

PUBLIC CONTRACTS REVIEW BOARD

Case 2090 – MSPP/01/2022 – Request for Proposal (RFP) is for a works concession for the Regeneration and Design, Management, Operation, Maintenance and Transfer Back of the ex-Chalet (Sliema) site (the “Site”) as a Superior Quality Catering and Entertainment Establishment

2nd April 2025

The Board,

Having noted the letter of objection filed by Dr Matthew Paris and Dr Luke Dalli on behalf of DalliParis Advocates acting for and on behalf of Carmelo Stivala Group, (hereinafter referred to as the appellant) filed on the 12th February 2024;

Having also noted the letter of reply filed by Dr Antione Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Malta Strategic Partnership Projects Limited (hereinafter referred to as the Contracting Authority) filed on the 22nd February 2024;

Having heard and evaluated the testimony of the witness Dr Matthew Joe Farrugia (Board Secretary of the Evaluation Committee) as summoned by Dr Matthew Paris and Dr Luke Dalli, legal counsel of the Appellant;

Having heard and evaluated the testimony of the witness Mr Sharlo Camilleri (Member of the Evaluation Committee) as summoned by Dr Matthew Paris and Dr Luke Dalli, legal counsel of the Appellant;

Having heard and evaluated the testimony of the witness Prof Glenn Farrugia (Representative of the Institute of Tourism Studies) as summoned by Dr Matthew Paris and Dr Luke Dalli, legal counsel of the Appellant;

Having heard and evaluated the testimony of the witness Mr Damian Psaila (Senior Manager NUOV, Appellant Company Representative) as summoned by Dr Matthew Paris and Dr Luke Dalli, legal counsel of the Appellant;

Having heard and evaluated the testimony of the witness Mr Michael Stivala (Representative of the Appellant) as summoned by Dr Matthew Paris and Dr Luke Dalli, legal counsel of the Appellant;

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 18th March 2025 hereunder-reproduced.

Minutes

Case 2090 - Objection MSPP/01/2022 - RFP for a Works Concession for the Regeneration and Design, Management, Operation, Maintenance and Transfer Back of the Ex-Chalet Site, Sliema-Promenade Tower Road, Sliema

The Tender was published on the 31st October 2022 and the closing date of the call for Tenders was on the 15th March 2023

The Estimated Value of the Tender (Excluding VAT): 140,158,659 euro

On the 12th February, 2024 an objection was filed by Dr Matthew Paris and Dr Luke Dalli on behalf of DalliParis Advocates acting for Carmelo Stivala Group

A Deposit of 50,000 euro was paid

There was one bid

On the 18th March 2025 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairperson, Dr Vince Micallef, and Mr Keith Victor Grech convened a public hearing to consider the appeal

Attendance:

Appellant: Carmelo Stivala Group

Dr Matthew Paris	Legal representative
Dr Luke Dalli	Legal Representative
Mr Michael Stivala	Company Representative
Mr Damien Psaila	Company Representative
Mr Melvin Darmanin	Company Representative

Contracting Authority: Malta Strategic Partnerships Projects Limited

Dr Clement Mifsud Bonnici	Legal Representative
Dr Kelly Cini	Legal Representative
Prof Saviour Formosa	EAC Chairperson
Dr Mathew Joe Farrugia	EAC Secretary
Mr Charlo Camilleri	Evaluator
Mr Godwin Mifsud	Evaluator
Ms Maria Zerafa	Company Representative
Ms Marisa Marmara	Company Representative
Mr Robert Falzon	Company Representative
Dr Raisa Attard	Company Representative

Witnesses:

Ms Claire Briffa	ITS – Chief Operating Officer
Prof Glen Farrugia	ITS COO Academia

Department of Contracts

Ms Marisa Gauci
Ms Mariella Farrugia

Mr Kenneth Swain acting as Chairperson welcomed the parties and announced the opening of the session.

Upon the Chairperson's request, Dr. Paris commenced by stating that they would scrutinize the case brought forth by the Michael Stivala Group regarding their client's bid. He emphasized the distinction between a concession and a standard call for bids. They would examine the Stivala Group's offer and the Evaluation Committee's report. The present case was unique, as it was not a typical offer. The government sought a developer for a completely abandoned site, demanding a concession fee from the bidder, a departure from standard bidding processes. Additionally, the successful bidder was required to develop and maintain the site for a specified period, all at their own expense. All risks were borne by the bidder. The Evaluation Committee's primary concern was not the financing or project feasibility, but the bidder's ability to manage the concession. The appellant intended to prove that the Committee's doubts were unfounded and that they had met all requirements, thus warranting the revocation of the Committee's decision.

In response, Dr. Mifsud Bonnici asserted that this concession was a mixed contract, encompassing both works and services. While it included works, such as design, building, and upkeep, it extended beyond these aspects. Given the 65-year concession period, the state had a duty to regulate long-term management. The bid included management and operations criteria, such as a business plan, senior management, and training. The appellant had not fully met the latter two. The appellant's appeal raised the following points: 1) improper evaluation procedure, 2) misinterpretation of award criteria, 3) criteria unrelated to the contract's subject matter, 4) criteria that should have been performance conditions, and 5) proportionality concerns. Dr. Mifsud Bonnici stated that points 3 and 4 were closed matters, and objections on those points would be contested.

Dr. Matthew Farrugia (ID: 0392898M), Secretary of the Evaluation Committee, testified that the Committee was chaired by Dr. Saviour Formosa, with members Godwin Mifsud, Charlo Camilleri, and Matthew Vella. The Committee convened approximately twenty times. They received only one bid. The evaluation process followed a standard procedure: administrative, technical, and financial aspects. The Committee found the bidder compliant in administrative criteria but non-compliant in technical criteria, specifically regarding points 3b and 3c of the first criterion. Following legal advice, they sought clarifications. Upon receiving and evaluating the responses, again with legal counsel, the Board rejected the bid. The evaluators determined scores by averaging individual member assessments.

Mr. Charlo Cammilleri (ID: 146076M) testified that a financial backing statement was required and vetted by Ecubed consultants and Perit Janice Borg for aesthetics. The bid was disqualified for failing to meet minimum requirements, particularly in the Head Chef and Food and Beverage Manager categories, where it scored zero. To qualify, the appellant needed at least two points in each category. Mr. Cammilleri explained that providing the names and qualifications of the personnel would have earned the Stivala Group six points and qualification. The Committee requested clarification, but the Stivala Group's response, which assured that the Food and Beverage Manager would possess the required qualifications, was provided in note 2, not note 3, rendering it unacceptable as a rectification. The bidder stated that a General Manager would oversee an Executive Chef and a Client-Facing Manager, but the witness found no evidence of the required qualifications. The bidder failed to provide necessary guarantees regarding catering and beverage management. The signing of the section indicating acceptance of mandatory sections was not considered. In a subsequent clarification, the bidder referenced parts of the original offer regarding training, but the Committee, after legal consultation, deemed this insufficient. When questioned about the definition of a "write-up," including word count, Mr. Cammilleri stated that the bid was rejected due to the absence of a specific training section, as required in 3c. Dr. Paris then confirmed that the rejection was based on the lack of a dedicated training section. He referred to pages 20-23 of the document, which included add-ons

beyond mandatory criteria. Initially, the Committee assigned zero points to these, but later admitted an error and assigned one point, which was still insufficient for qualification.

During cross-examination, Dr Mifsud Bonnici asked Mr. Cammilleri to confirm that the word count for the write-up was flexible, provided mandatory specifications were met. Mr. Cammilleri confirmed the Committee's conclusion that points 3a and 3b were not met.

Professor Glenn Farrugia (ID: 232786M) of the Institute of Tourism Studies (ITS) testified about his qualifications and role in vocational education. Dr. Paris asked him to locate the Executive Chef and Food and Beverage Management courses in the ITS prospectus. Professor Farrugia referenced pages 87 and 101 and explained the Malta Qualifications Framework (MQF). Executive Chef was at bachelor's level (level 6), and Head Chef was at level 5. Approximately 50% of chefs in Malta held a master's level (level 7) qualification.

Dr. Mifsud Bonnici confirmed during cross-examination that these MQFs were in place in 2022.

Mr. Damien Psaila (ID: 46588M), testified that his role was to scrutinize the Stivala Group's financial submissions.

Dr. Luke Dalli, representing the appellant, asked him to confirm that no specific qualifications or certificates were required in the original document. Mr. Psaila stated that they were specified in the clarification request. Dr. Dalli noted that the Operations Plan included health and safety, particularly given the project's proximity to the sea. Mr. Psaila confirmed that no qualifications or certificates were submitted, as they were not part of the original call. The Committee had the right to rectify under article 40 but instead sought clarification, in which the self-declaration of adherence to the request was presented as an organogram. The organogram confirmed that minimum requirements would be met.

During cross-examination, Dr. Mifsud Bonnici asked Mr. Psaila to elaborate on his role. Mr. Psaila stated that his company's remit was limited to financial considerations but that he was exposed to the entire bid. He confirmed that he was not asked to submit a write-up on operations. To scrutinize costings, they reviewed other parts of the submission. He confirmed that his costings included the position of Head Chef, as evidenced by the envisaged pay packet. The organogram indicated an Executive Chef. The organogram was provided by the bidder. There was no specific line item for the salary of a Head Chef or Executive Chef; figures were for overall human resources. Points 3b and 3c were subject to rectification. He did not see the clarification request itself.

Mr. Michael Stivala (ID: 499374M), Director and CEO of the Carmelo Stivala Group, testified that the group operates approximately 1,000 hotel rooms and 50 restaurants, with 1,500 more rooms in the pipeline. They own their hotels and are also contractors with their own workforce and equipment. He was involved in the project from the beginning, which held sentimental value. The group aimed to use modern construction methods while retaining the original appearance. The project was challenging due to sea conditions. The group had experience in underwater construction. He presented their project plans, emphasizing their commercial and sentimental interests. They believed they were the sole bidders due to the project's complexities. They planned to use modern technology for lower levels while preserving the original appearance above ground. The project included three kitchens and a hotel-like structure. They collaborated with the French firm Accor for operations, having similar projects at the Lido in Ta' Xbiex. The project's milestones included a four-year development period, with risks related to planning authority permits and concession fees. They would have been Accor franchisees, adhering to their standards.

Dr. Paris argued that the Evaluation Committee misinterpreted the tender document, treating add-ons as mandatory. The Stivala Group was not notified of rectification requests. He asserted that the evaluators approached the concession contract with a standard bid mindset, misunderstanding the bid requirements. He then argued that the organogram submitted by the Stivala group had included more than what was required, and so deserved at least a six rather than zero mark. The call requested a Head Chef and a Food and Beverage Manager. Previous witnesses explained the hierarchy and MQF levels. The Stivala Group provided an Executive Chef, a higher grade, and should have received more marks. It was unreasonable to expect qualifications of personnel engaged years later. He cited a previous case regarding wardens, where similar expectations were deemed unfair. Detailed qualifications were justified only for key experts involved in immediate construction. The contracting authority only requested that future managers meet minimum criteria. The appellant confirmed these criteria three times. The tender required meeting minimum criteria, which the appellant did. With only one bidder, there was no basis for comparison. He referred to circular 8 of 2022 and circular 03 of 2023, arguing that experience could be part of the selection criteria or the technical offer criteria. He stated that the bidders had satisfied the required minimums, and that even if they had not, they should have been given an opportunity to rectify. He quoted case 72/22/1 South Lease vs CPSU and page 12 of the tender document, stating that qualifications were to be provided upon contract award, not during tendering. He also cited Court Decision 609/24 and Public Procurement N0 40, 1/6/2023, arguing that the Evaluation Board should have sought rectification, not clarification. Regarding training, he argued that the tender document left the write-up length and content to the bidder. The appellant fulfilled criteria 3b and 3c. The law required induction and training for licensing. He emphasized the Stivala Group's reputation. He then discussed performance conditions, quoting the terms of reference and arguing that they applied post-concession. He cited European Court of Justice Case C-403/21, and Joe Micallef and Son Skip Services Ltd. vs Diretturta' L'Anzjani u Kura fil-Komunita stating that imposing performance criteria at bidding was disproportionate. He argued that the Evaluation Committee's role was limited to transparency. He addressed proportionality, citing article 60 of concession contracts, and argued that the Committee was inflexible. He stated that the appellant met requirements, albeit not in the Committee's preferred format. He argued that zero points were disproportionate, as no specific document was requested. He argued that the lack of competition should have been considered. He stated that the risk was on the bidder, and the Committee's concern was only about the operator's profits. He requested a re-evaluation.

Dr. Mifsud Bonnici began by discussing the legislative framework, agreeing that concession regulations were more flexible than standard procurement. However, he argued that this flexibility applied to the procurement process design, not the evaluation process, which depended on the concession document. The Contracting Authority chose an open procedure, requiring a simple yes or no response. He asked the tribunal to consider the Committee's perspective. The tender had two sections: a checklist and the BPQR, where bidders responded to five criteria. One criterion was omitted. He disagreed that the bidder bore all risks, as the government benefited from job creation and taxes. The government also risked investment failure and reputational damage. The decision was made to monitor operations at the tendering stage. The business plan (3a) was not mandatory but was missing. Criteria 3a and 3b were clear. The tender required a Head Chef and Food and Beverage Manager, qualified or experienced. Training requirements were also clear. The bidder was asked for a technical offer, specifically a business plan. The Concession Authority needed assurance of minimum requirements. The bidder knew they had to satisfy the terms of reference, the PPQR, and provide a write-up. A simple statement of employing qualified managers and providing training would have sufficed. He disagreed with the "nitty-picking" accusation. The bid did not state that the required managers would be employed or that training would be provided. The organogram did not guarantee

these criteria and did not mention a Food and Beverage Manager, only an Executive Chef. The Committee was not assured that an Executive Chef could perform the Head Chef's duties. No ITS levels were mentioned. There was no training write-up. Training was mentioned four times, but not in the context of customer service. This was a critical omission. The Committee sought clarification. Concession Contract Regulations differed from procurement regulations regarding clarifications and rectifications. He cited European legislation and the Trackwell case C-523/16, paragraphs 49-52, stating that rectification could not replace documents required from the start. He referenced Public Procurement Policy note 40, which allowed clarification for discrepancies, ambiguities, and unidentifiable items. The Committee used the latter, but the appellant simply reconfirmed their previous statements. The document stated that non-compliance would lead to disqualification. Proportionality did not apply. The RFT's objective was not just works but also operations, specifically superior quality service. The sub-criteria were linked to this. The tender required a Head Chef and Food and Beverage Manager. The argument that the response was disproportionate was invalid, as the tender was clear. The single bidder did not imply flexible rules. The appellant's fourth argument was trivial. The absence of the required information was significant. The transfer of operational risk was standard. He referenced the Trackwell case, paragraphs 43-46, and argued that the Committee had been scrupulous. The Committee's clarification request negated the proportionality argument. Operational conditions were part of the bid. He cited SNB contracts, paragraph 60, stating that operational conditions could be expected at tendering, but in this case, the bidder was asked for a self-declaration, which they failed to provide. Commitments at tendering were binding. Concession Directive 52 stated that the maximum duration should be indicated in the concession document. The Joint Monitoring Review Commission would police the initial self-declaration.

The Chairperson thanked the participants and declared the sitting closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 18th March 2025.

Having noted the objection filed by Carmelo Stivala Group (hereinafter referred to as the Appellant) on 12th February 2024, refers to the claims made by the same Appellant with regards to the tender of reference MSPP/01/2022 listed as case No. 2090 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Matthew Paris & Dr Luke Dalli

Appearing for the Contracting Authority:

Dr Clement Mifsud Bonnici

Whereby, the Appellant contends that:

a) ***1st (A) grievance - Wrong interpretation of criteria section 3 - b. Upper Management engaged to operate the establishment -***

The appellant company contends that the contracting authority, through the evaluation committee, wrongly interpreted the criteria in section 3 - b. Upper Management engaged to operate the establishment, and this in particular since no mandatory document was required to be submitted. Reference is hereby being made to tender document page 23. By way of comparison, wheresoever the tender document wanted specific documents, it was clear and unequivocal [reference - tender document page 12]. Besides noting the enormous contradiction in the tender drafting, notably that CVs, Declaration and Key Expert Forms, all of which are of a Note 2 status, whilst the criteria for non-key experts being of Note 3 status, the requirement for Food & Beverage Manager and for the Head Chef was at best ambiguous since no specific documentation was required to be submitted at this stage - and affording "0" points as per hereunder is not only draconian, but a wrong interpretation of the criteria, based on a requirement which required nothing other than a confirmation - a confirmation which has been provided and re-affirmed through the clarification reply as follows: *"Whilst confirming in its entirety the proposal, it is hereby additionally confirmed that the persons engaged for the contract are in full compliance with the minimum mandatory requirements, both for Upper management and for human resources management criteria."* It is thus the submission of the appellant company that, insofar as the average technical score for the Upper Management engaged to operate the establishment shall be of "z", since the economic operator confirmed adherence with the minimum amount, and not as indicated in the extract below:

b) ***1st (B) grievance - Criteria section 3 - c. Human resources management - training measures specified -***

The appellant company contends that training measures have been provided, albeit not extensively, and admittedly not lengthy, but in any case it provided enough and sufficient information to confirm that training shall be provided and thus de minimis obtain a minimum score. It is unfortunate that no clarification has been made in relation to this reason for rejection, which clarification would have specifically confirmed the above. Reference is hereby being made to appellant company's submission, in particular to: Page 7 - dealing with training to operate equipment, Page 10 - dealing with training to minimise risks and accidents, Page 166 - dealing with training and certifications as part of control measures, Page 183 - dealing with training as part of a Health & Safety plan. Whilst one would understand why a minimum scoring will be afforded in relation to the submission of the appellant company in relation to this criteria, however affording a "0" scoring is definitely not proportionate nor adequate enough, and thus it is the submission of the appellant company that the scoring as per hereunder is inadequate and thus a newly constituted evaluation committee, will be in a position to confirm that the "0" scoring is not justified.

c) ***1st (C) grievance - Breach of the tender document - "Add-on criteria" -***

In breach of the self-limitation principle, the evaluation committee has failed to adhere to principles enunciated through the tender document, and this to the detriment of the appellant company. The tender document distinguished between "add-on criteria" and "mandatory criteria", and for add-on criteria it held that a minimum of 1% shall be allotted, as follows: *"For Add-on criteria, the scoring shall take place across a range of points from '1%' to 100%. The submissions will be evaluated in terms of appropriateness and relevance of the proposed approach with a conciseness, internal coherence and with a level of detail. The minimum score that can be allotted for such criteria is 1% and thus the bid shall not be disqualified."* In breach of the above condition, the contracting authority, through the evaluation committee allocated '0' points on multiple occasions for add-on criteria, thus breaching the tender document,

i) Alternative Energy Generation ii) The strategy clearly outlines a plan which will be implemented within the operations of the establishment leading to the attainment of quality assurance certifications or equivalent. The above confirms that, the evaluation of the bid by the appellant company has not been done in accordance with declared conditions, and thus the evaluation committee acted in breach of the self-limitation doctrine - when this breach is coupled with all other breaches mentioned in grievance number 1, it is amply clear and sufficiently proven that there are grave and sufficient reasons to warrant a re-evaluation of the bids;

d) **1st (D) grievance - Breach of Procurement Policy # 40 -**

Reference is hereby being made to the Department of Contracts Procurement Policy number 40 which sets out an obligation on the part of the Evaluation committee to ensure that *"ambiguous, contrasting or not sufficiently explicit and clear"* documentation presented by a tenderer are clarified and explained. In clear and unambiguous terms, the policy states that, *"In the eventuality that it transpires that the submitted information/ documentation is or appears to be ambiguous, contrasting or not sufficiently explicit and clear, Contracting Authorities / Entities, in their capacity as Evaluation Committees, shall request the concerned Economic Operators to clarify the necessary information / documentation, within the appropriate Time Limit."* In the case under review, no clarification request has been made in relation to the training measures, which clarification would have provided the necessary confirmation and provided the needed Information as to how the requirement has been addressed through its original submission. The failure by the evaluation committee is grave and sufficient enough, and reaches the expected level, to spur a re-evaluation - and this since a right incumbent on the economic operator to address the matter at evaluation stage, has been suppressed by the evaluation committee Itself - this, failure has usurped the rights, or part thereof, of the appellant company for an effective evaluation by the reviewing committee.

e) **2nd grievance - Selection versus Award criteria: Criteria for exclusion -**

All procurement procedures involve a twofold set of criteria, i.e. • the Selection/Qualification/Eligibility criteria; and • Award criteria. By way of definition, Selection/Qualification/Eligibility are such which are mandatory without which the economic

operator cannot be considered for award, on their part, Award Criteria are those which are either based on price only or on a ratio system, known as best price quality ratio. Having established the principles, it is opportune to verify the manner in which this RFP, distinguished between selection and award criteria. In particular the RFP in provision 5.1 states that: *"5.1 The concession will be awarded to the tenderer submitting the proposal with the best price quality ratio and which is administratively and technically compliant."*

It is thus inconceivable, how and why the tender used criteria which are: • An award criteria • An award criteria relating to the performance of the contract • An award criteria which does not relate to the main objective of the tender [main objective is works concession, the operation is a mere right of exploitation] • An award criteria which does not have a significant impact on the performance on the tender [vide article 67 Directive 2004/18/EC]. To exclude the economic operator, as opposed to, using the award criteria to create a scoring and a final grading between the different economic operators [one submission in this case]. The appellant company has successfully satisfied the selection criteria, has provided all the necessary information, and nonetheless the contracting authority excluded it on an award criteria [which should have never been designated as mandatory, and in any case, they should never have as a consequence the disqualification of the bidder - eligibility criteria are to be assessed solely through selection criteria and not through award criteria]. For avoidance of doubt, the point hereby being made is that award criteria are there to create a ranking between eligible economic operators and not to lead to any exclusion whatsoever. It is thus the submission of the appellant company that its exclusion on the basis of award criteria, is not permissible, nor proportionate and definitely not in accordance with good procurement governance.

f) ***3rd grievance - Criteria 3 not sufficiently related to the scope of the tender -***

Directive 2004/18/EC, in article 67, clearly creates an obligation on the part of the contracting authority to create criteria which are "linked to the subject-matter of the public contract in question, and that any criteria relating to *"qualification and experience of staff"* can only be employed if, *"the quality of the staff assigned can have a significant impact on the level of performance of the contract"*

Now applying the above principles to the RFP under review, ones establishes that this procurement is a "works concession", and this as confirmed through: • Firstly - The tender document name is clear that this is a *"... works concession for the Regeneration and Design, Management, Operation, Maintenance and Transfer Back of the ex-Chalet (Sliema) site as a Superior Quality Catering and Entertainment Establishment"*. • Secondly - The tender document additionally states that, *"The Tenderer that is awarded the works concession will be entrusted with the execution of works consisting in the regeneration (including design) and continued maintenance of the Site as a Superior Quality Catering and Entertainment Establishment and in consideration for which that Tenderer will be granted the right to exploit the works carried out through the operation of the Site as a Superior Quality Catering and Entertainment Establishment."* • Thirdly - Finally, it makes it clear that, *"This Procurement Procedure is regulated by the Concession Contracts Regulations (S.L. 601.09)."*

It is thus clear that the main objective of this procurement is the works concession, which by its very definition excludes from the scope of the procurement the operation, and this by transferring the full risk of operation to the economic operator, which risk involves the exploitation of the works carried out - thus the operation of the site. It is thereby clear that the criteria in section 3 are not sufficiently linked to the subject-matter of the request for proposals [as operation is intrinsically outside the scope of the procurement] and more importantly, the experience of the Food & Beverage manager and the Chef [non key experts], do not have a significant impact on the level of performance of the contract - this renders Criteria 3 in breach of article 67 of Directive 2014/24/EU. Thus and thereby, and without prejudice to the above mentioned grievances, and exclusion on criteria which from the outset are breach of the regulations, is not just absurd but worst still illegal!

g) **4th grievance - Criteria as contract performance conditions -**

On a strictly without prejudice basis, the criteria in section 3, are all contract performance criteria, and thus they should not be criteria which lead to an exclusion of an economic operator. It is thus incomprehensible how matters relating to the performance of the contract, are taken into account by the evaluation stage! So much are they matters relating to the performance of the contract, that for Key Experts, the RFP states that, "*The Successful Tenderer shall, upon the award of the contract, provide a scanned copy of all related certificates and warrants (if applicable) for each Key Expert*" - Ironic as it might sound, the expectation of the evaluation committee was that for non-key experts the documents were to be submitted at tendering stage [something which the appellant committee forcefully rebuts, since the RFP did not state this]. In line with settled judgments, performance of a contract should not fall within the competence and scope of the evaluation committee, in particular when the risks of such performance is fully absorbed by the economic operator and not the contracting authority!

h) **5th grievance – Proportionality -**

Without any admission of non-compliance with the tender specifications, when one considers the scope of the tender, the magnitude of the project, the risk being fully assumed by the economic operator, the fact that no other economic operator participated in the procurement procedure, and the fact that the alleged non-compliance is related to contract performance, on the basis of proportionality the sanction should not and cannot be exclusion of the economic operator! 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 others - The principle which seeks to create a balance between competing interests! In this case, the appellant company is a sole bidder, and thus whilst not expecting "a red-carpet treatment" , when coupled with the alleged breaches, the principle of proportionality has further relevance in the context under review.

i) **6th grievance - Revocation of cancellation -**

The appellant company contends and it shall prove that there are manifest errors within the evaluation, and thereby the bid by the economic operator should have never been rejected and consequently a re-evaluation is being requested. As a consequence, the cancellation recommended by the contracting authority should also be revoked, since unlike what is declared, the bid of the appellant company is both qualitative and financially worthwhile, and thus cancellation is not justified. Thus and thereby, the appellant company is by virtue of this appeal also seeking to impugn the recommended cancellation by the contracting authority.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22nd February 2024 and its verbal submission during the hearing held on 18th March 2025, in that:

a) *1st grievance -*

Part I. The Inadmissibility of the First Ground of Appeal: the Appellant cannot raise claims related to the drafting of the RFP's clauses, whether on ambiguity or otherwise.

The Appellant feels aggrieved by the drafting of the RFP requirements. It makes particular reference to the alleged 'contradiction' between the section on Key Experts, which is marked as Note 2, and the rest of the Technical Offer which is marked as Note 3. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge allegedly contradictory terms up to one day before the lapse of the tender submission period. This application would have been more commercially sensible for the Appellant since no charge is levied for exercising the pre-contractual remedy in terms of Regulation 98. Rather, the Appellant chose to harbour its reservations and only flagged them to the Contracting Authority by filing this appeal ex post facto and paying the necessary deposit of €50,000 in terms of Regulation 109 of the CCR. The Appellant also laments that the First Mandatory Criterion is couched in ambiguous terms. While rebutting this allegation, the Contracting Authority pleads that such a claim cannot be raised after the award stage has been concluded. Once again, the Appellant had every opportunity, in terms of Regulation 98 of the CCR, to challenge allegedly ambiguous terms up to one day before the lapse of the tender submission period. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender. The Appellant could have exercised its remedies at law inter alia under Regulation 98, but it never did. Once the closing date lapsed, and the Appellant's bid submitted and opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.

Part II. Reply to the Add-On Criteria Grievance: The Appellant should have been awarded an additional 2 points under the add-on criteria.

Under paragraph 1.5.3 of the Appeal, the Appellant laments the evaluation committee's decision to award nil points for the add-on criteria in Point 2B (the "First Add-On Criterion") and Point

3A (the "Second Add-On Criterion") of the Evaluation Grid (together the "Add-On Criteria"). The RFP splits the BPQR criteria into 2: mandatory criteria and add-on criteria. It goes a step further, and clearly delineates the different rules applicable to either. On the one hand: *"Unless otherwise being stated in the table itself, all criteria are mandatory and the scoring shall take place across a range of points from '0' to 100%".* The rules on the Evaluation Grid go on to say that: *"a '0' score shall be allotted if the requested documentation is not submitted and/or the content of the documentation submitted does not meet all minimum requirements. If a score of '0' is allotted to any of the criteria the bid shall be disqualified."* On the other hand: *"For Add-on criteria, the scoring shall take place across a range of points from '1%' to 100%. The submissions will be evaluated in terms of appropriateness and relevance of the proposed approach with a conciseness, internal coherence and with a level of detail. The minimum score that can be allotted for such criteria is 1% and thus the bid shall not be disqualified."* Point 2B required tenderers to include effective methods of alternative energy generation in their business plans. Point 3A required tenderers to submit strategies for obtaining quality assurance certificates. As stated in its letter of rejection, the Appellant was disqualified because it failed on a number of mandatory criteria. It was not disqualified because of its failure to satisfy add-on criteria, for instance, because its business plan did not cater for effective methods of alternative energy generation, or because it did not provide a strategy for obtaining quality assurance certificates. With that being said, the Contracting Authority looked into the allegation the evaluation committee had accorded nil points to the Appellant's proposal in terms of these 2 Add-On Criteria because no submissions were made in relation thereto. It confirmed that no points were awarded for either add-on criterion. The Appellant should have been awarded 1 point each for a total of 2 extra points under the Add-On Criteria in accordance with the instructions laid down in Section 6.3: Evaluation Grid. While holding fast its rebuttal of the remaining points raised under the first grievance, the Contracting Authority will, by way of revision to the letter of rejection, address this. Even though the Appellant is right in this respect, this does not pave the way for a re-evaluation of the entire proposal.

Part III. Reply to the First Ground of Appeal: The Appellant failed to satisfy the Mandatory Criteria, even when given the opportunity to submit a clarification in this respect.

The Appellant starts off by saying that the evaluation committee wrongly interpreted the Mandatory Criteria because there was no requirement for mandatory documentation. With respect, the Contracting Authority cannot but comment on the illegibility of this argument. It is a non sequitur, because there is no requirement either in the CCR or Directive 2014/233 (the "Concessions Directive") for award criteria to compulsorily demand the submission of supporting documentation. What was requested of tenderers was the inclusion of information on the Food & Beverage Manager and the Head Chef in the executive summary and business plan portion of the proposal, and a write-up delineating the training programme for start members. Tenderers were given explicit instructions in Section 6.3: Evaluation Grid that if the mandatory requirements are not met, then a score of '0' will be allotted to that particular criterion and the proposal would be

disqualified. The Appellant was disqualified on both counts. This decision is proportionate as shall be explained in the Contracting Authority's reply to the fifth ground of appeal. The Appellant argues that it should not have been disqualified even though the Mandatory Criteria were marked as Note 3. In supporting its argument, the Appellant draws a parallel with the Key Experts section of the RFP which is a Note 2 matter. Without prejudice to the preliminary plea raised in this respect, the Appellant's gripe is not with the manner in which this RFP was drafted, but rather with the drafting of procurement documents in Malta generally. The general rule is that the Technical Offer Form is a Note 3 matter, with the exception of the Key Experts section. This is even acknowledged in Procurement Policy Note #40 issued in July 2023 and cited by the Appellant which on page 5 explains that: *Rectification Requests in relation to Key Experts are the only part of the Technical Offer per se that may be rectified.* Nor is the Appellant correct to say that no clarification request was made on the reasons for rejection. Even though it was not bound to do so, the evaluation committee provided the opportunity to the Appellant to clarify where in the proposal submitted the information on the Mandatory Criteria could be found. The reply does not address the query raised by the evaluation committee in its request. It does not identify where in the Appellant's proposal the information on the Mandatory Criteria is located. Rather, the Appellant's reply provided new information by means of a purported 'additional confirmation' that the personnel engaged are compliant with the mandatory requirements. The Appellant, in so doing, attempted to substantially amend its proposal through a clarification request. It is not allowed to submit new information in response to a clarification request. This principle has been developed by the EU Courts of Justice* over the years, leading to its inclusion in the latest version of the Classic Directive. This is also confirmed in the Procurement Policy Note #405 which states: *Contracting Authorities / Entities are being notified that any required mandatory information / documentation which was not originally submitted with the Procurement / Concession Submission will disqualify the bidder unless the said information / documentation is subject to Note 2, thus, rectifiable. Therefore, through the Clarification / Rectification Request, bidders should not be given the opportunity to modify / add information to their Procurement / Concession Submission with the scope of presenting a compliant bid (emphasis added). In addition, it is not permissible to request a 'Yes or No Response' which might lead bidders to provide the expected answer.* The Contracting Authority submits that this is what the Appellant attempted to accomplish here. It attempted to make up for its failure to include information on the Mandatory Criteria in its original proposal by submitting new information in the clarification response. In doing so, the Appellant remained in default. It did not give information which would have enabled the evaluation committee to allocate scoring accordingly for the First Mandatory Criterion which clearly implemented a scoring scale. 2 points each would have been allocated had the Food & Beverage Manager and/or the Head Chef satisfied the minimum requirements, while 6 points would have been allocated if the personnel possessed qualifications and experience higher than the minimum requirements.

b) *2nd grievance -*

Part I. The Inadmissibility of the Second Ground of Appeal: the Appellant cannot, at this stage, raise grievances related to the unlawfulness or otherwise of mandatory award criteria.

The Appellant feels aggrieved because it alleges that it could not have been disqualified once it passed the selection criteria. In this respect, the Appellant claims that the Mandatory Criteria are wrongly designated in the RFP as award criteria when they are serving the function of selection criteria. It described this designation as 'not permissible'. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge any alleged unlawfulness up to one day before the lapse of the tender submission period. The selection criteria and the award criteria have been clearly established in the RFP since day one of its publication, that is, 31 October 2022. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender. The Appellant could have exercised its remedies at law inter alia under Regulation 98, but it never did. Once the closing date lapsed, and the Appellant's proposal submitted and opened, the Appellant's remedy in terms of Regulation 98 of the CCR is time-barred and extinguished.

Part II. Reply to the Second Ground of Appeal: the Appellant's understanding of selection criteria and award criteria is outdated.

The Appellant's understanding of the interplay between selection criteria and award criteria was the state of play under the predecessor Directive 92/50,² and remained so under the 2004 procurement directives (together referred to as the "Old Directives"). The judgement cited by the Appellant in *Gebroeders Beentjes BV versus State of the Netherlands* was delivered in 1988, even before the enactment of the predecessor of the Old Directives. The Old Directives maintained a strict distinction between selection and award criteria. The former regulated the admission of bidders to the race, serving as prerequisites for the eventual evaluation of the tenders. Award criteria, on the other hand, could only be used to evaluate the tender, in the sense of assigning scores thereon. This rigid understanding of the criteria, with no room for cross-influence between the two, was endorsed by CJEU jurisprudence, particularly in the 2008 judgement of *Lianakis*. This is no longer the case. The traditional understanding of these criteria changed with the promulgation of the Classic Directive and the Concessions Directive in 2014 (together referred to as the "New Directives"). In fact, one of the drivers behind the introduction of the New Directives was the need to address the interpretation of *Lianakis*. The New Directives have not maintained the strict separation between selection criteria and award criteria. The Classic Directive brought in the possibility of award criteria requiring certain qualifications and experience of the staff assigned to contractual performance. Article 67(2)(b) of the Classic Directive, which was not present in the Old Directives, allows award criteria to comprise: *organisation, qualification and experience of staff assigned to performing the contract, where the quality of the staff assigned can have a significant impact on the level of*

performance of the contract. The justification behind the introduction of this new article is explained in Recital 94 to the Classic Directive: *Wherever the quality of the staff employed is relevant to the level of performance of the contract, contracting authorities should also be allowed to use as an award criterion the organisation, qualification and experience of the staff assigned to performing the contract in question, as this can affect the quality of contract performance and, as a result, the economic value of the tender.* The Concessions Directive is not as strict on contracting authorities as the Classic Directive. As explained in Recital 68 to the former, the reason is that concessions are "usually long-term complex arrangements" and consequently, more flexibility is required "to define and organise the procedure leading to the choice of the concessionaire". Unlike its counterpart, the Concessions Directive does not require contracting authorities to procure on the basis of MEAT. It establishes general rules in Article 41 for the formulation of award criteria so as to enable the contracting authority "*to identify an overall economic advantage*". The rule in Article 67 of the Classic Directive to permit award criteria on staff-specific qualifications and experience only "wherever the quality of the staff employed is relevant to the level of performance of the contract is not applicable to concessions such as the RFP in question. The Concessions Directive also expressly stipulates that the Contracting Authority was entitled to ask for a staff training programme as an award criterion in accordance with its Recital 66: *Measures aiming at the protection of health of the staff involved in the process of performance of the concession, [...] or training in the skills needed for the concession in question can also be the subject of award criteria or concession performance conditions provided that they relate to the works or services to be provided under the concession.* It is now well-established that the weighting accorded to award criteria can generate the same output as selection criteria: disqualification. The Appellant's argument that the selection and award criteria are two watertight processes may have found some comfort pre-2014. It no longer does so today.

c) **3rd grievance -**

Part I. The Inadmissibility of the Third Ground of Appeal: the Appellant cannot post-mortem raise allegations which attach to the unlawfulness or otherwise of the Mandatory Criteria.

The Appellant claims that the Mandatory Criteria are not linked to the subject-matter of the contract. Although the Appellant makes reference to Article 67 of the Classic Directive, the correct reference point is Article 41(2) of the Concessions Directive: *The award criteria shall be linked to the subject-matter of the concession, and shall not confer an unrestricted freedom of choice on the contracting authority or the contracting entity. They may include, inter alia, environmental, social or innovation-related criteria.* The Mandatory Criteria have existed as a state of fact in the public eye since the publication of the RFP in October 2022. However, the Appellant only chose to lament their alleged unlawfulness after it learnt of its disqualification. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge any alleged unlawfulness up to one day before the lapse of the tender submission period. Instead, the Appellant voluntarily submitted a proposal without raising any

objection. In doing so, it accepted the contents of the RFP in their entirety as stated in Rule 9.4 of the General Rules Governing Tenders which complement the RFP. This rule also requires tenderers to *"examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document"*. The Contracting Authority submits that it cannot be held accountable for any failure by the Appellant to carefully peruse the RFP documentation prior to the submission of its proposal. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.

Part II. Reply to the Third Ground of Appeal: The Mandatory Criteria are linked to the subject-matter of the contract.

The Mandatory Criteria do not have to pass through the test in Article 67(2) of the Classic Directive, that is, they are not only allowed as award criteria *"where the quality of the staff assigned can have a significant impact on the level of performance of the contract"*. *In arguendo*, the Contracting Authority submits that the Mandatory Criteria satisfy even the Classic Directive rule. The need for a highly qualified and experienced Food & Beverage Manager and Head Chef ties in with the purpose of this concession to revitalise the Ex-Chalet Site into a *"Superior Quality Catering (emphasis added) and Entertainment Establishment"*. The Appellant is correct to say that the Mandatory Criteria must be linked to the subject-matter of the concession. This is the requirement in Article 41(2) of the Concessions Directive. The subject-matter of the concession is clear from the title page of the RFP: *Request for Proposals for a works concession for the regeneration and design, management, operation, maintenance and transfer back of the ex-chalet site, Sliema promenade, Tower Road, Sliema as a superior quality catering and entertainment establishment*. It calls for a works concession which is not simply limited to the construction phase of the contract, but also expressly *"the management, operation, maintenance and transfer back"* of the Site. The Appellant's allegation is that the Mandatory Criteria should not be there because they are not related to construction, but to operation. What the Appellant is trying to do is to create a superficial division between the execution of the works and the contractor's right to exploit the works for profit. The definition of a "works concession" cannot be split into two to suit the purposes of the Appellant. It must be taken as a whole, that is, it is equally: (a) the entrustment of the execution of works and (b) the right to exploit the works being the consideration derived by the contractor from the contract. It is difficult to understand why the Appellant is arguing against its own right to generate revenue by the operation of the Site. The Contracting Authority submits that the operation is linked to the subject-matter of the contract.

d) ***4th grievance -***

Part I. The Inadmissibility of the Fourth Ground of Appeal: the Appellant should have exercised its pre-contractual remedy to question the classification of the Mandatory Criteria.

The Appellant claims that the Mandatory Criteria are not award criteria but contract performance conditions. The Mandatory Criteria have existed as a state of fact in the public eye since the publication of the RFP in October 2022. However, the Appellant only chose to question their classification after it learnt of its disqualification. In accordance with Regulation 98 of the CCR, the Appellant had every opportunity to challenge the classification of the Mandatory Criteria up to one day before the lapse of the tender submission period. Instead, the Appellant voluntarily submitted a proposal without raising any objection. In doing so, it accepted the contents of the RFP in their entirety as stated in Rule 9.4 of the General Rules Governing Tenders which complement the RFP. This rule also requires tenderers to "*examine carefully and comply with all instructions, forms, contract provisions and specifications contained in this procurement document*". The Contracting Authority submits that it cannot be held accountable for any failure by the Appellant to carefully peruse the RFP documentation prior to the submission of its proposal. It has been jurisprudentially established that grievances which can and should have been raised at the pre-contractual stage cannot be raised after bidders learn of their unsuccessful attempt to win the tender.

Part II. Reply to the Fourth Ground of Appeal: the Mandatory Criteria are not performance conditions.

The Appellant does not substantiate its allegation that the Mandatory Criteria amount to performance conditions. It has failed to satisfy the onus probandi required in adversarial proceedings, which by itself is sufficient to enable the Honourable Board to dismiss the fourth ground of appeal. It is difficult to follow the logic of the Appellant. Under the third ground of appeal, it argues that the Mandatory Criteria fall short of the Article 67 rule in the Classic Directive. This rule expressly recognises that award criteria can be based on the qualifications and experience of staff to be employed in the performance of the contract. It is now arguing that the Mandatory Criteria are performance conditions. This is not the case. The Concessions Directive retains more flexibility and discretion for contracting authorities. Subject to the rules contained therein, it allows them to cater for their requirements either in terms of award criteria or concession performance conditions. In drafting the Mandatory Criteria, the Contracting Authority has exercised its discretion in a proportionate and transparent manner. As the Maltese Courts have consistently held, it is not for the bidder to dictate what contracting authorities buy from the private market.

e) ***5th grievance -***

By means of its fifth ground of appeal, the Appellant alleges that its disqualification is a misapplication of the proportionality principle. The Contracting Authority disagrees. The Mandatory Criteria in question fall under the 'Executive Summary and Business Plan' portion (the "Business Plan Section") of the '2. Facilities and Capital Investments' part of the Technical Offer. The Business Plan Section is clearly marked as Note 3 on page 13 of the RFP document, as is the Technical Offer itself on page 10. Note 3 is explained on page 18 as: 3. No rectification shall be

allowed. Only clarifications on the submitted information may be requested. This contrasts with Note 2 which is explained as: 2. Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification. It is an uncontested matter of fact that the Mandatory Criteria were marked as Note 3 with the invariable consequence that they were matters incapable of rectification. The evaluation committee took the decision not to request a rectification from the Appellant on this basis. With that being said, the Contracting Authority is aware that the Court of Appeal has at times dispensed with the need for hard adherence to the Note 3 vs Note 2 rule, and instead looked at the substance of the irregularity through the lens of proportionality. The proportionality test as laid down in *Ballut Blocks* requires that the criterion be suitable for the purpose of achieving the desired objective and to not go beyond what is necessary to achieve it. The Contracting Authority submits that the decision not to go for a rectification request withstands this test too. The objective of the RFP is to concede the ex-Chalet site (the "Site") for transformation into a superior quality catering and entertainment establishment.^[1] The purpose of the First Mandatory Criterion is to ensure a minimum level of qualifications and experience *"in an establishment of a similar class"* for higher management, while the purpose of the Second Mandatory Criterion is to ensure proper staff training in providing *"a customer-oriented service of an optimum level"*. The Contracting Authority submits that the Mandatory Criteria are very much necessary to achieve the purpose of the RFP. It stands by the evaluation committee's decision not to request a rectification from the Appellant in this respect. Even by definition, a rectification can only be requested to rectify information that already exists, which is not the case here. The evaluation committee went a step further and requested clarification from the Appellant to identify the information relating to the Mandatory Criteria in its proposal. The Appellant failed to do so. Having taken all this into account, the evaluation committee took the decision to disqualify the Appellant. The Contracting Authority submits that this decision stands the proportionality test as devised in our jurisprudence. On the contrary, a rectification request would have failed the test devised by the CJEU. The possibility to request rectifications rests on a number of conditions, inter alia that such rectification cannot result in substantial amendments to the tender or be tantamount to the submission of a new one. In the *Cassar Petroleum* judgement cited by the Appellant, the bidder had failed to submit a copy of the relevant licence and had bartered away its right to subcontract in its original bid. The Court of Appeal concluded that allowing the appellant to submit the relevant licence, which belonged to its sub-contractor, would have been tantamount to changing the terms of the offer. It went on to reject the appeal. Similarly, the Appellant in this case failed to submit information in relation to the Mandatory Criteria. The Contracting Authority cannot accept the introduction of any new material after the closing date of submissions. Doing so would lead to a change in the original proposal which is not permissible at law.

f) **6th grievance -**

By way of the sixth ground of appeal, the Appellant maintains that the cancellation of the RFP is not justified because its proposal is qualitatively and financially worthwhile. The Contracting Authority reiterates that cancellation was the invariable consequence of the non-compliance of the Appellant's proposal. Since no other economic operator submitted a proposal, the Contracting Authority had no choice other than to cancel the RFP.

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 Appellant's grievances.

The appellant submitted a bid for the tender, which was subsequently evaluated by the Contracting Authority. The evaluation focused on several criteria, including the add-on criteria as detailed in the Tender Document. The appellant was awarded "0" points for two add-on criteria:

1. Add-on Criteria 2B – Business plan to include effective methods of alternative energy (Pg. 22)
2. Add-on Criteria 3A – Business plan to include strategies for obtaining quality assurance certificates (Pg. 23)

The appellant contests the evaluation, asserting that the awarding of "0" points was inconsistent with the guidelines provided in the Tender Document and the Evaluation Grid Instructions.

Tender Document and Evaluation Grid Instructions

The Tender Document specifies that for add-on criteria, the scoring shall range from 1% to 100%. In particular, the Evaluation Grid Instructions (Pg. 20) state:

"For Add-on criteria, the scoring shall take place across a range of points from 1% to 100%. The submissions will be evaluated in terms of appropriateness and relevance of the proposed approach, with a conciseness, internal coherence, and level of detail. The minimum score that can be allotted for such a criterion is 1%, and thus the bid shall not be disqualified."

This provision establishes that the minimum score for an add-on criterion is 1%, and no bidder should receive a score of "0" under such criteria unless the submission is wholly inadequate.

Contracting Authority's Response

In its Reasoned Letter of Reply (Article 39, Pg. 7), the Contracting Authority acknowledged the error in the evaluation process. It confirmed that no points were awarded to the appellant for either Add-on Criterion 2B or Add-on Criterion 3A. The Contracting Authority further stated:

"The Appellant should have been awarded 1 point each for a total of 2 extra points under the Add-on Criteria in accordance with the instructions laid down in Section 6.3 of the Evaluation Grid."

This response indicates that the appellant's submission met the minimum threshold for both add-on criteria and should have been awarded 1 point per criterion, totalling 2 extra points.

Issue for Determination

The central issue for determination is whether the Contracting Authority's failure to award the appellant points under Add-on Criteria 2B and 3A constitutes a breach of the tender document, specifically the scoring instructions outlined in the Evaluation Grid.

Findings

Upon review of the Tender Document, the Evaluation Grid Instructions (Pg. 20), and the Contracting Authority's Reasoned Letter of Reply, the Public Contracts Review Board finds as follows:

Scoring Criteria:

The tender clearly stipulates that for add-on criteria, the minimum score to be awarded is 1%. The appellant's submission, therefore, could not be justifiably awarded "0" points for either Add-on Criterion 2B or Add-on Criterion 3A, given that the appellant's submission did not fall short of the minimum threshold as per the Evaluation Grid Instructions.

Contracting Authority's Acknowledgment of Error:

The Contracting Authority, in its reply, acknowledged the oversight and agreed that the appellant should have received 1 point for each add-on criterion, thereby confirming the appellant's entitlement to a minimum score under the add-on criteria.

Breach of Tender Terms:

The failure to award points to the appellant under the add-on criteria constitutes a breach of the clear terms set out in the Tender Document. Specifically, awarding "0" points is inconsistent with the provisions of the Evaluation Grid Instructions, which mandate a minimum score of 1% for each add-on criterion.

The Public Contracts Review Board finds that the Contracting Authority's decision to award "0" points to the appellant for Add-on Criteria 2B and 3A was in breach of the tender document. The appellant is entitled to receive 1 point for each of the add-on criteria, totalling 2 additional points.

Reason of rejection 1: The appellant failed to satisfy the Mandatory Criteria 3b – Upper Management engaged to operate the establishment

The Contracting Authority rejected the appellant's submission, citing non-compliance with Mandatory Criterion 3b, which requires that the upper management (specifically, the head chef) be qualified to operate the establishment. This mandatory criterion stipulates that:

- The Head Chef must have a minimum of MQF level 5 qualification or a minimum of 3 years of experience working in an establishment of similar class (worth 2 points).
- A higher qualification or more years of experience would award 6 points.

The appellant argues that no mandatory document was specifically requested to demonstrate compliance with this criterion. The Contracting Authority, on the other hand, maintains that the appellant was expected to submit documentation (either self-declaration or other evidence) to show that the proposed personnel meet the criteria outlined.

Tender Document and Evaluation Grid Instructions

The appellant asserts that, upon reviewing the tender document, there is no clear indication that specific documents or literature were required to support the Mandatory Criterion 3b in the technical offer section, nor does the evaluation grid provide sufficient instructions. The tender document does indeed provide guidelines for other sections, such as the business plan, self-declaration for key experts, an organigram, and write-ups (Pg. 10–17), as well as for other criteria like the training program (Pg. 24). However, the **Evaluation Grid** for Mandatory Criterion 3b does not specify any documentation requirements to substantiate the qualifications or experience of the head chef.

The Contracting Authority's argument that the appellant was expected to provide documentation to demonstrate that the head chef meets the required qualifications is based on a broader expectation rather than specific, written instructions in the tender documents.

In this context, the Public Contracts Review Board acknowledges the appellant's argument that no mandatory document or specific instructions were included in the tender document to demonstrate compliance with Mandatory Criterion 3b. In contrast, the other mandatory criteria and technical offer sections do indicate what documents or evidence were required (e.g., self-declarations, business plans, organigrams, and write-ups).

For example:

- Pg. 10–17: Tender document outlines requirements for business plans, self-declarations for key experts, and organigrams.
- Pg. 24: The evaluation grid clearly specifies documentation needed to support the training program. However, Pg. 22 and Pg. 24 (regarding Mandatory Criterion 3b) fail to clarify what literature or documentation is necessary to demonstrate the head chef's qualifications.

The expectation of the Contracting Authority, though reasonable in context, was not adequately transposed into the tender document [emphasis of the Board]. The tender document did not clearly communicate the requirement for a self-declaration or other supporting documents regarding the head chef's qualifications or experience, which would have provided clarity to potential bidders on how to meet this criterion.

Given this absence of clear instructions, the Public Contracts Review Board is of the view that the appellant should not be penalized for failing to submit documentation that was not explicitly requested in the tender document.

Findings

The Public Contracts Review Board finds the following:

Lack of Specific Instructions:

The tender document, particularly the Evaluation Grid, did not explicitly request specific documentation (e.g., self-declarations, certificates, or other evidence) to demonstrate compliance with Mandatory Criterion 3b. While the other sections of the tender document are clear about the required documents, the failure to include such instructions for this particular criterion led to ambiguity regarding the documentation required.

Expectation vs. Documentation Request:

The Contracting Authority's expectation that the appellant provide information on the head chef's qualifications and experience is reasonable, but the failure to properly communicate this requirement in the tender document creates an unfair disadvantage for bidders.

No Penalization for Lack of Requested Documents:

The appellant's failure to submit the documentation concerning the head chef's qualifications or experience cannot be used as a reason for rejection, given that the tender document did not clearly indicate that such documents were required for this particular criterion.

The Public Contracts Review Board finds that the rejection of the appellant's submission based on the failure to meet Mandatory Criterion 3b constitutes a breach of the tender process. The appellant should not have been penalized for not submitting documents that were not clearly requested in the tender document.

Reason of rejection 2: The appellant failed to satisfy the Mandatory Criteria 3c – Human resources management – Training measures specified

The Contracting Authority rejected the appellant's tender, citing non-compliance with Mandatory Criterion 3c, which required the submission of a Training Plan as part of the Human Resources Management requirements.

The Contracting Authority's grounds for rejection were that:

1. The appellant did not submit the required write-up detailing the training measures.
2. The training plan submitted by the appellant was not aligned with the customer-oriented service requirement.

The appellant contests this decision, arguing that while the training plan was not submitted in the exact format requested (a write-up), the necessary training measures were addressed in various sections of their submission. Specifically, the appellant points to the following sections of their submission as addressing relevant training measures:

- 1.5.2.3.1 – Page 7: Dealing with training to operate equipment.
- 1.5.2.3.2 – Page 10: Dealing with training to minimize risks and accidents.
- 1.5.2.3.3 – Page 166: Dealing with training and certifications as part of control measures.
- 1.5.2.3.4 – Page 183: Dealing with training as part of the Health & Safety plan.

The Contracting Authority contends that the training plan submitted by the appellant did not comply with the mandatory criterion because it was not presented in the requested format and focused on elements unrelated to customer service.

Tender Document and Evaluation Grid Instructions

The tender document and the Evaluation Grid provide instructions regarding the submission of a training plan. The Evaluation Grid specifies that a write-up is required, but it does not prescribe a specific format (e.g., self-declaration, or other). The instructions state:

"It is up to the bidder to identify the most appropriate length of the write-up/description in respect of each criterion below, as applicable, with the proviso that the write-up/description should address all requirements accordingly." (Pg. 20)

This instruction gives bidders the flexibility to determine the format and content of the write-up, as long as all criteria are addressed.

Write-Up Not Submitted in Requested Format:

The appellant argues that although the specific write-up requested was not submitted, the relevant training measures were described throughout various sections of their submission. The Evaluation Grid instructions allow bidders to determine the form and length of their write-up, as long as the requirements are adequately addressed. The appellant's submission contains multiple references to training measures, including sections on equipment operation, risk management, certifications, and health & safety.

The Board further finds it pertinent to reference the Court of Appeal's decisions, which clarify that a bidder should not be disqualified for failing to provide information in the exact format requested if the required information can be obtained from other sections of the submitted documents. In particular, the Court of Appeal's decision in *Bonnici Bros Projects Ltd et vs. Ministru Ghas-sahha et* (30 July 2018) and *Rockcut Limited vs. Id-Direttur Generali tad-Dipartiment tal-Kuntratti et* (25 June 2018) states:

"L-offerent m'ghandux jigi skwalifikat fuq in-nuqqas tal-ghotja ta' xi taghrif mitlub fid-dokument tas-sejba, jekk kemm il-darba l-kumitat ta' evalwazzjoni jkun jista jikseb dak it-tgħarif min xi parti ohra tad-dokumenti li jigu sottomessi bhala parti minn dik l-offerta."

The Board concurs with the appellant's argument that the required training measures were described in various parts of the tender documents and that this should be considered as satisfying the intent of the mandatory criterion.

Training Plan Focused on Customer-Oriented Service:

The Contracting Authority's second argument is that the appellant's training plan was not focused on a "customer-oriented service." The Contracting Authority asserts that the training plan submitted by the appellant was geared more toward operational measures and did not explicitly address customer service.

However, the Board notes that the Evaluation Grid did not specify the exact aspects of customer service that the training plan should cover. The contract documentation did not outline the need for specific topics like communication skills, problem-solving, or empathy, which are often included in customer service training programs. Therefore, the "customer-oriented service" requirement should be interpreted broadly. The Board believes that the training measures submitted by the appellant, particularly in areas such as equipment operation, health & safety, and risk management, could directly or indirectly support customer-oriented service by ensuring well-trained and capable personnel.

If the Contracting Authority intended to specify training requirements on topics such as effective communication, active listening, and other customer service skills, it should have made this clear in the tender documentation. Since such specifics were not included, the Board finds that the appellant's submission, which includes relevant training descriptions, should be deemed compliant with the overarching requirement of a training plan.

Findings

The Public Contracts Review Board finds as follows:

1. **No Specific Format Requirement:** The tender document and **Evaluation Grid** did not specify a rigid format for the training write-up. The appellant addressed the training requirements across multiple sections of the submission, and the relevant information was available in the documents provided.
2. **Training Measures Relevant to Customer Service:** While the appellant's training plan did not explicitly focus on "*customer-oriented service*," the training measures described are relevant to ensuring that the personnel are adequately trained for their roles. Without a clear and specific directive from the Contracting Authority regarding the content of the customer service training, the appellant should not be penalized for providing training descriptions that align with the broader goals of effective service delivery.

In this context, the Public Contracts Review Board concludes that the rejection of the appellant's tender based on non-compliance with Mandatory Criterion 3c is unfounded. The appellant's submission, while not in the exact format requested, adequately addressed the training requirements through various sections of the tender documents. Furthermore, the training measures provided align with the overall objective of ensuring well-trained personnel, which is consistent with the spirit of the mandatory criterion.

Criteria as Contract Performance Conditions

Upon evaluation of the appellant's tender, the Contracting Authority excluded the appellant's bid on the grounds of non-compliance with certain criteria relating to Key Experts. The appellant contests this

decision, arguing that the criteria mentioned in the Request for Proposal (RFP) are contract performance conditions and should not lead to the exclusion of the tenderer at the evaluation stage.

The appellant's specific objections concern the requirement for the submission of certificates and warrants for Key Experts. According to the appellant, the RFP clearly states that these documents should be submitted only upon the award of the contract, and the appellant's failure to provide them at the tendering stage should not result in exclusion. Furthermore, the appellant argues that the expectation of the evaluation committee—that documents for non-key experts should be submitted at the tendering stage—is not explicitly stated in the RFP, and therefore, no such requirement should have been enforced at the evaluation stage.

The Contracting Authority, in its defence, asserts that the evaluation of the qualifications and certifications of the Key Experts was critical to ensuring that the successful bidder could deliver the contract in accordance with the specifications. The Contracting Authority further contends that the submission of required documents for non-key experts at the tendering stage was a necessary precondition for evaluating the overall quality of the bid.

The issue for determination is whether the criteria relating to the submission of certificates and documentation for Key Experts should be treated as contract performance conditions and whether the appellant's exclusion for failing to provide this documentation at the tendering stage was justified. Additionally, the Board must assess whether the Contracting Authority's expectation regarding the submission of documents for non-key experts was clearly defined in the RFP.

Moreover, the Contracting Authority emphasizes that the documentation relating to Key Experts is integral to the evaluation process because it allows the Contracting Authority to assess the technical capabilities of the tenderer, ensuring that the personnel proposed for the contract have the necessary skills and qualifications. In the context of non-key experts, the Contracting Authority argues that the required documentation should be submitted upfront as part of the tendering process, as it is critical for assessing the bid's overall responsiveness.

The appellant disagrees with the Contracting Authority's interpretation of the criteria as contract performance conditions. The appellant, in succinct, submits the following arguments:

Key Experts Documentation Submission upon Award of Contract:

The appellant argues that the RFP specifically states that the scanned copies of all related certificates and warrants for Key Experts are to be provided only upon the award of the contract. The appellant contends that, therefore, there is no requirement in the RFP to submit these documents during the tendering stage, and the expectation that such documents be submitted in advance is unwarranted. The appellant

emphasizes that the RFP makes a clear distinction between the submission of documents at the tendering stage and the provision of documents after contract award.

Contract Performance Conditions and Exclusion:

The appellant submits that the criteria concerning Key Experts should be understood as contract performance conditions and, as such, should not be used as a basis for exclusion during the evaluation stage. The appellant argues that such criteria are intended to ensure the successful performance of the contract once awarded, rather than as a criterion for evaluating the technical compliance of the bid itself. Since the required documentation for Key Experts was not requested at the tender stage but only after contract award, the appellant maintains that exclusion based on this non-submission is a disproportionate sanction.

Expectation of Documents for Non-Key Experts:

The appellant further rebuts the Contracting Authority's expectation that documentation for non-key experts should be submitted at the tendering stage. The appellant points out that the RFP does not explicitly mention this requirement, and it is unreasonable for the Contracting Authority to impose an additional obligation on the tenderers that was not clearly stated. According to the appellant, such an expectation creates an unnecessary burden on bidders and constitutes an unjustified basis for rejection.

Principle of Proportionality

The principle of proportionality in public procurement requires that decisions made during the evaluation process must not exceed what is necessary to achieve the legitimate objectives of the procurement. Any exclusion of a tenderer should be based on non-compliance with essential tender requirements that are directly related to the subject matter of the contract. In this case, the Key Expert documentation relates to the performance of the contract, not the evaluation of the bid's responsiveness or technical capability.

The Board must assess whether excluding the appellant based on non-submission of Key Expert documentation at the tendering stage is proportionate to the objective of evaluating the bid. Given that the RFP clearly specifies the requirement to provide Key Expert documentation after the award of the contract, the appellant's exclusion for failing to provide this documentation at the tendering stage seems to be an excessive measure, especially in light of the fact that the required documents were not intended to be submitted during the evaluation stage.

Findings

The Public Contracts Review Board finds as follows:

Key Experts Documentation as Contract Performance Conditions:

The Board acknowledges that the qualifications and certificates of Key Experts are critical to the performance of the contract. However, the Board agrees with the appellant that these requirements should not have been a basis for excluding the tenderer during the evaluation stage.

Non-Key Experts Documentation:

The Board finds that the RFP does not explicitly require the submission of documentation for non-key experts at the tendering stage. As a result, the expectation that such documents should be submitted during the tendering process, as suggested by the Contracting Authority, was unreasonable and cannot serve as grounds for exclusion.

Proportionality of Exclusion:

The Board finds that the exclusion of the appellant's tender for failing to submit the Key Expert documentation at the evaluation stage was disproportionate. The documents were required only after the award of the contract, and therefore, the appellant should not have been penalized for their non-submission at the tender stage.

The Board,

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

- a) To uphold the Appellant's grievances;
- b) To revoke the Letter of Rejection dated 31st January, 2024;
- c) To revoke the cancellation of the RFP dated 31st January, 2024;
- d) To order the Malta Strategic Partnership Projects Limited, to reinstate the offer of the appellant company and to re-evaluate the bid by a newly constituted evaluation committee taking into consideration the Board's findings and to do anything else which is conducive and necessary for the proper execution of the above orders;
- e) Directs that the deposit paid by Appellant be fully reimbursed.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Keith Victor Grech
Member