

PUBLIC CONTRACTS REVIEW BOARD

Case 2051 – CT2089/2024 – Works – Demolition, Excavation and Construction Preparatory Works to Transform an Existing Waste Treatment Site into an Urban Greening Project, Marsaskala, Malta

3rd January 2025

The Board,

Having noted the letter of objection filed by Dr Matthew Paris on behalf of DalliParis Advocates acting for and on behalf of Vassallo Builders Ltd, (hereinafter referred to as the appellant) filed on the 21st October 2024;

Having also noted the letter of reply filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Wasteserv Malta Limited (hereinafter referred to as the Contracting Authority) filed on the 31st October 2024;

Having also noted the letter of reply filed by Dr Audrey Marlene Buttigieg Vella and Dr Daniel Inguanez acting for and on behalf of the Department of Contracts (hereinafter referred to as the Department of Contracts) filed on the 30th October 2024;

Having also noted the letter of reply filed by Dr John L Gauci acting for and on behalf of Bonnici Bros Services Ltd (hereinafter referred to as the Preferred Bidder) filed on the 30th October 2024;

Having heard and evaluated the testimony of the witness Ms Claudette Fenech (Representative of the Malta Business Registry) as summoned by Dr Matthew Paris acting for Vassallo Builders Ltd;

Having heard and evaluated the testimony of the witness Mr Daniel Mercieca (Representative of Vassallo Builders Ltd) as summoned by Dr Matthew Paris acting for Vassallo Builders Ltd;

Having heard and evaluated the testimony of the witness Ms Joanne Camilleri (Secretary of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Vassallo Builders Ltd;

Having heard and evaluated the testimony of the witness Perit Miriam Magri (Secretary of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Vassallo Builders Ltd;

Having heard and evaluated the testimony of the witness Mr Jonathan Buttigieg (Representative of Vassallo Builders Ltd) as summoned by Dr Matthew Paris acting for Vassallo Builders Ltd;

Having heard and evaluated the testimony of the witness Mr Jonathan Buttigieg (Representative of Vassallo Builders Ltd) as summoned by Dr Clement Mifsud Bonnici acting for Wasteserv Malta Limited;

Having heard and evaluated the testimony of the witness Mr Jason Grech (Representative of the Department of Contracts) as summoned by Dr Daniel Inguanez acting for the Department of Contracts;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by the legal representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 9th December 2024 hereunder-reproduced.

Minutes

Case 2051 – CT 2089/2024 – Works – Demolition, Excavation and Construction Preparatory Works to Transform an Existing Waste Treatment Site into an Urban Greening Project, Marsaskala, Malta

The tender was issued on the 12th April 2024 and the closing date was the 30th May 2024.

The estimated value of this tender, excluding VAT, was € 5,138,570

On the 21st October 2024 Vassallo Builders Ltd filed an appeal against Wasteserv Malta Ltd objecting to their disqualification on the grounds that their bid was non-compliant at eligibility stage.

A deposit of € 25,693 was paid.

There were six bids.

On the 9th December 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Mr Keith Grech as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Vassallo Builders Ltd

Dr Matthew Paris	Legal Representative
Dr Zack Esmail	Legal Representative
Mr Jonathan Buttigieg	Representative
Mr Daniel Mercieca	Representative (Online)
Mr Carlo Aquilina	Representative (Online)

Contracting Authority – Wasteserv Malta Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Perit Johanna Portelli	Chairperson Evaluation Committee
Ms Joanne Camilleri	Secretary Evaluation Committee
Perit Miriam Magri	Evaluator
Ms Diana Aurora Sanchez	Evaluator
Perit Georgia Favata	Evaluator
Mr Louis Cordina	Representative
Mr Richard Bilocca	Representative

Preferred Bidder – Bonnici Brothers Ltd

Dr John L Gauci	Legal Representative
Perit David Bonnici	Representative
Mr Samuel Bonnici	Representative

Department of Contracts

Dr Audrey Marlene Buttigieg Vella	Legal Representative
Dr Daniel Inguanez	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and noted that there were two preliminary pleas to be dealt with prior to hearing the merits of the case.

Dr Matthew Paris Legal Representative for Vassallo Builders Ltd stated that appellant had submitted a request for information consisting of five questions – of these one was answered, two ignored and not answered and two answered incorrectly. One would hope that the missing replies will be provided in the course of the testimonies to be heard. The rest of the objection can be dealt with in the conclusion of the submissions.

Dr Calleja Legal Representative for Wasteserv Malta Ltd said that the documents which the Contracting Authority had annexed dealt with the points raised under the preliminary pleas and thus these pleas were exhausted.

Dr Paris said that the decision of the Tender Evaluation Committee (TEC) was unjust and the appellant's exclusion was unjust both in form and substance. The Authority claims that two documents were not submitted. The Power of Attorney (P/A) document is there in fact whilst the final and provisional certificate was submitted and the appellant should not have been excluded. The documents allegedly missing were definitely provided as will be proven and appellant complied with what was requested. Even had the documents not been submitted the shortcomings were so negligible that proportionality should have been applied as held in a number of local and European Court cases. Public Procurement Regulation (PPR) 62 requires an offer to be valid *ab initio* – appellant's offer is such and the exclusion was not warranted.

Dr Calleja stated that the fact that a rectification was requested is proof enough that the offer was not valid *ab initio*. The bid was in fact not valid from the very beginning. The rectification requested missing documents but none were submitted in the rectification reply although they eventually turned up late, a month after the rectification request. The fact that the appellant was given the opportunity to rectify is in itself a clear indication of the fair way that this evaluation was conducted. The e-mail sent to submit the documents was irregular as in the General Rules Governing Tenders (GRGT) Rule 15.2 lays down that replies must be submitted on the E-Procurement Platform. In PCRB Case 1191 it was held that submissions by e-mail are irregular and incorrect. The Authority gave the appellant a full opportunity to conform but it still did not comply.

Dr Daniel Inguanez Legal Representative for the Department of Contracts (DoC) said that ultimately the main question of the appeal would turn on a matter of facts and precisely what happened when the appellant tried to submit the documents on the EPPS.

Dr Paris requested that witnesses be heard.

Ms Claudette Fenech (53572M) called to testify by the appellant stated on oath that she is a legal advisor at the Malta Business Registry. She stated that on the 1st May 2024 the directors were the same as those shown on the date of the summons. Similarly in the case of the other party, AC Enterprises Ltd, to the Joint Venture.

Mr Daniel Mercieca (219294M) called to testify online by the appellant stated on oath that he has Microsoft Certification plus several other IT qualifications. He started working for the Vassallo Group around eight years ago and is currently their Infrastructure and Security Manager. Referred to the document tabled by Vassallo Builders Ltd as DOC 7, witness confirmed on oath that the document was prepared by him. The source of the document was Vassallo Builders and the destination was the EPPS server. Witness explained in detail the different entries and details of each column. The report indicates that the connection with the server was completed and the transmitted packet received by

the server. The figure of a handshake in the report indicates that the packet was received. The box highlighted in red in the report indicates the time of the connection with the EPPS and shows the total of kilobytes uploaded – the discrepancy in file sizes can be accounted for through things like the addition of headers etc. Item 5 in the schedule indicates that the data was not received.

Questioned by Dr Mifsud Bonnici Legal Representative for Wasteserv Malta Ltd, witness confirmed that he was an employee of Vassallo Group Ltd and stated that he had never submitted any tenders on the EPPS or replied to any clarification or rectification on EPPS. Witness was not present at the time the clarification was submitted, but confirmed that the document tabled as DOC 7 was prepared by him on the 4th December from data extracted about four months prior. This was requested by Mr Ryan Portelli an employee of Vassallo Builders. Mr Portelli was not involved in the preparation of the mentioned report. According to the witness the second screen shot was done from the Company's own traffic network panel and the third report extracted from the One drive of Mr Portelli. Witness agreed that there were assumptions in the compilation of the report and that the highlighted part was used to confirm Mr Portelli's thesis.

Ms Joanne Camilleri (512677M) called to testify by the appellant stated on oath that she is employed in the Procurement Department at Wasteserv and was Secretary of the TEC on this tender. Apart from her, the TEC consisted of a Chairperson and three evaluators. Asked by Dr Paris to relate the evaluation process, witness stated that the TEC met circa eight times, the first time a week after the close of the tender (around May/June) and six offers were evaluated. Three bids were processed at the first meeting including Vassallo's bid where missing documents were noted. Before seeking rectification the TEC did not seek the advice of the DoC. The rectification to Vassallo Builders requesting Power of Attorney and Performance of Works Certificate was drafted by the TEC, sent to the DoC for approval and then submitted to bidder (DOC WS 2). Referred to the phrase "failing to reply" in the rectification, witness stated that the TEC was making the point that if a reply is not received in time offer would be excluded. The date of the rectification was confirmed as the 21st June 2024 and the five working days allowed for a reply expired on 28th June, with the bidders reply received on the 26th June. The TEC were notified that a rectification reply had been submitted. The TEC met thereafter. The EPPS indicated that documents had been uploaded but the attachments were not showing. At this stage Mr Jason Grech at the DoC was contacted and he confirmed that the documents could not be located. Since the documents were missing the TEC could not proceed any further. At this stage no clarification could be sought as there was only one opportunity to clarify hence the reason why Vassallo Builders were not contacted. Nor was the Malta Business Register consulted to check if the signatories of the agreement were authorised so to do.

Witness further stated that the evaluation was completed, and the report forwarded to the DoC. The rejection letter (DOC M) was drafted by her. Witness could not recall if the word 'equivalent' was used in her original draft letter of rejection which was subsequently sent by the DoC. Subsequent to this a generic e-mail was received from Mr Jonathan Buttigieg with attachments and this was referred to the Chairperson and the other evaluators.

In reply to a question from Dr Calleja, witness said that the bid on the EPPS was submitted in the name of Vassallo Builders Ltd.

Replying to a question from Dr Inguanez witness re-iterated that the TEC did not consider the e-mail submission as this was outside the EPPS system.

Questioned by Dr John Gauci Legal Representative for Bonnici Brothers Ltd, witness stated that Mr Jason Grech works in the IT department at the DoC and he confirmed that the documents were not

found in the system as far as he could establish and there were no other problems in the system during the period of the evaluation.

Perit Miriam Magri (407781M) called to testify by the appellant stated on oath that she has been employed as an architect at Wasteserv for eleven years and was one of the evaluators. In the course of the evaluation all documents submitted in the offers were examined by the evaluation team jointly not individually. Opinions and interpretations were discussed until agreement was reached on the award of points. In the case of the bid in question a rectification was requested as certain documents specified in the tender were missing. The TEC expected a Power of Attorney document identifying a representative of the Joint Venture with authority to bind it and to receive instructions for both parties. The tender document requested this point specifically by providing the P/A forms. There was no specific format laid down for the P/A but the document had to clearly give authority to one individual to act for both sides according to General Rules Version 4.10, Clause 2.3 which clause was read out in full by witness. Witness was referred to VBAC Joint Venture Agreement dated 15th May 2024 and agreed that Clause 8 appointed Vassallo Builders for the construction and AC Enterprises for demolition and excavation. The TEC did not check if the individuals mentioned were legally authorised to sign on behalf of the respective parties. Witness re-iterated that the TEC required a P/A form which was mandatory according to the tender and which laid out specifically what was required, since the Joint Venture document did not give the TEC the comfort that one party could sign on behalf of both. Clause 2.3 of the General Rules specifically states that a lead partner must be appointed and confirmed by a P/A. Referred to paragraph 2 of the Joint Venture Agreement witness read out the phrase stating that one person is to be designated to act as leader with authority to bind the Joint Venture but said that this did not replace the requirement to submit a P/A.

Witness was next referred to the ESPD, point 2A.17 stating Vassallo Builders as leader and AC Enterprises as partners and respectively signed by Jonathan Buttigieg and Anton Camilleri and agreed that this was a clear indication of the situation. Referred to tender (page 7) witness agreed that the Joint Venture offered two projects by Vassallo Builders which included excavation and construction completed in the last five years to the value of € 1.5 million and other small projects by AC Enterprises which were not considered since below the established threshold. In the ESPD Vassallo Builders submitted two projects – University of Malta Residence & Community Complex and Vassallo Business Park with values of circa 26 million and 24 million Euro respectively. The rectification request referred only to one project and the bidder was given the opportunity to nominate another project. When the QP Report was examined by the TEC it was noted that this was not equivalent to a final accepting report but was a preliminary report which referred to a project that was practically complete although there was ongoing works.

Referred to pages 8, 15 and 16 of the Report witness stated that although the project covers the scope of works that the TEC required and that the works on the original contract were practically complete nonetheless it still indicated that there were outstanding works. Through several photos in appendix 'C' there are indications that works were still outstanding. The ESPD mentioned the University Campus project, but appellant was given the opportunity to nominate any project. The TEC did not exercise its right of discretion to contact end-clients direct as they did not see their role as going to an end-client to make compliant a non-compliant offer. The TEC did not evaluate documents that were not submitted through the EPPS but could only rely on documents in hand which did not state that works had been completed – the certificate mentions pending works. The documents submitted on the 17th July 2024 were not evaluated and were ignored as they could not be considered as they were not submitted through the proper channels.

In reply to questions from Dr Mifsud Bonnici, witness said that the Report by QP was not acceptable as a final acceptance certificate and proof was needed that the works had been completed to the satisfaction of the client.

Mr Jonathan Buttigieg (481769M) called to testify by the appellant stated on oath that he was a Structural Engineer by profession and is a Director and Chief Executive of Vassallo Builders where he has been employed for 32 years. He confirmed that the documents (identified as DOC 1, DOC 2 and DOC 3) sent on 17th July 2024 were a follow-up on the EPPS submissions, and the reply by the DoC that EPPS portal accepts only one attachment when replying to a clarification and it is not normal procedure to send files by e-mail. Witness confirmed that the rejection letter was addressed to Vassallo Builders Ltd but received on witness' own e-mail. The Joint venture is made up of Vassallo Builders and AC Enterprises and indicates how the work is to be split up. Two articles in the JV Agreement indicate the lead partner as Vassallo Builders which is authorised to commit both companies.

Referred to the ESPD document it is not contested that Vassallo Builders is the lead partner. In respect of the completion certificate, appellant nominated two projects which both satisfy the criteria requested regarding completion of works and value. As regard the QP document this clearly states that the works were completed and the project is practically complete. In practice, in Malta, this phrase, is taken to mean that a project is complete and any remaining works are not going to impede the use of the premises. The wording 'practically complete' depends also on the type of contract used.

Witness went on to explain the set-up on Vassallo Business Park and its link to Vassallo Builders. The QP Report states that the Business Park project is practically complete. Page 15 (read out) state that the original contract/scope are now practically complete but refers to ongoing works requested by incoming tenants. The table in page 8 indicates the works that were completed while page 16 confirms this, so the original contract is now practically complete. Any outstanding works are additional works demanded by incoming tenants Lidl Ltd. These account for the photographs in Appendix 'C' and are works outside the original contract. . The QP Report is dated 11th August 2022.

In reply to questions from Dr Mifsud Bonnici, witness explained the difference in 'taking over' certificates – this could be a formal certificate or a 'deemed taking over' certificate and agreed that no explanation was provided as to what the document covered. The EPPS was submitted through the Vassallo Builders account and hence the reason why documents were so addressed. Witness further stated that Ryan Portelli submitted the offer and the reply to the clarification. He agreed that on the 21st June there was a request for clarification which was replied to on the 26th June with an e-mail of 17th July submitting a P/A and the completion certificate of the Campus Hub. Witness agreed that the documents produced by Ryan Portelli and Daniel Mercieca were created on the 2nd July that is after the reply to the clarification had been submitted.

Questioned by Dr Inguanez witness agreed that Section 5(A)(i) in the tender asking for the submission of a P/A had not been met as appellant had decided that the JV Agreement met this requirement. . He had held regular meetings with Mr Camilleri and agreement had been reached on the process necessary on prices and methodology. The Management Committee consisted of the witness and Mr Camilleri, with the witness being the leader both of the Committee and the JV.

In reply to questions from Dr Gauci witness agreed that Rule 2.3 of the General Rules which form part of the tender requirements requires the submission of a P/A in the case of a joint venture but maintains that the JV Agreement shows that there is an authorised leader and according to the parties to that Agreement that satisfies the tender criteria. It was pointed out to witness that although

appellant maintains that the Agreement satisfied the criteria the JV still thought it was necessary to submit an actual P/A at the second attempt. When asked why the in-house engineer was not asked to provide a completion certificate witness stated that the matter was not handled formally.

Mr Jonathan Buttigieg (481769M) called to testify by the Contracting Authority and still under oath stated that the appeal was in the name of Vassallo Builders and AC Enterprises. Prior to submitting the appeal authority was given to the witness by telephone and maybe e-mail by both parties even though the JV Agreement allowed the witness to act on behalf of both. Referred to the final confirmation certificate (DOC WS6) witness stated that this certificate was issued by Perit Andrew Sapienza and referred to the Campus Hub. Witness is not aware when the document was issued as it is not dated but agreed that it could have been issued on the 26th June – the same date as appellant replied to the rectification request. As the certificate was not dated it was impossible to establish when the project started and when it was finished.

Mr Jason Grech (1185071M) called by the Department of Contracts stated on oath that he was requested to table an audit trail of the EPPS submission by Vassallo Builders (DOC 3). According to this trail the Economic Operator endeavoured to reply to a rectification by filling in the form but left the mandatory part blank. This was rejected by the server and indicated 'ERROR' to the user. Two minutes later another attempt was made to reply but the user failed to attach file. Since the mandatory text area was completed in this second attempt no 'ERROR' was indicated by the system.

In reply to questions from Dr Paris, witness said he is an Assistant Director at the DoC in charge of IT, with qualifications in the subject. He re-iterated that the TEC requested a rectification, but the economic operator left the mandatory text area empty at the first attempt and that is a reason for the exclusion.

This concluded the testimonies.

Dealing with the preliminary pleas Dr Mifsud Bonnici stated that the appeal was not in line with Regulation 270 as the appeal should have been filed by both sides – the JV has no juridical personality as this lies with the parties in the JV. The appeal puts special obligations on both parties as they are joint and severally liable for performance of the contract, therefore both are required to appeal. In the *Bonnici Brothers* Case the Court of Appeal held that proceedings have to be filed by all members. Mr Jonathan Buttigieg confirmed he was authorised to submit the appeal. This is not permissible under Maltese law (Article 1866 of the Civil Code) since the other partner, AC Enterprises Ltd, is based in Malta and therefore no single partner could appeal on its own. According to the General Rules if a tender is submitted by a JV an account must be created for the JV and only this account must be used to submit the tender.

Dr Paris said that the undated rectification request was addressed to Vassallo Builders Ltd TID 210886, the rejection letter of the 11th October 2024 was addressed to Vassallo Builders Ltd TID 00210886 and so was the audit trail produced by Mr Jason Grech. However, it is now being claimed that this EPPS account was not entitled to be used to appeal. The *Firetech* Case (282/2015) was cited in support of the claim that not all breaches of a tender should lead to exclusion and the Court upheld that it was not proportional to exclude a bid because the JV account was not used. The General Rules have since been changed and it cannot now be claimed that it is ineligible to submit a claim. In the *Hitachi-Zosen* Case (para 42) it was pointed out that it was difficult to understand why the DoC was objecting to the appeal in a certain name when they themselves had used the same name. It is simply frivolous to claim that Vassallo Builders could not submit an appeal as the appeal was made exactly on the same basis as appellant had been addressed.

Public Procurement Regulation 270, continued Dr Paris, states that ‘any person’ who can show that it has a grievance and is likely to suffer harm could appeal. The Authority is claiming that the P/A was not submitted and therefore that person could not act as lead partner whilst ironically at the same time addressing the rejection only to that lead partner and not to AC Enterprises. In procurement the right of remedy exists through the EU Remedies Directive. In the *Bonnici* Case (236/2018) the Court of Appeal held that even if a wrong name had been submitted this can be rectified under Article 175 (i)(ii) and (iii) and in Appeal Court Case 231/2023/1 the Court of its own volition exercised the right of Article 175 (iii) and allowed the altering of the name (Article 1789 Cap 12 of Civil Code). There is no indication of expression of nullity here and no one has suffered prejudice. The Board should throw out these submissions as the arguments are frivolous.

Dr Mifsud Bonnici said the arguments were far from frivolous and merited a reply. The terms of Regulation 270 are a matter of public order and deals with the situation where ‘any person or tenderer’ refers to someone who did not bid but suffered harm. Maltese law is more extensive than the Directive as it allows ‘harm or intent’. The *Credorax* case is not similar to this situation when here we are dealing with an actual tender. It is necessary to clarify a point regarding the *Firetech* case and the General Rules – to ensure transparency a recent amendment in the General Rules states that partners in a JV must be indicated in the EPPS. The argument regarding letters addressed to Vassallo Builders is not valid since if the bid contravened the General Rules a bidder cannot rely on that contravention to make its own case.

Dr Paris dealing with the exclusion due to the lack of a P/A said that General Rule 2.3 deals with the requirements in submitting bids which lead on to two bullet points on joint ventures. The first bullet point is limited to the requirement of the P/A and the sole purpose to appoint a lead partner to represent all partners. The reason for appellant’s exclusion was the failure to appoint a lead partner but the JV Agreement tied the parties as to duties and obligations, gives power to any director to bind the JV and indicates a lead partner and gives precisely what the Authority requested. There is no doubt that *ab initio* the Agreement, reinforced in paragraph 8, covered all these points. There was a failure on the part of the TEC to consult the DoC to clear any uncertainties on this point. Perit Magri testified that she had no doubt who was the lead partner and that Mr Anton Camilleri was a partner. The ESPD was clear that Vassallo Builders were the lead partners. Nowhere was it specified that the P/A had to be a particular, separate document. The ESPD in its very form already indicated the lead partner and satisfied this requirement. The documents provided satisfied this requirement.

Dealing with the final and provisional certificate, Dr Paris stated that the reason for exclusion on this count was incorrect. In all probability appellant was excluded as it did not submit a document entitled ‘Final or Provisional Acceptance Certificate’, most probably because the TEC had the mind-set that they were expecting a document so headed. The Authority requested one project which was to include excavation and construction completed during the last five years totalling € 1.5million in value. Projects worth € 30 million and € 25 million were offered – these were serious projects undertaken by a reputable firm. The Campus Hub project was based on a Government concession and should have given great moral comfort to the TEC and its members should not have been in any doubt that it was complete and in use. Discretion to contact the end client was not availed of even though the tender gave this facility. The degree of care by the TEC was not exercised. This degree of care and the need to check and clarify was emphasised in the *Tideland* Case (T 0211/02). The projects were complete to the value of € 50 million and the Government was aware of this, so why was discretion not exercised when one is dealing with public funds. The original scope of the works was practically completed. This is confirmed in the independent QF Report which confirms that the project was practically complete

to the extent that the works were paid for and that the ongoing works refer to tenanted parts of the building – the form, substance and equivalence are there.

On the question of equivalence, Dr Paris stated that the tender required that the design standard is equivalent, but this was not part of the eligibility criteria but of the technical part and is totally unrelated. The Authority did not require equivalence as part of the eligibility and therefore there was no obligation on the bidder to provide it (Section 3 of the Technical Specifications). In PCRB Case 1181/2018 the matter of substance over form was considered and it was held that there were no limitations if despite errors all the facts were provided and should not be a cause for exclusion. The rectification created ambiguity as *ex admisis* no document that gives comfort to the Authority on the Campus Hub was included – appellant claims that by referring to the documents on the Business Park the TEC was only interested in confrontation. The appellant was given no choice, and this was a clarification request rather than a rectification. On the point of proportionality, witness Mr Grech gave the reasons why the documents were not received as the failure to complete text box which leads to an error being indicated. A conflict in proofs exists here as the document of 17th July (DOC 2) indicates that the problem was that the screenshot showed only one attachment – the system accepts only one document, and multiple documents can only be accepted if zipped. Conversely the reason given today was the failure to fill the text box. It is up to the Board to decide which reason applies. Mr Mercieca in his testimony confirmed that the documents were despatched, but they were not received at destination.

Dr Paris said that no request has been made to appoint an IT expert and if the Board is not in a position to decide where the malfunction exists then it has to militate in favour of the party using the system rather than the party that created it. Prof Albert Sanchez reference to a case dated 29th July 2020 was quoted that if the malfunctions of the department were not proven and it was not possible to determine the origin of the error then on the basis of proportionality it must absorb the cost. This situation cannot compare to the *Suratek* Case. Also to be noted that the European Directive allows means of communication by methods other than the established module. The point regarding magnanimity in the *NQuay MT* Case does not apply in this case either. Appellant's documents were despatched on the 17th July, reached the other side and the TEC had every chance to check with the end-users and had proof that bid was compliant *ab initio*. On the basis of proportionality the utmost should be made to save this bid.

Dr Mifsud Bonnici said that before going into detailed arguments one must look at the case overall and ask if it makes sense for the Authority to prefer a higher priced bid. The Authority in fact did its utmost to accommodate appellant rather than to exclude it and gave it a chance to rectify its bid – a clear manifestation of reasonableness and proportionality. Appellant did not reply to the rectification and to now argue the case on the basis of proportionality and substance over form one must see how these principles have not been deviated from. The liability for this appeal is down to the appellant and it is important to emphasise that the TEC acted within the self-limitation principles and if they had not there would not be any faith in the procurement system.

Dr Calleja stated that the appellant was not compliant *ab initio*. The appellant claims that the letter of rejection made a qualified request for the P/A. In the case of a consortium the request for a P/A is mandatory and the claim that a JV Agreement is equivalent to a P/A is not right. Clause 8 in that Agreement shows Vassallo Builders as JV leaders but nowhere does it give authorisation from AC Enterprises for Vassallo Builders to act for them. Clause 2 in that Agreement is not binding as it speaks of the future and states that the lead partner 'shall' be appointed indicating that a lead partner shall be appointed only if the contract is won.

Dr Mifsud Bonnici dealt with the point regarding the confirmation certificate. The tender required certification that the works were completed and approved. The documents submitted in the ESPD regarding the Vassallo Business Park did not give comfort to the Authority as certificate indicates the work was practically complete. If the works were complete the certificate should have stated so. If the works were carried out under a FIDIC contract then certificate could have been easily issued, but an internal certificate was not acceptable in this case and one could not expect the Authority to verify if the certificate was correct. If the argument is that the document presented was equivalent to what the tender requested then one has to prove it. Mr Buttigieg went to some lengths to prove that the report was equivalent to a final or provisional certificate – if this argument was accepted by the TEC it would have infringed the principles of self-limitation and transparency. The *NQuayMT* Case decision although close, does not equate to this case, as the documents were submitted. If documents are not submitted what is there to clarify. In that case it was also held that you go to the end-client only if the bidder's position is compliant.

Dr Calleja proceeded to deal with the point regarding the rectification reply, the reply of which, he stated was incorrect as the titles of both Vassallo Builders and AC Enterprises were incorrectly stated. As a consequence the TEC could not even reply to this document. The Contracting Authority confirmed with the DoC that the documents, as also confirmed in testimony of Mr Jason Grech, were not in the system. The documents were submitted in July and an audit report was then requested to verify Mr Buttigieg's claim, which report was attached to the rejection letter. This report which is binding was prepared by Eurodynamics and explains clearly that the mandatory part was not dealt with. After that second attempt it was too late to submit further documents as the time period expired and would have infringed the equal treatment principle.

Dr Mifsud Bonnici said that the Board has to balance the standard of proofs presented. Appellant did not reach this standard of proof. The individual who actually submitted the tender was not at the hearing and his evidence was not heard. Mr Ryan Portelli is the only person who could have testified on what happened. The report submitted by Mr Mercieca on behalf of the appellant is one sided, ignoring completely the Authority's side and it shows only extracts and not a full record. There is no proof or assurance that the correct document from the EPPS was correctly selected. Witness, in fact, agreed that the packet selected in his report was at random and there is no certainty that it was the right one. The e-mail is perfectly consistent since the EPPS allows only one document to be attached and if one examines Mr Mercieca's last screen shot it shows that appellant was fully aware that only one document can be uploaded as in his first submission he submitted only one document. In the Economic Operators User Manual (DOC 10 page 54) it is stated that the EO is able to reply multiple times but still only one document can be uploaded. There was no confusion on the part of the Authority and the balance of proof is in their favour. In Case 320/2020/1 the Court of Appeal held that it is up to the appellant to show that the error was in the system not in the submissions.

Dr Calleja cited PCRB Case 1216 where the Board held that accepting further submissions after rectification breaches the equal treatment principle. He stated that even if the July documents were to be considered Appellant would still be not compliant for the reason that if one referred to DOC WS7.1 and WS 7.2 one would note that the P/A is dated one day after the rectification request and there is no date on the Campus Hub certificate – the documents were generated simply to meet the rectification reply. This tender was not compliant *ab initio* but *ex post-facto*.

Dr Mifsud Bonnici in a short comment noted that appellant's approach was inconsistent and negligent as the final certificate on the Campus Hub was detailed but the submission on the Business Park was informal and not issued.

Dr Inguanez concluded by saying that the DoC agrees with the submissions made by Wasteserv. Appellant claims, in regard to the P/A, that the JV Agreement meets the requirements. However, the P/A is there to authorise who signs on behalf of the JV. Every statement made in the tender submission is binding as it forms part of the eventual contract. The JV does not empower Mr Buttigieg to sign on behalf of both companies. The indication is that he was the lead but confirmation was necessary and rectification sought. The objective of Regulation 222 is to ensure that economic operators possess the experience to fulfill the contract and the Authority requires assurance that projects were successful, accepted and paid for. Two persons, Mr Mercieca and Mr Grech both agreed that electronic signals were sent and one wonders why Mr Portelli did not turn up to give his testimony and why an e-mail was submitted instead of using the EPPS?

There being no further submissions the Chairman thanked all the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th December 2024.

Having noted the objection filed by Vassallo Builders Ltd (hereinafter referred to as the Appellant) on 21st October 2024, refers to the claims made by the same Appellant with regards to the tender of reference CT2089/2024 listed as case No. 2051 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris
Appearing for the Contracting Authority:	Dr Antoine Cremona, Dr Clement Mifsud Bonnici & Dr Calvin Calleja
Appearing for the Department of Contracts:	Dr Audrey Marlene Buttigieg Vella & Dr Daniel Inguanez
Appearing for the Preferred Bidder:	Dr John L Gauci

Whereby, the Appellant contends that:

- a) ***1st grievance - Rectification request addressed***

The appellants do not agree with the statement in the rejection letter, since it did successfully transfer from its servers files in the cumulative size of 1263KB, representing [a] Final completion certificate for Campus Hub, [b] a power of attorney issued by AC Enterprises Limited, and [c] a power of attorney issued by Vassallo Builders Ltd, and thereby the rectification requested has been successfully addressed. If for any reason whatsoever, the ePPS did not record the upload by the Appellant, the statement by the Contracting Authority that "the Economic Operator failed to upload the attachments" is incorrect. It is also to be stated that the Appellants followed precisely the instructions of the Contracting Authority, as well as the e-Tenders Terms of Use, and thereby any alleged system non-performance should not and cannot be attributed to the Appellants. For all intents and purposes, the Appellants followed up the rectification reply with an additional communication, which should have given the necessary comfort to the Contracting Authority that the Appellants did not only upload the documents within the stipulated time, but also that it acted with utmost good faith throughout the full process. In any case, and without prejudice to the aforesaid, whilst being fully aware that "*Requests for Clarifications and/ or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained*" it has been clearly stated in multiple decisions that when a matter can be easily resolved without impinging on the rights of others, the less draconian course of action should prevail - in this case, the most draconian course of action is the one chosen by the Contracting Authority.

b) ***2nd grievance - Irrespective of the rectification, Appellant is compliant***

On a strictly without prejudice basis, it is the position of the Appellant that the original bid as submitted was fully compliant with the eligibility requirements, both in substance as well as in form. Primarily, the following statements are to be forcefully made: Vassallo. Builders Limited is a leading company in Malta, with robust knowledge, expertise and experience in "demolition, excavation and construction", and over the last five [5] years it has been involved in multiple projects which satisfy the minimum eligibility criteria. AC Enterprises Limited is likewise a leading company in Malta, with robust knowledge, expertise and experience in "demolition, excavation and construction", and over the last five [5] years it has been involved in multiple projects which satisfy the minimum eligibility criteria. Whilst the Appellants are not expecting any different treatment, in accordance with reg. 39 any and all decisions of the Contracting Authority must be proportionate. In addition and without prejudice to the above, the Contracting Authority has been fully authorised and granted authority to ascertain directly with the client that the projects have been completed to the satisfaction of the client. It seems that, the Contracting Authority opted not to exercise its right, and this to the sole detriment of the Appellants, and to the benefit of the third placed and circa €750,000 more expensive recommended tenderer.

c) ***3rd grievance – Proportionality***

Without any admission of non-compliance, the principle of proportionality has always been interpreted as a principle which cannot create an imbalance between the rights of the entity

invoking it and the rights of third parties - The principle which seeks to create a balance between competing interests! In this case, the Appellants, whilst still holding that there are no breaches, any such alleged breaches, are negligible - they do not in any manner impinge on the rights of others, or worst still, they do not create any advantage whatsoever to the Appellants - the Appellants (sic) is for all intents and purposes fully compliant!

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 31st October 2024 and its verbal submission during the hearing held on 9th December 2024, in that:

a) ***Preliminary Plea – The appeal is inadmissible because the appellant could not lodge this appeal on its own***

The Appeal is inadmissible because it has been lodged in the name of the Appellant only. Maltese law requires that all economic operators to a joint venture exercise the remedy jointly in terms of Regulation 270 of the PPR. The Appellant *ex admissis* exercised the remedy only on its own behalf as one of the partners to the joint venture. The Appellant has not exercised this right for and on behalf of the joint venture and/or for and on behalf of the other member to the consortium-whom the Contracting Authority understands to be AC Enterprises Limited (C-49755). The Contracting Authority submits that where a bid is submitted by a group of economic operators in a temporary form, such as a joint venture, the proposal is the property of all the economic operators to the joint venture. Therefore, if the remedy in terms of Regulation 270 of the PPR is exercised, it must be exercised in the name of all economic operators forming part of the joint venture. 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 270 of the PPR is no longer available to them. The Contracting Authority further submits that a joint venture partner cannot unilaterally decide to file an appeal in terms of Regulation 270 of the PPR, or at the very least, without the authority to represent the other joint venture partners in the exercise of that remedy. If the exercise of the remedy is eventually successful, it will have a material effect on the other partners in the joint venture who agreed to joint and several liability with the exercising partner.

b) ***1st grievance – The appellant did not send the attachments to its rectification reply to the Contracting Authority***

During the evaluation process, the TEC observed 2 shortcomings in the Appellant's tender submission. The first shortcoming was the failure by the Appellant to submit a power of attorney confirming the authority of the lead partner to bind all parties to the joint venture. As the Appellant itself confirmed in its appeal, its bid was submitted by a joint venture. The second shortcoming was the failure by the Appellant to corroborate the project relied on to satisfy the technical and

professional ability criterion with a copy of the final or provisional acceptance certificate. This was a mandatory requirement, albeit marked as Note 2 to Clause 5, under Clause 5(c) of the Tender. In accordance with Note 2 to Clause 5, the Contracting Authority gave the Appellant the opportunity to rectify these 2 shortcomings on 20 June 2024. The deadline for submitting a reply was 28 June 2024, that is, 5 working days. The Appellant submitted its response on 26 June 2024. The Appellant's response allegedly had 3 documents in attachment. These 3 documents allegedly comprised the final completion certificate as well as the power of attorney submitted by each member to the joint venture agreement. However, the Contracting Authority did not receive these documents. In accordance with the principle of good administrative behaviour, the Contracting Authority contacted the Central Government Authority for confirmation by its Procurement System and Development department (the "IT Department") on the allegedly uploaded documents. On 5 July 2024, the Central Government Authority's IT Department confirmed that no attachments were uploaded. This inquiry by the Contracting Authority preceded the Appellant's communication on 17 July 2024 where the Appellant flagged the non-appearance of its 3 attachments on the ePPS portal. Following the Appellant's communication, the Contracting Authority approached the Central Government Authority for a second time to carry out an ePPS audit with regard to the Appellant's rectification response. The Central Government Authority reconfirmed that the Appellant did not attach any documentation in its rectification response of 26 June 2024. According to the ePPS audit carried out by the Central Government Authority, the Appellant attempted to answer the Contracting Authority's rectification request twice. On its first attempt, the Appellant submitted the optional attachments field but did not fill in the mandatory field entitled 'Clarifications'. Therefore, the user received a validation error which required it to restart its rectification response from scratch. On its second attempt, the Appellant filled in the mandatory field entitled 'Clarifications' but did not submit the optional attachments field. This second attempt was successfully received on the system. The Contracting Authority only received the 3 attachments in question with the Appellant's e-mail dated 17 July 2024. Therefore, the Appellant did not respect the 28 June 2024 deadline for the submission of its rectification response and any supporting documentation. Nor were the 3 documents submitted using the correct channel on the ePPS portal. The ePPS audit carried out by the Central Government Authority was communicated to the Appellant.

The architecture of ePPS was intentionally designed to create a system which is impenetrable such that the market's trust and reliance in public procurement is secured. Malta has transitioned from the traditional model of physical tender submissions and public opening sessions to an electronic system, aiming to encourage active participation from economic operators in procurement procedures and to enhance trust in the process.

c) ***2nd grievance – the Appellants original bid is not compliant***

The Appellant maintains that its original bid as submitted before the tender submission deadline satisfied the Tender's eligibility requirements. The Contracting Authority does not agree with this assertion. Firstly, if the Appellant was fully compliant by means of its original submission, then the TEC would not have requested a rectification on 20 June 2024. Nor is this assertion congruent with the Appellant's actions at the evaluation stage. If the Appellant was convinced that its bid was compliant with the Tender's eligibility requirements, it would have raised this assertion in its rectification response on 26 June 2024 instead of raising it for the first time in its appeal. Nor would the Appellant have attempted to attach documents to its rectification response, or actively taken additional steps, including follow-up e-mail correspondence with the Contracting Authority, to ensure that the latter was in receipt of the additional 3 documents.

The Technical and Professional Ability Criterion

The Appellant claims that it submitted projects of both parties to the joint venture as references in its original bid. It argues that the submission of these projects satisfied the technical and professional ability criterion under Clause 5(c)(i) of the Tender.

The Contracting Authority submits that the Appellant's argument is not well-founded. The Tender requirement stipulated that: *“Tenderers are to state one (1) project including excavation and construction works completed during the last five (5) years, up to publishing of this tender, totalling a minimum value of €1.5 million (excl. VAT). [...] Listed projects shall be supported by copies of the Final or Provisional Acceptance Certificate or equivalent issued by or on behalf of past Clients, proving that works have been completed to the satisfaction of the client.”*

For one of the joint venture partners, AC Enterprises Limited, the Appellant submitted multiple projects as references. None of these projects individually satisfied the Tender requirement, that is, none of them concerned construction works and none of them individually totalled €1.5 million. Therefore, the projects for the first partner did not satisfy the Clause 5(c)(i) requirement. As for Vassallo Builders Limited (C-20882), this partner submitted 2 projects as references. It submitted a 'Project Monitor Report for the first project. This was not a copy of the Final or Provisional Acceptance Certificate or its equivalent as requested in the Tender. Furthermore, the submitted report expressly referred to 'outstanding works' which meant that the project in question had not been completed. Therefore, the first project for the second partner did not satisfy the Clause 5(c)(i) requirement.

The only remaining project which could potentially satisfy this eligibility requirement was the second project of the second partner. However, the Appellant had not submitted any documentation for this project.

In view of the fact that Clause 5(c)(i) is marked as a Note 2 document, the TEC issued a rectification request. In its rectification response, the Appellant failed to submit the documentation required to satisfy the eligibility criteria. Therefore, the TEC could not consider its offer any further. In view of the foregoing, the Contracting Authority humbly demands the PCRB to reject this ground of

appeal insofar as it concerns the Appellant's compliance with the technical and professional ability criterion under Clause 5(c)(i) of the Tender.

The Power of Attorney

The Appellant submits that firstly, the power of attorney is not a mandatory document, and secondly, the authorisation of the joint venture partners to the bid was confirmed in the joint venture agreement. The Contracting Authority humbly submits that the Appellant is wrong on both counts. Firstly, the Tender does not state that a power of attorney should be submitted "*if necessary*". Clause 5(A)(i) states that: "*if applicable, the necessary forms - such as the Power of Attorney, are to be uploaded*". This distinction between 'if necessary' and 'if applicable' is not a matter of linguistic licence. Rule 2.3 of the General Rules Governing Tenders requires: "*tenders submitted by companies forming a joint venture [to] fulfill the following requirements: One partner must be appointed lead partner and that appointment confirmed by submission of power of attorney signed by legally empowered signatories representing all the individual partners.*" The Appellant's bid was submitted as a joint venture. Therefore, the power of attorney requirement applied to the Appellant's bid, which triggered the latter's obligation to submit the power of attorney as part of its bid. It did not do so. It also failed to rectify this shortcoming when it was presented with the opportunity to do so by the Contracting Authority in its rectification request dated 20 June 2024.

Secondly, the Appellant insists that each partner's signatory was duly authorised to enter into the joint venture agreement, and hence to submit a bid. The Contracting Authority humbly submits that this is not the *raison d'être* behind Clause 5(A)(i) which establishes the power of attorney requirement. The purpose of this requirement is to ensure that the joint venture has appointed a lead partner and that the lead partner has been granted proper authority "to bind, and receive instructions for and on behalf of, all partners, individually and collectively". This is the wording used in Rule 2.3 of the General Rules Governing Tenders. The instrument by means of which this authority is granted is the power of attorney. The Appellant had no such power of attorney in place when it submitted its bid. This is corroborated by the Appellant's communication to the Contracting Authority on 17 July 2024 where it attached 2 powers of attorney, one for each partner of the joint venture. These instruments are both dated 21 June 2024, that is, one day after the Contracting Authority's rectification request. This is in breach of the rule which requires economic operators to be compliant with the tender requirements *ab initio* to be eligible to qualify for a tender. Furthermore, Rule 9.3 of the General Rules Governing Tenders requires associations of economic operators (such as joint ventures) to create an ePPS account for the joint venture and the bid to be submitted through that ePPS account. The Rule continues to state that: "*In the case where a person requires to submit a tender on behalf of an entity which may be an organisation or Joint Venture/Consortium, the submission must be performed through the account of the entity. The latter must assign the person an account to perform the submission on its behalf, if the person is not already assigned. The entity will*

be considered as the economic operator submitting the tender.” The Appellant did not comply with these instructions.

d) ***3rd grievance – The Contracting Authority’s decision is Fully Compliant with the Law and with the Procurement Principles***

The Appellant invokes the principle of proportionality in defence of its tender submission. It claims that its bid is compliant with the eligibility requirements, and that subsidiarily, its shortcomings were negligible. The Contracting Authority does not agree with this assessment. The TEC identified 2 shortcomings in the Appellant's bid and sought their rectification in a request dated 20 June 2024. In spite of this opportunity, the Appellant failed to rectify its shortcomings. Therefore, the TEC decided to disqualify the Appellant's bid according to the Tender rules and to the procurement principles. The Contracting Authority could not have afforded further opportunities of rectification to the Appellant or otherwise deem it compliant with the conditions without breaching the general principles of equal treatment, transparency and self-limitation. It is also prohibited from doing so by the proviso to Note 2 of Clause 5 which states that: Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained.

This Board also noted the Department of Contract’s Reasoned Letter of Reply filed on 30th October 2024 and its verbal submission during the hearing held on 9th December 2024, in that:

a) ***1st grievance - Rectification request addressed***

The economic operator was responsible to upload the documents required by the Evaluation Committee through the rectification request. The appellant's offer could not be considered further by the Evaluation Committee because the appellant did not upload the documents requested by the Evaluation Committee. The Evaluation Committee asked the appellant to rectify its position by uploading the power of attorney and missing final or provisional Certificate related to the Reference Project. In the absence of these mentioned documents the appellant's offer could not be considered further. It is up to the appellants to prove that *“any alleged system non-performance should not and cannot be attributed to the appellants.”* No problem was encountered by the other bidders who attached all the relevant documents. It resulted very clearly from the audit report, which was communicated to the appellant, that the attachment for clarification was left empty.

With reference to the extract of the judgment in Tideland Signal Ltd. vs Commission of the European Communities (Case T0211/02), quoted by the appellant, the emphasis in this case was on the Community law principle of good administration which imposes an obligation on the evaluation committee to seek clarification in every case where a tender is ambiguously drafted. In the case before this Honourable Board it cannot be said that the Evaluation Committee was draconian in its actions and did not give the appellant the opportunity to present the documents it

should have attached with the tender in the first place. In fact the Evaluation Committee fulfilled its obligation to issue a rectification and the appellant failed to respond to such request. If the appellant uploaded corrupted documents, or failed to even upload a document, then in keeping with the principle of self-limitation the Evaluation Committee had no other option but to treat the rectification request as not replied to. This has already been confirmed by the Court of Appeal in its judgment in the case Al-Nibras for Science & Technology Limited vs. Onorevoli Ministru tal-Edukazzioni et, of the 12th March 2019. This case also concerned a rectification request which, due to some technical difficulty on the part of the bidder, was not replied to. All the evidence suggests that any technical error or difficulty which the appellant may have encountered to upload its replies to the rectification requests were on the part of the appellant's work station.

b) ***2nd grievance - Irrespective of the rectification, Appellant is compliant***

It is a fact, as admitted by the appellant itself, that the appellant did not comply with the tender requirements. Contrarily to what is being claimed by the appellant, the language used for the documents requested is not "if necessary" but "if applicable".

According to clause 2.3 of the General Rules Governing Tenders, "Tenders submitted by companies forming a joint venture/consortium/group of Economic Operators must also fulfil the following requirements: *One partner must be appointed lead partner and that appointment confirmed by submission of power of attorney signed by legally empowered signatories representing all the individual partners. The tender must include a preliminary agreement or letter of intent stating that all partners assume joint and several liability for the execution of the contract, that the lead partner is authorised to bind, and receive instructions for and on behalf of, all partners, individually and collectively.*" The word used is "must",

Moreover the tender document itself provides, under the section 'Eligibility Criteria, that "Economic Operators are to complete the Eligibility Section through the tender response format (Note 2). If applicable, the necessary forms -- such as the Power of Attorney, are to be uploaded through the tender response format/Epps/xml structure by the Economic Operator, as indicated in the relevant fields of the tender structure,"

c) ***3rd grievance – Proportionality***

The contracting authorities are expressly obliged by law to adhere to the principles of equality, transparency and proportionality. During evaluation the evaluation committee is obliged to adhere to the terms of the tender.

Reg.62(2) of the Public Procurement Regulations allows and provides for instances whereby the contracting authority may request economic operators to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit - "*Provided that such requests are made in full compliance with the principles of equal treatment and transparency.*"

Moreover, Clause 6 of the tender document makes it clear that "*The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.*" So the price on

its own is not the sole criterion. All bids have to also satisfy the administrative and technical criteria as requested by the tender document.

Moreover, Clause 5.3 of the General Rules for Tenders provides that - *"The Economic Operator must provide all information and documents required by the provisions of the procurement document. All such documents, without exception, must comply strictly with these conditions and provisions and contain no alterations made by the tenderer."*

All the above means that the appellant was primarily obliged to submit all tender documents, to submit a complete offer. It is irrelevant that the appellant's offer was the cheapest if the administrative and technical compliance of the offer was lacking. Consequently, the missing Final or Provisional Certificate related to the Reference Project is an important document which evidences the completion of the listed project. The power of attorney attests that the appointment of the lead partner is confirmed by the other individual partner/s. Without these two documents the appellant's offer cannot be considered compliant.

As per clause 39(1) and (2) of the Public Procurement Regulations: 39(1) states that *"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."* 39(2) provides that *"The tenderer must be selected in a transparent manner and according to a prescribed procedure."* In view of this provision, the Contracting Authority fulfilled its obligation to treat bidders fairly and impartially by ensuring that all bidders submitted the applicable documents. The principle of proportionality cannot be applied without take (sic) into account the other bidders who duly filed the necessary documents. The principle of proportionality in regard to the appellant would have been breached had the Evaluation Committee not issued the request for rectification. On the contrary, the appellant was allowed to submit the necessary documents but it failed to comply with such request. It cannot be said that the rejection of the appellant's offer exceeds what is appropriate or necessary for the evaluation procedure to achieve the objective of the tender. It cannot be said that the Evaluation Committee did not fulfil its obligation to treat the bidders fairly and impartially and this in breach of the above-mentioned clauses 39(1) and (2). In this present case the Evaluation Committee acted within the self-limitation rule when it did not consider further the appellant's offer. It evaluated the appellant's offer, saw that it lacked the documents which were applicable for the tender in question, issued a rectification request, and this request was not abided by the appellant. The Evaluation Committee could not but stop considering the appellant's offer and this in line with the cardinal procurement principle of self-limitation.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 30th October 2024 and its verbal submission during the hearing held on 9th December 2024, in that:

- a) ***Compliance with Submission Requirements and Document Verification***
Responsibility of the Objector to Ensure Complete Submission

Vassallo contends that it provided all necessary documents and asserts that any failure to record the submission lies with DOC's electronic procurement system (ePPS). BBSL respectfully submits that, per the terms of the tender, responsibility for ensuring successful and complete submission lies solely with each bidder, as required by both standard procurement practice and the specific tender guidelines. The procurement process relies upon clear, consistent adherence to submission requirements, which is essential to establishing procedural fairness and operational integrity.

Verification of Power of Attorney and Eligibility Documents

The Objector's claim that the Power of Attorney was not a mandatory document lacks merit, as the tender documentation explicitly requires the submission of necessary authorizations for the bid to be considered valid. Failure to include such documents leaves the evaluation committee unable to confirm bid compliance with eligibility requirements, and thus, the committee's exclusion of the Objector is fully justified. BBSL maintains that such omission on the part of the Objector is incompatible with the tender's criteria and is grounds for non-compliance.

Non-reliance on External Upload Confirmation

Given the importance of maintaining an accurate and transparent bidding process, the ePPS is designed to function as a neutral and impartial system that objectively registers submissions. The Objector's failure to secure upload confirmation constitutes a procedural shortcoming for which BBSL, as the Recommended Bidder, cannot be penalised. The Objector's argument would undermine the integrity of the procurement system by permitting a bidder's unilateral assertion of compliance, in contravention of the principles of transparency and verification that are at the basis of Maltese procurement law.

b) ***Proportionality and Principle of Non-exclusion***

Adherence to the Principle of Proportionality

The Objector contends that exclusion from the tender on the grounds of documentation non-compliance is disproportionate. BBSL respectfully submits that strict adherence to compliance requirements is not only justified but essential to uphold the principles of fair competition. Any relaxation of tender standards for one bidder, especially where others-such as BBSL-have adhered rigorously to submission requirements, would create an inequitable playing field. BBSL humbly directs the Honourable Board to the judgment of the Court of Appeal (Superior) on the 22d June 2022 in the case of NQUAYMT v. Agenzija ghal Infrastruttura Malta et, which held:

"L-eccess fil-manjamina u fit-tfitti sabiex jigu salvati offerti akkost ta' kollox mbux espressjoni ta' proporzjonalita imma huwa sproporzjon kontra min kien "compliant" mill-bidu nett. Din il-Qorti mbux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozimament dak li trid is-sejba għall-offerti u m'għandu jipretendi li jigi mitlub "jirrange" l-offerta biex ikun kompatibbli ma' dak mitlub."

This judgment reiterates that excessive leniency in salvaging non-compliant bids undermines the principle of proportionality. A compliant bidder that adheres to requirements from the outset

should not be placed at a disadvantage due to any perceived procedural shortcuts for another bidder. Thus, the exclusion of the Objector is both proportionate and legally justified.

Experience and Project Values as Non-substitutes for Procedural Compliance

While the Objector highlights its extensive experience and substantial project values to argue compliance, such factors do not mitigate the necessity for strict procedural adherence. BBSL emphasises that compliance with tender documentation requirements is a fundamental precondition for eligibility. Tender procedures stipulate not only technical capability but, critically, adherence to submission standards as evidence of reliability, commitment, and ability to fulfil contractual obligations.

c) ***Fair Competition and Equal Treatment of Bidders***

Equal Treatment

The Objector seeks an exception from the uniform application of tender standards, which contravenes the principle of equal treatment. Allowing a post-deadline remedy for Vassallo's incomplete submission would confer an unfair advantage and undermine the competitive fairness that procurement regulations seek to protect. Such an exception would prejudice BBSL and other compliant bidders, weakening the credibility of the tender process.

Inadmissibility of Rectification Requests Post-Deadline

BBSL submits that allowing for post-deadline rectifications would significantly harm the competitive process by introducing subjectivity and discretionary leniency, elements that procurement regulations are designed to minimize. BBSL complied fully with the procedural requirements within the stipulated timeline, and any relaxation for the Objector's benefit would be inequitable and legally untenable under Maltese procurement law.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider the preliminary pleas and appellant's grievances raised before it.

Initially the Preliminary Pleas will be dealt with as per below.

a) ***Preliminary Plea – Request For Information***

- i. The Board observes that the appellant was given all the necessary information to enable it to submit its letter of objection in a timely manner. Therefore, once the information was properly provided, the Board will not consider this matter any further.

b) ***Preliminary Plea – Inadmissibility of Appeal***

- i. The Board notes that throughout the entire procurement process, the appellant used the TID number '000210886'. The bid submitted by the joint venture was properly evaluated by the Evaluation Committee, and a rectification request was issued, referencing the same TID number. The name of the economic operator cited by the Contracting Authority in the

rectification request was 'Vassallo Builders Ltd'. This same sequence of events was repeated and replicated and thereby ratified in the drafting of the rejection letter dated 11th October 2024.

- ii. When considering all of the above, and the fact that the rejection letter makes no mention of the arguments raised now by the Contracting Authority, issues which were known to the Contracting Authority as from the outset, the Board believes that upholding such a plea would violate the principle of proportionality, which is enshrined in our law.

With regards to the merits, this Board will deal with the grievances in the same chronology as presented by the appellant in its letter of objection.

c) ***1st grievance - Rectification request addressed***

- i. Without entering into the merits of whether the bid of the appellant was compliant *ab initio*, as this will be dealt with in the 2nd grievance below, the matter to be decided in this 1st grievance is whether or not the rectification request, as issued by the Contracting Authority, was duly replied to by the appellant in the correct manner or otherwise.
- ii. Initially, this Board points out that that the rectification request, dated 20th June 2024, was issued in a clear manner, making reference to the relevant sections of the tender document on which according to the Evaluation Committee the appellant failed to submit the relevant documentation.
- iii. Once the Board heard the testimony under oath of Mr Jason Grech as well as taking cognizance of all the documentary evidence exhibited, including:
 - a. Document WS3 as submitted by the Contracting Authority;
 - b. Document WS4 as submitted by the Contracting Authority;
 - c. Document WS5 as submitted by the Contracting Authority;
 - d. Document WS6 as submitted by the Contracting Authority;
 - e. Document WS7.1 as submitted by the Contracting Authority;
 - f. Document WS7.2 as submitted by the Contracting Authority;
 - g. Document WS8 as submitted by the Contracting Authority;
 - h. Document WS9 as submitted by the Contracting Authority;
 - i. Doc 1 as submitted by the appellant;
 - j. Doc 2 as submitted by the appellant;
 - k. Doc 3 as submitted by the appellant;
 - l. Doc 4 as submitted by the appellant;
 - m. Doc 7 as submitted by the appellant;
 - n. Doc 8 as submitted by the appellant;
 - o. Doc 9 as submitted by the appellant;
 - p. Doc 10 as submitted by the appellant;
 - q. Doc 11 as submitted by the appellant; and

- r. the server logs of the incident as drafted by ‘European Dynamics’, and presented by Mr Jason Grech,
- it immediately can come to the conclusion that this is not an issue where the Board needed to involve one of its own experts as per Regulation 90(1) of the Public Procurement Regulations (“PPR”).
- iv. The chain of events that led to the issuance of the rejection letter, as far as this 1st grievance is concerned, are crystal clear to this Board. In fact, the Evaluation Committee acted with a great degree of care while at the same time fully adhering to the principles of Self Limitation and Equal Treatment of economic operators. At the end of the day, for there to be trust in the public procurement process, all economic operators are to be treated in the same equal manner. For instance, the Evaluation Committee would have breached these principles if it had given cognisance of the attachments included in the email of Mr Jonathan Buttigieg dated 17th July 2024. This for two specific reasons. Firstly, the date of the email is post the deadline of the rectification request. Secondly, all communications have to be made through the proper channels, i.e. through the ePPS system.
- v. On a more specific basis, this Board does not agree with arguments brought forward by the appellant that ‘Doc 2’ (as presented by the appellant) shows conflicting evidence. The full and complete server logs as prepared by European Dynamics present a complete picture of events which transpired. The economic operator made two attempts to reply to the rectification request. In both instances there were missing elements. During the first attempt a mandatory field box was left empty which prompted a validation error from the system. During the second attempt this ‘issue’ was properly dealt with by the economic operator but the attachment section was left empty. Due to the attachment section not being a ‘mandatory’ box, when replying to rectification requests, the system accepted this reply of the economic operator.
- vi. That said, the aforementioned context falls squarely within the purview of NQUAYMT noe vs Agenzija ghal Infrastruttura Malta decided on 22nd June 2022 (Ref 35.22/1) become relevant whereby it was stated that: “.Jekk oblatur ikun inghata opportunita ta rettifika imma xorta wabda jibqa administratively non-compliant, il-bord ta evalwazzjoni ma jistax isalva dik l-offerta billi joqgħod jigri wara dak l-oblatur sakemm dan, forsi, jirregola l-pozizzjoni tiegħu. F’dan il każ, il-konsorzju appellat inghata kull cans jissottometti rubu għat-talbiet tal-awtorita kontraenti, u imputet sibi jekk baqa jitraskura dak li kellu jagħmel.”
- vii. At this point, this Board cannot but reject the appellant’s first grievance.
- d) **2nd grievance - Irrespective of the rectification, Appellant is compliant – ‘Power of Attorney’**
- i. Initially reference is made to the tender dossier Section 1 paragraph 5(A)(i) which states that **“If applicable, the necessary forms – such as the Power of Attorney, are to be uploaded through the tender response format/Epps/xml structure by the Economic Operator.”** (bold emphasis added)

- ii. Reference is also made to the General Rules Governing Tenders whereby in paragraph 2.3 it is stated that “Tenders submitted by companies forming a **joint venture**/consortium/group of Economic Operators **must** also fulfil the following requirements: i) One partner **must** be appointed lead partner and that appointment **confirmed by submission of power of attorney** signed by legally empowered signatories representing all the individual partners. The tender must include a preliminary agreement or letter of intent stating that all partners assume joint and several liability for the execution of the contract, that the **lead partner is authorised to bind**, and receive instructions for and on behalf of, all partners, individually and collectively. ii) All partners in the joint venture/consortium/group of Economic Operators are bound to remain in the joint venture/consortium/group of Economic Operators until the conclusion of the contracting procedure. The consortium/joint venture/group of Economic Operators winning this contract must include the same partners for the whole performance period of the contract other than as may be permitted or required by law.” (bold emphasis added)
- iii. Therefore, while this Board agrees that initially the ‘Power of Attorney’ document is not mandatory in nature, this is only because not all economic operators who participate in this tender process will be made up of joint ventures and / or consortiums. Once the bid of the appellant was made by a joint venture, this requirement becomes of a mandatory nature. This due to the word ‘must’ used in the General Rules Governing Tenders quoted above.
- iv. Once it has been established that a ‘Power of Attorney’ is therefore required, what now needs to be considered is whether the Joint Venture Agreement as submitted by the appellant met the requirements of the clauses referred to above or otherwise. (as stated in the first grievance above, the Evaluation Committee was right in its conclusion that any further documentation presented in emails post the deadline date for submission of the rectification request was not to be considered)
- v. In the opinion of this Board, the requirements of the General Rules Governing Tenders are clear and unambiguous, in that they require a ‘Power of Attorney’ and a ‘Preliminary Agreement’. The Joint Venture Agreement submitted by the appellant, in the opinion of this Board clearly satisfies the requirements of the ‘Preliminary Agreement’ section. However, the Power of Attorney document was not submitted. The evaluation committee duly issued the rectification request, which was not fully replied to as per above 1st grievance arguments already dealt with. It is also the opinion of this Board that although a Power of Attorney may be express or implicit, verbal or in writing, given the special nature of the public procurement process, all legislation and Regulations in the public procurement ambit shall take precedence over ordinary law – *lex specialis derogate lex generalis*.
- vi. Moreover, the fact that the appellant tried submitting a ‘Power of Attorney’ document, as evidenced by the email dated 17th July 2024 by Mr Jonathan Buttigieg, is also proof that in the mind of the appellant, the Joint Venture Agreement is not a total substitute for ‘Power of

- Attorney' document. Otherwise, their reply to the rectification request should have been that such authorisation has already been granted and submitted.
- vii. Therefore, this Board does not uphold this grievance of the appellant.
- e) **2nd grievance - Irrespective of the rectification, Appellant is compliant – ‘Performance of works of the specified type’**
- i. Initially reference is made to the tender dossier Section 1 paragraph 5(A)(c)(i) which states that “..... *Listed projects shall be supported by copies of the **Final or Provisional Acceptance Certificate or equivalent issued by or on behalf of past Clients, proving that works have been completed to the satisfaction of the client***” (bold & underline emphasis added)
 - ii. In the opinion of this Board, the report submitted by the appellant is nor a Final Certificate nor a Provisional Acceptance Certificate. Whether it is equivalent or otherwise is another issue. However, for sure it is not issued by or on behalf of past clients. The report is issued by a private entity to HSBC Bank plc ‘as lender under the facility agreement’. Moreover, such report, even though it does mention instances that “the works of the original contract/scope are now practically complete.....” this does necessarily mean that this should act as an equivalent to a Final / Provisional Acceptance Certificate.
 - iii. What was required was a definitive reporting document stating the above wording. The requirements were clear and unambiguous in their drafting. If the Evaluation Committee would have accepted anything other than what the tender required, they would have been in breach of the principle of Self-Limitation.
 - iv. Therefore, this Board does not uphold this grievance of the appellant
- f) **3rd grievance – Proportionality**
- i. With regards to this grievance, this Board when considering all of the above, will again make reference to the case NQUAYMT noe vs Agenzija ghal Infrastruttura Malta decided on 22nd June 2022 (Ref 35.22/1) whereby it was stated that “*L-eccess fil-manjamina u fit-tfittix sabiex jigu salvati offerti akkost ta’ kollox mbux espressjoni ta’ proporzjonalita imma huwa sproporzjon kontra min kien “compliant” mil bidu. Din l-Qorti mbux l-enwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tieghu, isegwi rigorozimament dak li trid issejba ghall-offerti u m’ghandux jippretendi li jigi mitlub “jirrange” l-offerta biex inkun kompatibbli ma dak mitlub*”
 - ii. In the opinion of this Board, the Evaluation Committee acted with due care and diligence, issued the rectification request as mandated and proceeded to act within the parameters of the principles of Equal Treatment, Self Limitation and more importantly with that of Proportionality.
 - iii. Therefore, this Board does not uphold this grievance of the appellant

The Board,

Having evaluated all the above and based on the above considerations, concludes and decides:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender to Bonnici Bros Services Ltd,
- c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Keith Victor Grech
Member