ir-rikors tal-appell għalhekk sar sew, u ma hemmx in-nullità li qiegħda tara CMC.

⁸ (26 June 2009) [Ref. 170/2002/1].

⁹ Għaladarba l-“Bezzina-Hydrobudowa Consortium” hija entità li qatt ma eżistiet, isegwi li ma jistax ikollha personalità ġuridika u lanqas ma jista’ jkollha interess ġuridiku u locus standi biex tistitwixxi azzjoni f’isimha. Filfatt jekk kien hemm xi drittijiet li ġew leżi, ma kienux iddrittijiet tal-“Bezzina-Hydrobudowa Consortium”, iżda kienu invece ta’ Bezzina Maritime Services Ltd u ta’ Hydrobudova SA, iż-żewġ kumpaniji li fil-fatt kienu pprezentaw id-dokumenti tal-prekwalifikazzjoni separatament minn xulxin (għalkemm kull kumpanija kienet specifikat l-intenzjoni tagħha li tagħmel joint venture ma’ l-oħra) u għalhekk il-kawża kellha tiġi se mai istitwita minn dawn iż-żewġ kumpaniji u mhux mill-“Bezzina-Hydrobudowa Consortium” għaliex huma dawn iż-żewġ kumpaniji individwali li għandhom l-interess ġuridiku rikjest mil-liġi.

27. Therefore, the Contracting Authority submits that this Honourable Board should set aside the Appeal.

C. Inadmissibility of the First Ground of Appeal: The Appellant’s grievance is inadmissible at law because it has no utility to the outcome of this Appeal

28. In brief, and by means of the Appellant’s first ground of appeal, the Appellant is claiming that its proposal satisfied the selection criteria, namely, the Gearing Ratio requirement, and therefore, its proposal was wrongly disqualified.

29. The Contracting Authority submits that, even if *in arguendo*, the Appellant were right (which it is not) and its proposal would have proceeded to the subsequent phases of the evaluation, this would not have changed the recommendation of the RFP to the Successful Tenderer.

This is because the Appellant’s proposal would still not have been the first ranking proposal even if it obtained the *full* technical score.

30. Clause 6.1 of the RFP provided that the award criteria for the RFP will be based on the best price quality ratio (“**BPQR**”) with a weighting ratio of 60% to the technical aspect of the offer and a weighting ratio of 40% to the financial aspect of the offer.

31. By applying this formula, the evaluation committee ranked the Successful Tenderer in the first place and Katari Hospitality JV in the second place as follows:

Qualitative and Technical Score

$$= \frac{\text{Average Qualitative and Technical Score of the Respective Offer}}{\text{Highest average Qualitative and Technical Score}} \times \text{Technical Weight}$$

Technical Score

$$\text{Technical Score}_{\text{Valletta Luxury Projects}} = \frac{98}{98} \times 60 = 60$$

$$\text{Technical Score}_{\text{Katari Hospitality JV}} = \frac{96}{98} \times 60 = 58.775$$

Financial Score

$$\text{Financial Score}_{\text{Valletta Luxury Projects}} = \frac{1,200,000}{1,200,000} \times 40 = 40$$

$$Financial\ Score_{Katari\ Hospitality\ JV} = \frac{626,262}{1,200,000} \times 40 = 20.87$$

Overall Best Price Quality Ratio (BPQR) Evaluation	Valletta Luxury Projects	Katari Hospitality JV	Iconic Hotel Malta – Nobu Consortium
Technical Score	60	58.775	0
Financial Score	40	20.87	0
Overall Price Quality Ratio Score	100	79.645	0

32. If, *in arguendo*, the Appellant obtained the highest possible Technical Score, nothing would have changed: the Successful Tenderer would still have come first, as indicated by the calculations shown below.

Hypothetically, and assuming that the Appellant would have been allocated the highest score of 100 for all Technical Scoring—resulting in a Weighted Average Technical Score of 60—the following hypothetical scores would result given that the Appellant submitted a Yearly Concession Fee of €605,129:

Technical Score

$$Technical\ Score_{Valletta\ Luxury\ Projects} = \frac{98}{100} \times 60 = 58.8$$

$$Technical\ Score_{Katari\ Hospitality\ JV} = \frac{96}{100} \times 60 = 57.6$$

$$Technical\ Score_{Iconic\ Hotel\ Malta-Nobu\ Consortium} = \frac{100}{100} \times 60 = 60$$

Financial

Score

$$\text{Financial Score}_{\text{Valletta Luxury Projects}} = \frac{1,200,000}{1,200,000} \times 40 = 40$$

$$\text{Financial Score}_{\text{Katari Hospitality JV}} = \frac{626,262}{1,200,000} \times 40 = 20.87$$

$$\text{Financial Score}_{\text{Iconic Hotel Malta-Nobu Consortium}} = \frac{605,129}{1,200,000} \times 40 = 20.174$$

HYPOTHETICAL Overall Best Price Quality Ratio (BPQR) Evaluation	Valletta Luxury Projects	Katari Hospitality JV	Iconic Hotel Malta – Nobu Consortium
Technical Score	58.8	57.66	60
Financial Score	40	20.87	20.17
Overall Price Quality Ratio Score	98.8	78.53	80.17

Therefore, and in such a *hypothetical* scenario, where the Appellant’s offer is deemed to satisfy the selection criteria and assuming it obtained a full Technical Score in the technical evaluation, the Appellant would not have ranked first. The Successful Tenderer would be re-confirmed as the first ranking.

In view of the above, the Contracting Authority submits that, in any case, the Appellant is *not* harmed because of this alleged grievance and the outcome of the evaluation would not change even if the Appellant were right—which it isn’t.

33. Therefore, the Contracting Authority submits that this Honourable Board should set aside this first ground of appeal, irrespective of the merits of the issue.

D. First Ground of Appeal: The Appellant's Proposal did not satisfy the Gearing Ratio

34. In brief, and by means of this first ground of appeal, the Appellant is saying that it did satisfy the Gearing Ratio requirement in the RFP's selection criteria and that it is the evaluation committee that misinterpreted this requirement.
35. Save for the inadmissibility issues raised on this issue in the preceding Section C, the Contracting Authority rebuts this allegation and restates that the Appellant, specifically, and not the Arrigo Group of Hotels Limited, did not satisfy the Gearing Ratio requirement. It is the Appellant's interpretation of the Gearing Ratio which is wrong and which was not adopted in any one of the other 6 proposals.
36. Before the Contracting Authority explains in further detail why the Appellant did *not* satisfy the Gearing Ratio requirement, it must be said that:
 - a. The RFP provided selection criteria on economic and financial standing and on technical and professional standing.
 - b. With respect to economic and financial standing, the RFP required 5 different criteria, in particular:
 - i. Tenderers had to provide audited financial statements 3 consecutive years between 2018 and 2021. In the case of joint ventures each member had to submit these audited financial statements.
 - ii. Tenderers had to satisfy a Current Ratio of not less than 0.75 and this had to be applied as an average of 3 consecutive years between 2018 and 2021. In the case of joint ventures each member had to satisfy this Current Ratio.
 - iii. Tenderers had to satisfy a Gearing Ratio of not more than 3 and this had to be applied as an average of 3 consecutive years between 2018 and 2021. In the case of joint ventures each member had to satisfy this Gearing Ratio.
 - c. The tenderer's submission for these selection criteria on economic and financial standing had to be for the same period. For example, if the tenderer chooses to submit audited financial statements for period years 2018, 2019 and 2020, then cumulative turnover, current ratio and gearing ratio must be for the same period.
37. Now, in this case, the Iconic Hotel Malta – Nobu Consortium chose the period 2018 – 2020. However, and when it set out its calculations for the Current Ratio and

Gearing Ratio of each of the Appellant and the Arrigo Group of Hotels Limited, it was evident to the evaluation committee that:

- a. the Current Ratio was based on an average of the total of current assets of 2018, 2019 and 2020 as against an average of the total of current liabilities of 2018, 2019 and 2020;
- b. while the Gearing Ratio was based on an average of the total of debt of 2018, 2019 and 2020 as against the average of the total of equity of 2018, 2019 and 2020.

Based on these calculations, both the Appellant and the Arrigo Group of Hotels Limited “satisfied” the Current Ratio and Gearing Ratio requirements in the RFP.

However, this was not the correct methodology to calculate the Current Ratio and the Gearing Ratio.

38. Rather, and the requested methodology according to the RFP and in line with industry standards, was to calculate the Current Ratio and the Gearing Ratio based on an average of the 3 respective ratios achieved for each year within the financial period chosen by the tenderer.
39. In this specific case, the evaluation committee was able to *correctly* calculate the Current Ratio and the Gearing Ratio of the Appellant and the Arrigo Group of Hotels Limited.

While both satisfied the Current Ratio, the Appellant did *not* satisfy the Gearing Ratio.

40. The Contracting Authority humbly submits that the Appellant appears to have reverse engineered the methodology for the calculation of the Gearing Ratio such that it passes this test.
41. This is evident from the illustrative table below.

Appellant	2018	2019	2020	Average
Total debt	€836,628	€800,177	€1,801,039	€1,145,948
Total equity	€808,628	€284,848	€231,458	€441,645
Ratio				2.59

The Appellant calculated the “Gearing Ratio” by averaging out the total of total debt for 2018-2020 as against the average of the total of total equity for 2018-2020. This

achieves a Gearing Ratio of 2.59 which is “not more than 3”, and therefore, would satisfy the requirements in the RFP.

However, the Appellant did so only because if it had averaged out the Gearing Ratio, as the RFP requested, the following would have been its result:

Appellant	2018	2019	2020	Average
Total debt	€836,628	€800,177	€1,801,039	
Total equity	€808,628	€284,848	€231,458	
Ratio	1.03	2.81	7.78	3.88

This would have meant that the Appellant would have failed the Gearing Ratio requirement “of not more than three (3)” with an average gearing ratio of 3.88 as above, resulting in a “more than 3” average.

42. Given that the selection criteria on financial and economic standing are a Note 2 matter, the evaluation committee afforded the Iconic Hotel Malta – Nobu Consortium an opportunity to rectify its submission. However, the consortium refused to avail itself of this opportunity and rather stuck to its guns and insisted that *its* interpretation of the Gearing Ratio is the correct one.

On this basis, the evaluation committee also found that the Appellant refusal to rectify the proposal and to insist on *its* interpretation of the RFP constituted a “disagreement” with the RFP which led to the Appellant’s proposal being disqualified.

43. On the matter relating to the rectification request—which was specifically addressed by the Appellant, the Contracting Authority would like to clarify that:
- a. 7 December 2023 is *not* in the “middle of the Christmas festivities” which customarily start later in the month closer to 25 December. In any case, and according to a manual notification on ePPS issued by the Department of Contracts on 10 November 2023, the relevant period in December 2023 to be avoided was that between 22 December 2023 and 3 January 2024: “*Ancillary procurement tasks with a set deadline (such as Clarification Meetings, Site Visits, Request for Additional Information) shall as much as possible not coincide with the aforementioned dates.*”.
 - b. The evaluation committee, after the Appellant’s request through ePPS, afforded the full 5 working days as required by the General Rules Governing Tenderers for the rectification—the original request issued on 6 December

2023 erroneously set 13 December 2023 as the deadline, but this was duly extended to 15 December 2023.

- c. The Appellant implored the evaluation committee to extend the deadline to 15 January 2024 because its advisors were purportedly unavailable. The Appellant sent no less than 3 requests for such an extension on 7 December at 17:57, 9 December at 10:14 and 12 December at 15:04.

The evaluation committee, correctly so, ignored such requests given the clear deadlines provided for in the General Rules Governing Tenders.

In any case, and on 26 October 2023, the Appellant had confirmed its acceptance to extend the validity period of the offer until 31 January 2024. Therefore, the Appellant should have had resources mobilised during this period to address any clarifications or rectifications requests from the evaluation committee.

44. As shall be explained in further detail during the hearing, the evaluation committee was guided by no less than 2 technical advisors on this issue: E-Cubed Consultants represented by Professor Gordon Cordina and Professor Philip von Brockdorff—who independently confirmed that the Gearing Ratio was correctly calculated by the evaluation committee.
45. Moreover, the Contracting Authority submits that the evaluation committee interpreted and applied the Gearing Ratio requirement equally with all bidders and consistent with the principle of self-limitation.
 - a. *First*, and if the evaluation committee would have accepted the Appellant's calculation of the Gearing Ratio, it would be treating the Appellant's proposal differently from the other 6 proposals evaluated at this stage and which applied the Gearing Ratio in the same way the evaluation committee did.
 - b. *Second*, and if the evaluation committee would adopt the Appellant's interpretation of the Gearing Ratio requirement, it would be violating the principle of self-limitation given that the RFP is clear and unambiguous.

The Gearing Ratio required was “*formulated [...] in such a way to allow all reasonably well-informed and normally diligent tenders to interpret [it] in the same way*”¹⁰ and this is corroborated by the fact that the remaining tenders interpreted the Gearing Ratio “in the same way”.

¹⁰ C-19/00 SIAC *Construction* (18 October 2001) para 42.

The *contra proferentem* rule has no application in the interpretation of procurement documentation and the line of argumentation suggested by the Appellant is disturbing. If the *contra proferentem* rule, as interpreted by the Appellant, had to be applied on a case-by-case basis in public procurement, it would allow multiple interpretations of the same condition depending on how it would impact each bidder in the process.

46. Therefore, the Contracting Authority submits that this Honourable Board should set aside this first ground of appeal.

E. Second Ground of Appeal: Successful Tenderer has submitted the highest Yearly Concession Fee

47. In brief, and by means of this second 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.

48. 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.

49. *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)"

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.*

50. *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.
51. 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 clear that the Successful Tenderer inputted the Yearly Concession Fee of €1,200,000 as the Grand Total on the Tender Response Format on ePPS.
52. 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.
53. 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 without changing in any way the substance of the offer.

54. 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 49.c.
55. 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.
56. 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.
57. 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.
58. 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.
59. 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.
60. 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.

61. 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.
62. By means of this second ground of appeal, the Appellant must also be suggesting that this Honourable Board completely disregards the principle of proportionality.
63. 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.
64. 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.
65. On a concluding note, the Contracting Authority must say that the Appellant's reference to Clause 6.2 of the General Rules Governing Tenders is completely out of place.

The Appellant must be mixing up the clarifications posted by contracting authorities *prior* to the closing date for the submission of proposals with the clarifications requested from bidders *during* the evaluation. The latter are *never* published and are *never* “notified to the other bidders”. The latter are not regulated by Rule 6.2, but by Rules 15,16 and 17 of the General Rules Governing Tenders.

66. Therefore, the Contracting Authority submits that this Honourable Board should set aside this second ground of appeal.

F. Inadmissibility of the Third Ground of Appeal: The Appellant’s grievance is inadmissible at law because the Appellant has acquiesced to any extensions to the deadline and the remedy at law is now extinguished

67. In brief, and by means of this third ground of appeal, the Appellant is alleging that the RFP is afflicted by a procedural irregularity given extensions to the deadline.

68. The Contracting Authority submits that this third ground of appeal is inadmissible at law because:

- a. the Appellant acquiesced to any extensions to the deadline for the submission of proposals when it submitted its final and binding proposal;
- b. the Appellant has failed to exhaust the remedy at law which was available to it to address this issue.

For the avoidance of doubt, the Contracting Authority refutes the Appellant’s very serious allegations that it acted in such a way to “favour” any specific tenderer, as shall be submitted in further detail in the following Section G.

69. **First**, the Appellant waived any reservation or objection that it may have had on the conduct of the procurement procedure once it submitted its final and binding proposal.

70. The General Rules Governing Tenders provide that the Appellant is taken to accept “in full and in its entirety” the content of the procurement documentation and that the Appellant’s reservations on the procurement procedure are “waived” as a result of submitting a proposal.¹¹

¹¹ General Rules Governing Tenders, Rule 9.4:

In submitting a tender (unless otherwise indicated) a tender offer above 100MB will not be accepted by the system (ePPS), the tenderer accepts in full and in its entirety, the content of this tender document, including subsequent Clarifications issued by the Central Government Authority/Contracting Authority (CGA/CA), whatever the economic operator’s own

71. Therefore, The Appellant's submission of its final and binding proposal must be taken as a sign of trust and confidence in the RFP and the way it was handled by the Contracting Authority.
72. **Second**, the Appellant failed to exhaust the remedy at law which was available to it as soon as it was notified of the clarifications issued by the Contracting Authority duly extending the closing date for the submission of proposals.

The Appellant was put on notice, through manual notifications issued through ePPS on 17 April and then again on 20 April 2023, that the closing date for the submission of proposals was going to be extended. This has been explained in further detail in paragraph 82.

73. The Appellant could have resorted to an application in terms of Regulation 98 of the CCR as soon as these manual notifications were issued, but it did not.
74. It must be said that the remedy in Regulation 98 of the CCR, unlike its counterpart Regulation 262 of the Public Procurement Regulations, can be filed: (i) at least 1 day prior to the closing date;¹² and (ii) without the need for any deposit.¹³

This was a specific choice of the legislator. The legislator opted to amend the relevant remedy in the Public Procurement Regulations and in the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sector Regulations, but not in the CCR. This is deliberate. The legislator wanted to retain the remedy in terms of Regulation 98 of the CCR accessible.

75. The Court of Appeal has consistently refused to consider grievances on the procurement procedure raised by bidders at a late stage and after bids are submitted:

"The appellant should not have exercised this remedy after it submitted its bid and after the evaluation of bids was concluded if it was of the opinion that the procurement procedure was affected by ambiguities".¹⁴

corresponding conditions may be, which through the submission of the tender is waived. Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document.

¹² CCR, Regulation 98.

¹³ CCR, Regulation 105.

¹⁴ *AIB Insurance Brokers Limited vs Awtoritá dwar it-Trasport ta' Malta et*, Court of Appeal (27 October 2021) [Ref. 237/2021/1] para 16: *"Ma kellhiex l-appellanti tiffa' l-offerta tagħha u wkoll thalli li jingħalaq il-proċess tal-evalwazzjoni tal-offerti qabel ma fittex rimedju jekk dehrilha li dak il-proċess kien milqut b'ambigwitatiet"*.

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.¹⁵

76. The Appellant *could* have challenged the alleged irregularity in the extension of the closing date for the submission of proposals, but *never* did.

Once the closing date lapsed, and proposals were submitted *and* opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.

77. Therefore, the Contracting Authority submits that this Honourable Board should set aside this third ground of appeal, irrespective of the merits of the issue.

G. Third Ground of Appeal: The extension of the deadline was necessary and was not motivated by any advantage to any bidder

78. Save for the inadmissibility issues raised on this issue in the preceding Section F, the Contracting Authority submits that the Appellant's allegation that the extensions to the closing date for submission of proposal are "inexplicable" and "specifically aimed to favour Katari Hospitality JV" are unfounded.

79. The Contracting Authority forcefully refutes the Appellant's allegations of impropriety and collusion.

80. The Appellant's allegations were clearly made lightly on baseless inferences and coincidences which only fit within the Appellant's narrative. These allegations unjustifiably harm the Contracting Authority's reputation and the Contracting Authority hereby reserves all rights against the Appellant.

81. The Contracting Authority maintains that the extensions of the closing date for the submission of the proposal were exclusively motivated by the need to address technical limitations in the ePPS system and the Appellant, along with all economic operators, were informed directly of such.

82. The Contracting Authority is hereby setting the record straight on the timeline relevant to this grievance:

¹⁵ (30 June 2021) [Ref. 95/21/1], see paragraph 7.

- a. Indeed, the closing date for the submission of bid was on Wednesday 19 April 2023.
- b. On Wednesday 12 April 2023, one of the eventual tenderers—which was neither the Successful Tenderer or Katari Hospitality JV—flagged a technical issue with the Contracting Authority and the Department of Contracts that ePPS was not allowing the submission of bids which exceeded 100MB.

In brief, and despite what was told to bidders in Clause 1 (General Instructions) of Section 1 – Instructions to Tenderers, the size limitation of ePPS per proposal remained 100MB when it should have been 200MB.

- c. Given this context, the Contracting Authority and the Department of Contracts agreed on extending the closing date for the submission of proposals until 21 April 2023 until European Dynamics, the creator of ePPS, addresses this technical limitation.
- d. On 17 April 2023 at 17:51 (CET), a manual notification was sent to all economic operators associated with the RFP by the Contracting Authority as follows:

*The Contracting Authority wishes to inform all economic operators that in furtherance of the notification issued by the Department of Contracts' IT Unit dated Thursday, March 30, 2023 whereby the Tender Preparation Tool (TPT) Version 5.0.1 has been replaced by the new WebTPT, **a technical matter in relation to the upload limit in the new WebTPT is currently being tackled.***

Therefore, the closing date for submissions of Tenders is being extended from Wednesday 19th 2023 at 09:30 a.m to Friday 21st April 2023 at 09:30a.m.

- e. On 19 April 2023, at 11:34 (CET), another manual notification was sent to all economic operators associated with the RFP by the Contracting Authority as follows:

The Contracting Authority wishes to inform all Economic Operators that the technical matter related to the upload limit has been resolved through the necessary enhancement in the WebTPT.

Economic Operators are being encouraged to submit their submissions as early as possible to avoid last minute traffic. The deadline for the submissions is Friday 21st April 2023 at 9:30a.m.

- f. On 20 April 2023, another eventual tenderer—which was neither the Successful Tenderer nor Katari Hospitality JV—flagged yet another technical issue with the Contracting Authority and the Department of Contracts with the submission of proposals on ePPS.
- g. Although tenderers were permitted to upload multiple bids to overcome the 200MB size limitation imposed by ePPS, the economic operator in question was faced with a technical limitation imposed by ePPS which was preventing it from uploading its proposals.
- h. Given this context, the Contracting Authority and the Department of Contracts agreed on extending the closing date for the submission of proposals by 1 week until 28 April 2023 until European Dynamics, the creator of ePPS, addresses this technical problem
- i. On 20 April 2023 at 15:48 (CET), a manual notification was sent to all economic operators associated with the RFP by the Contracting Authority as follows:

*The Contracting Authority wishes to inform all economic operators that in furtherance of the notification issued by the Department of Contracts' IT Unit dated Thursday, March 30, 2023 whereby the Tender Preparation Tool (TPT) Version 5.0,1 has been replaced by the new WebTPT, **a technical matter in relation to the upload limit in the new WebTPT is currently being tackled.***

Therefore, the closing date for submissions of Tenders is being extended from Friday 21st April 2023 at 09:30a.m to Friday 28th April 2023 at 09:30a.m.

- j. On 26 April 2023 at 09:46 (CET), another manual notification was sent to all economic operators associated with the RFP by the Contracting Authority as follows:

The Contracting Authority wishes to inform all Economic Operators that the Contracting Authority has been informed by

the Department of Contracts that the technical matter has been resolved.

Economic Operators are being encouraged to upload their proposals as early as possible to avoid last minute traffic. The deadline for the submissions is Friday 27th April 2023 at 09:30a.m.

This manual notification was corrected a few minutes after as follows:

The Contracting Authority would like to inform you that in relation to the manual notification issued today, the date should read Friday 28th April 2023 at 09:30am and not Friday 27th April 2023 at 09:30am. This is in line with the notification issued by the Contracting Authority on the 20th April 2023.

83. This timeline of events irrefutably shows that the Contracting Authority and the Department of Contracts have acted correctly and consistent with their duties as contracting authorities; they were motivated by the need to act transparently, to promote genuine competition and to act proportionately.

There is really nothing much more to say on this issue.

84. Therefore, the Contracting Authority submits that this Honourable Board should set aside this third ground of appeal.

H. Inadmissibility of the Fourth Ground of Appeal: The Appellant's grievance is inadmissible at law because the Appellant has acquiesced to the procurement documentation and the remedy at law is now extinguished

85. In brief, by means of this fourth ground of appeal, the Appellant complains that the methodology for the allocation of points to the Qualitative and Technical Score is not appropriate.

86. The Contracting Authority submits that this fourth ground of appeal is inadmissible at law because:

- a. the Appellant acquiesced to the RFP and its conditions when it submitted its proposal;
- b. the Appellant has failed to exhaust the remedy at law which was available to it to address this issue.

87. **First**, the Appellant waived any reservation or objection that it may have had on the procurement procedure once it submitted its final and binding proposal.
88. The General Rules Governing Tenders provide that the Appellant is taken to accept “in full and in its entirety” the content of the procurement documentation and that the Appellant’s reservations on the procurement procedure are “waived” as a result of submitting a proposal.¹⁶
89. Therefore, The Appellant’s submission of its final and binding proposal must be taken as a sign of trust and confidence in the RFP and the way it was handled by the Contracting Authority.
90. **Second**, the Appellant failed to exhaust the remedy at law which was available to it as soon as it was in receipt of the RFP.
91. The Appellant could have resorted to an application in terms of Regulation 98 of the CCR.
92. As already submitted above in Section F, the remedy in Regulation 98 of the CCR, unlike its counterpart Regulation 262 of the Public Procurement Regulations, can be filed: (i) at least 1 day prior to the closing date;¹⁷ and (ii) without the need for any deposit.¹⁸

This was a specific choice of the legislator. The legislator opted to amend the relevant remedy in the Public Procurement Regulations and in the Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sector Regulations, but not in the CCR. This is deliberate. The legislator wanted to retain the remedy in terms of Regulation 98 of the CCR accessible.

93. The Court of Appeal has consistently refused to consider grievances on the procurement procedure raised by bidders at a late stage and after bids are submitted:

¹⁶ General Rules Governing Tenders v4.9, Rule 9.4:

In submitting a tender (unless otherwise indicated) a tender offer above 100MB will not be accepted by the system (ePPS), the tenderer accepts in full and in its entirety, the content of this tender document, including subsequent Clarifications issued by the Central Government Authority/Contracting Authority (CGA/CA), whatever the economic operator’s own corresponding conditions may be, which through the submission of the tender is waived. Tenderers are expected to examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document.

¹⁷ CCR, Regulation 98.

¹⁸ CCR, Regulation 105.

*"The appellant should not have exercised this remedy after it submitted its bid and after the evaluation of bids was concluded if it was of the opinion that the procurement procedure was affected by ambiguities"*¹⁹

94. The Court of Appeal, in its seminal judgment ***Managing Consulting Service Industry (MCSI) Limited vs Direttur tal-Kuntratti et***,²⁰ had specifically refused to consider grievances on the award methodology provided for in the tender dossier within the context of an application in terms of Regulation 270 of the PPR:

*15. Essentially the MCSI's complaint entails that "the tender did not provide the necessary and essential tools to the Evaluation Committee for it to screen the offers on a like with like basis from a technical lens" and that "the principal contention of the appellant company is that both the minimum requirements and the expectations (preferable factors) should have been identified in the tender's terms of reference, and that both of them were necessary and essential in order to screen the technical offers from the Evaluation Committee". The complaint is therefore not that the Selection Committee did not proceed as is required by the conditions outlined in the call for tenders, **but rather that such conditions were not defined.** [...]*

*16. It is therefore evident that this complaint affects a shortcoming that in MCSI's view had already existed prior to when the offers were evaluated, even more so, prior to the lapse of time in which the offers could be made. Although all this affects the decision on the "proposed award of contract" to Brightness JV, and the rejection of MCSI's offer, what MCSI is effectively seeking to contest is that which it considers as "ambiguities of a particular term or clause included in a call for competition" which led to the call for offers to be "in breach of law". Reg. 262 clearly states that such a complaint had to be made "prior to the closing date of a call for competition", **and not as, in today's case, after that date, especially after the decision was made on the award of the contract.**²¹*

¹⁹ *AIB Insurance Brokers Limited vs Awtoritá dwar it-Trasport ta' Malta et*, Court of Appeal (27 October 2021) [Ref. 237/2021/1] para 16: "Ma kellhiex l-appellanti tiffa' l-offerta tagħha u wkoll thalli li jingħalaq il-proċess tal-evalwazzjoni tal-offerti qabel ma tfittex rimedju jekk dehrilha li dak il-proċess kien milqut b'ambigwitatijiet".

²⁰ (17 June 2019) [Ref. 45/19].

²¹ 15. *Essenzjalment, l-ilment ta' MCSI huwa illi "it-tender ma tax l-għodda neċessarji u essenzjali lill-kumitat tal-evalwazzjoni sabiex jgħarbel l-offerti on a like with like basis mill-lenti tenkika" u illi "l-kontenzjoni prinċipali tas-soċjeta appellanti hi li kemm il-minimum requirements u kemm l-expectations (preferable factors) kellhom jġu identifikati fit-terms of reference tat-tender u li t-tnejn li huma kienu neċessarji u essenzjali sabiex isir l-għarbiel tal-offerti tekniċi mill-kumitat*

95. The Appellant *could* have challenged the alleged shortcomings of the RFP with respect to the award methodology before the closing date for the submission of proposals, but *never* did.

Once the closing date lapsed, and proposals were submitted *and* opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.

96. Therefore, the Contracting Authority submits that this Honourable Board should set aside this fourth ground of appeal, irrespective of the merits of the issue.

I. Fourth Ground of Appeal: The award methodology in the RFP exceeds the minimum requirements in the law

97. Save for the inadmissibility issues raised on this issue in the preceding Section H, the Contracting Authority submits that the award methodology in the RFP is in accordance with law.

98. The award methodology for the BPQR was set out in Clause 6 of Section 1 of the RFP. In brief,

- a. The weighting of the BPQR is 60% on the technical score and 40% on the financial score.
- b. *"Each technical offer will be evaluated in accordance with the award criteria and the associated weighting as detailed in the evaluation grid of this tender document (Article 6.3). No other award criteria will be used. The award criteria will be examined in accordance with the requirements as indicated in the Terms of Reference".*
- c. The RFP provided detailed instructions to the tenderers on how to address the criteria and sub-criteria of the BPQR.

talevalwazzjoni". L-ilment, mela, ma huwiex tant illi l-kumitat tal-għażla ma mexiex kif iridu l-kondizzjonijiet tas-sejha għal offerti iżda illi dawk il-kondizzjonijiet ma kinux imfissra. [...] 16. Huwa evidenti, għalhekk, illi dan l-ilment jolqot nuqqas li, fil-fehma ta' MCSI, kien għa' jeżisti qabel ma saret l-ewalwazzjoni tal-offerti u, anzi, qabel ma għalaq iż-żmien li fih setgħu jintefgħu l-offerti. Għalkemm dan kollu jolqot, naturalment, id-deċiżjoni dwar "l-għoti propost fil-kisba ta' kuntratt" lil Brightness JV, u r-rifjut tal-offerta ta' MCSI, dak li MCSI effettivament qiegħda tfittex li timpunja huma dawk li tqis "ambigwitatiet ta' terminu jew klawżola partikolari mdaħħla f'sejha għall-kompetizzjoni" li jwasslu biex is-sejha għal offerti tkun "bi ksur ta' xi ligi". Ir-reġ 262 igħid ċar illi lment bħal dan kellu jitressaq "qabel iddata tal-għeluq ta' sejha għall-kompetizzjoni", u mhux, bħal fil-każ tal-lum, wara dik id-data, u saħansitra wara d-deċiżjoni dwar l-għoti tal-kuntratt.

- d. The score for each criterion was set out clearly as follows:
- i. Design and implementation of the infrastructure: 20 points
 - ii. Environmental Impact-Green Systems: 30 points
 - iii. Management and operations of the investment: 20 points
 - iv. Management and operations of the investment: 30 points

This added up to a total of 100 points.

- e. The RFP also provided the specific score for the sub-criteria under EACH criterion. With respect to the sub-criteria, the RFP also: (i) distinguished whether a sub-criterion is Mandatory or an Add-On; (ii) cross-referred a specific sub-criterion with the relevant section in the technical offer; or (iii) explained what was being asked of the bidder for that sub-criterion in the “Scoring Scheme” column of Clause 6.3.

An example of a criterion and sub-criterion in the RFP can be seen below:

4	Management and operations of the investment		Total Points 30	
a.	<i>Mandatory Criteria</i> Tourism-Oriented Marketing Strategy	Section 1, Executive Summary and Business Plan	10	<i>The marketing plan includes clearly defined activities/interventions that seek to create more awareness about the historical and cultural elements within the lower part of Valletta, thus promoting the location as a tourism destination. (2 points for every such activity up to a maximum of 10 points)</i>

99. The Contracting Authority submits that the award methodology in the RFP, as set out above, complies with the requirements of the law which only require:
- a. The criteria are listed in **descending order of importance**²²—while in this case the Contracting Authority set out not only the criteria and points for each criterion, but also the sub-criteria and the points for each criterion.
 - b. The **criteria shall be accompanied by requirements** which allow the information provided by the tenderers to be effectively verified²³—the RFP provided for a detailed “Scoring Scheme” for EACH sub-criterion which was clearly and unambiguously drafted.

²² CCR, Regulation 79(5).

²³ CCR, Regulation 79(3).

- c. The criteria are **linked to the subject-matter of the concession**—the criteria and the sub-criteria are linked to the subject-matter to the RFP, and in any case, no claim has been raised in this regard.
- d. The criteria are **objective and comply with the general principles of public procurement**.

On this last requirement, the Court of Appeal has already made it clear in *Cateressence Limited et vs Direttur tal-Kuntratti et*²⁴ that: the BPQR criteria on the technical aspect “*necessarily involves subjective opinions*”²⁵ and that what is important is that “*bidders know which are the elements which need to be included in their offer [as indicated in paragraph b above] and that bidders are given an indication of which elements are most important for evaluation purposes [as indicated in paragraph a above]*”.²⁶

The Court of Appeal concluded that:

However, all of this does not mean that for the MEAT process [today BPQR] to be fair it must quantify in an exact and concrete manner how one gets each mark. Indeed, there are cases when the functional duty includes the use of discretion of the person on whom the duty is imposed. There are circumstances where one cannot make objective norms because the circumstances are so fluid and changing that they do not allow the necessary rigidity of the objective norm. In such cases the evaluation must necessarily be subject to the prudent and diligent judgment of the evaluators.

*It is not this Court's task to examine whether, for any particular item, the appellant consortium deserved a point or two more. Rather the Court of Revision must contemplate whether the Evaluation Committee adhered to the established criteria and abided by the parameters outlined in the call for tenders.*²⁷

²⁴ (14 February 2017) [Ref. 380/16].

²⁵ “*Dan l-aħħar aspeġt jinvolti neċessarjament opinjonijiet sogġettivi.*”

²⁶ “*Hu importanti li l-offerenti jkunu jafu liema huma l-elementi li bilfors iridu jiffurmaw parti mill-offerta tagħhom, u jingħataw indikazzjoni ta’ liema elementi ser ikunu l-aktar importanti waqt l-evalwazzjoni.*”

²⁷ “*Dan kollu, pero’, ma jfissirx illi biex il-proċess tal-MEAT [illum BPQR] ikun wieħed gust wieħed irid jikkwantifika bl-eżatt u b’mod konkret kif wieħed igib kull marka. Tabilhaqq ikun hemm każijiet meta d-dmir funzjonali jikkomprendi l-użu ta’ diskrezzjoni tal-persuna li fuqha huwa impost dover.*”

100. Against this context, the Contracting Authority, without prejudice to the inadmissibility objection raised in the preceding Section, cannot but reiterate that the award methodology is not only compliant but exceeds the minimum requirements in the CCR—which have been transposed from the Concessions Directive 2014/23—and therefore, the Appellant’s grievance on this issue is unfounded.
101. Therefore, the Contracting Authority submits that this Honourable Board should set aside this fourth ground of appeal.

J. Inadmissibility of the Eighth Demand

102. The Contracting Authority submits that the eighth demand requested by the Appellant is inadmissible at law and ought to be rejected.
103. That by means of the eighth demand the Appellant is requesting this Board to:

8. Without prejudice to the other demands above, [...] order the cancellation of the Tender Process MSPP/02/2022, inter alia, in accordance with article 90(3) of S.L. 601.03.

104. 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.
105. 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.

Hemm ċirkostanzi fejn wieħed ma jistax jagħmel normi oggettivi minħabba li ċ-ċirkostanzi jkunu tant fluwidi u kanġjanti li ma jippermettux ir-rigidità neċessarja tan-norma oggettiva. F’każijiet bħal dawn levalwazzjoni ta’ bilfors trid tkun soġġetta għall-gudizzju prudenti u diligenti tal-evalwaturi. [...] Mhux kompitu ta’ din il-Qorti li tidhol biex teżamina jekk, għal xi oġġett partikolari, il-konsorzju appellanti kienx haqqu xi punt jew tnejn aktar. Din hi Qorti ta’ revizjoni li dak li trid tara huwa jekk il-kumitat evalwattiv segwiex il-kriterji stabbiliti u jekk mexiex mal-parametri indikati fis-sejfhagħall-offerti.”

106. In the specific case of procurement procedures subject to the CCR, this Board, within the context of the remedy filed in Regulation 106 of the CCR, does *not* have the power to cancel a procurement procedure even if it is “*the best solution in the circumstances of the case*”. The same applies to the Court of Appeal if this case had to go before it.
107. On the other hand, this Board is *expressly* empowered to cancel the procurement procedure within the context of the remedy filed in Regulation 98(e) of the CCR.
108. This must be a specific choice of the legislator. *Ubi lex voluit dixit, ubi noluit tacuit.*
109. After the closing date for the submission of proposals, this Board is not empowered to cancel the RFP.
110. 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 eight demand is inadmissible and ought to be rejected.

K. Procedural and Case Management Considerations

111. 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 Katari Hospitality JV;
 - 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.

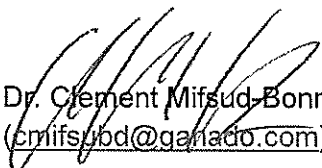
112. **On a concluding note, the Contracting Authority will not object to the refund of the deposit paid by the Appellant if the Appeal is withdrawn in good time before the hearing to be scheduled by this Honourable Board.**

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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