

PUBLIC CONTRACTS REVIEW BOARD

Case 2107 – CT2333/2024 – Work Tender for the Demolition, Excavation and Piling Works of the Arts & Cultural Hub at Marsa Using Environmentally Friendly Measures

26th May 2025

The Board,

Having noted the letter of objection filed by Dr Matthew Paris acting for and on behalf of Green Building Solutions Limited, (hereinafter referred to as the Appellant) filed on the 7th April 2025;

Having also noted the letter of objection filed by Dr John L. Gauci acting for and on behalf of SB Marine Works JV, (hereinafter referred to as the Recommended Bidder) filed on the 17th April 2025;

Having also noted the letter of reply filed by Dr Ryan C. Pace acting for Festivals Malta Agency (hereinafter referred to as the Contracting Authority) filed on the 17th April 2025;

Having also noted the letter of reply filed by Dr Audrey M. Buttigieg Vella and Dr Mark Anthony Debono acting for the Department of Contracts filed on the 17th April 2025;

Having heard and evaluated the testimony of the witness Mr Etienne Bonello (Chairperson of the Evaluation Committee) as summoned by Dr Zack Esmail acting for the Appellant.

Having heard and evaluated the testimony of the witness Mr Rhys Buttigieg (Representative of Green Building Solutions Limited) as summoned by Dr Zack Esmail acting for the Appellant.

Having heard and evaluated the testimony of the witness Mr Christopher Grech (Technical Expert engaged by the Contracting Authority) as summoned by Dr Ryan Pace acting for the Contracting Authority.

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

Having noted and evaluated the minutes of the Board sitting of the 6th May 2025 hereunder-reproduced.

Minutes

544-Objection CT 2333/2024 Works Tender for the Demolition, Excavation and Piling Works of the Arts & Cultural Hub at Marsa Using Environmentally Friendly Measures

The tender was published on the 2nd December 2024 and the closing date of the call for tenders was the 12th February 2025.

The estimated value of this tender, excluding VAT, was € 3,977,226.39.

On the 7th April 2025 Green Building Solutions Limited filed an appeal against the decision of Festivals Malta Agency to disqualify their offer on the grounds that it was not technically compliant.

A deposit of € 19,886 was paid. There were nine bids.

On the 6th May 2025 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Ana Thomas and Mr Keith Victor Grech as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Green Building Solutions Limited

Dr Matthew Paris	Legal Representative
Dr Zack Esmail	Legal Representative
Dr Kayleigh Borg	Legal Representative
Ms Beryl Buttigieg	Company Representative
Mr Rhys Buttigieg	Company Representative

Contracting Authority – Festivals Malta Agency

Dr Ryan Pace	Legal Representative
Mr Francis Agius	CEO of Contracting Authority
Mr Etienne Bonello	Chairperson of Evaluating Committee
Architect Christopher Grech	Technical Expert

Recommended Bidder – SB Marine Works JV

Dr John L Gauci	Legal Representative
Dr Carl Grech	Legal Representative
Mr Mark John Scicluna	Company Representative
Mr Alex Bonnici	Company representative

Department of Contracts

Dr Mark Anthony Debono	Legal Representative
Dr Audrey Buttigieg Vella	Legal Representative

The Chairman started the hearing by naming the parties present and invited Dr Zack Esmail representing the appellant Green Building Solutions Ltd to present his initial submissions.

Opening statements:

Dr Zack Esmail for Green Building Solution Ltd

In his submission Dr Esmail stated that the tender document asked for a graphic work schedule, that is, a Gantt Chart, this being the crux of the matter of this appeal. He declared that the evaluation was carried out through wrong interpretation of the tender specifications and which eventually led to the exclusion of the appellant. He insisted that this goes against the principle of self-limitation.

Dr Ryan Pace for the Contracting Authority – Festivals Malta

Dr Pace reaffirmed that the main issue was whether the evaluation regarding the important major works involved was done correctly. He reiterated that he couldn't understand why the Contracting Authority and the Tender Evaluation Committee were not supposed to analyse in a detailed way the Gantt Chart and a submitted program of works which had major shortcomings. Dr Pace insisted that the TEC would have been wrong if it did not do its duty correctly. He continued that since the program of work was the main issue, this had to be scrutinized in detail. He added that a clarification was asked for and if the appellant did not explain himself properly or could have explained itself properly the Contracting Authority cannot according to established rules insist on further clarifications or rectifications.

Dr John L Gauci for the Recommended Bidder – SB Marine

Dr Gauci stated that from the submissions filed during this hearing one can ascertain that the appellant has been disqualified for not understanding properly what was required in the Tender Document and also for including in his program of works items which has nothing to do with this project. Dr Gauci insisted that one cannot award a tender which has yet to be analysed after.

Dr Mark Anthony Debono for the Department Contracts

Dr Debono stated that he didn't have any initial submissions and will reserve his interventions following the final submissions

Dr Esmail called Mr Etienne Bonello (ID 402780M) Chairman of the Evaluating Committee to the witness stand.

Answering questions by Dr Esmail, Mr Bonello explained his experience involved in tendering for the last 15 years and he also gave details of the members involved in the TEC. He also explained that they relied on the expertise of Architect Chris Grech as regards technical specification.

He also explained that the evaluation process involved that each member of the TEC evaluated respectively the tender document and this was followed by about 3 meetings for collective discussions. Following further questioning Mr Bonello stated that the reference to the program of works is specifically found on page 6, Section C, No E of the Tender Document.

Mr Bonello indicated page 20, article 32 of the Special Conditions after he was asked where in the Tender Document one could find what form the Gantt Chart should have had. He also explained that the scope of works of the Tender was excavation, demolition of structures and piling works and that according to page 3 article 1.2 the time limit of the execution of works shall be 12 months from date specified. This time limit included all the 3 undertakings and he also explained that the time limit proposed by Green Building Solution Ltd was about 11 months.

Answering to further questions Mr Bonello explained that the reference to the scope of works is found in Page 28 of Section 3. He also read out the text.

Cross examination of the witness by Dr Ryan Pace.

Answering to questions by Dr Pace, Mr Bonello described the evaluation process especially that regarding the appellant's offer, that is:

First session:

- Administrative evaluation of the 5 bids and where necessary sent clarifications to GBS Ltd.
- Sent clarification to appellant regarding information about Key Experts and which were not complete.
- Relevant documents together with the technical review of our expert i.e. Architect Chris Grech were sent to the Contracting Authority.

Second session: Discussion and sent all documents to Department of Contracts

Third session: Discussion and concluded the adjudication.

Answering further questions Mr Bonello referred to another clarification regarding shortcomings of technical aspects relating to the Gantt Chart required in Section 1, Article 5 c i. of the tender document.

He explained that information asked for was about which activities are related to structural works, utility installations, external works and paving together with information at which stages these activities are included in the program of works presented by the appellant as the tender document only mentions piling and there is no reference to external works neither to utility installations or even paving.

Answering to further questions Mr Bonello read out the clarification sent by the appellant and reiterated that the Tender was about excavations, demolition and piling works and not what the appellant reiterated.

Cross examination by Dr Mark Anthony Debono

Answering a question by Dr M. A. Debono, Mr Bonello explained that according to Architect Chris Grech the Gantt Chart did not make sense. He also proposed that Architect Chris Grech was in a better position to explain this fact.

Re-examination by Dr Zack Esmail.

To a question by Dr Ismail, Mr Debono insisted that since the TEC evaluators were not technical persons they rested on Architect Grech's professional technical experience as regards the technical part of the Tender.

Intervention by Dr Pace

To questions by Dr Pace, Mr Bonello reiterated it is clearly written in the DOF that all technical documentation and BOQs and special were done by Architect Grech and were passed to the Department of Contracts. These together with those of the those of the person representing

Festivals Malta to write the Tender. Mr Bonello also stated that Architect Grech is responsible for the whole project.

Dr Z. Ismail called Mr Rhys Buttigieg (ID 389087M) to the witness stand

Answering questions by Dr Ismail, Mr Buttigieg stated that he is the director of Green Building Solutions and that he had experience in public and private works for 17 years as an operations manager. He also stated that GBS Ltd provided a Gantt Chart within the stipulated time and presented other surveys showing experience in such works.

He explained that the Gantt Chart provided listed all requirements of the Tender and more, and by following article 21 of the tender document GBS Ltd indicated the services and overall, outside works i.e. excavation, piling and demolition including all subsurface and the outside area. This contrary to what is being said in this hearing. These were presented in the Gantt Chart since we were following requirements which were described as non-exhaustive. He stated that GBS Ltd felt the need to list all these items to make sure that they would honour the whole contract. He also declared that following experience in other works and in the site itself (6 years before) and according to the presented Gantt Chart the works can be done in 11 months. The Gantt Chart covers everything in the Tender and even goes beyond.

Re-examination by Dr Pace

Mr Buttigieg explained that since he had 17 years of experience he knew how to make a Gantt Chart irrespective of the documents which he had presented to the Contracting Authority. These included Gantt Charts used in other works done besides this Tender and which he mentioned in his answer. He reiterated that the works referred to were answered according to Article 21. He followed this by reading out the extract found in the Tender Document.

At this stage Dr Pace invited Mr Buttigieg to indicate what and where landscaping and paving were needed since the later was familiar with the site.

A debate about the description of site itself and its needs followed between Dr Pace and Mr Buttigieg with the later insisting that there is a reference to landscaping in Article 21.

Following further questions Mr Buttigieg confirmed that he has 17 year-experience, and that he could work out a Gantt Chart whether he was presented with one or not by the Contracting Authority.

Answering a question by Dr John L. Gauci, Mr Bonello was not aware if anyone from GBS Ltd visited the site in question.

Cross examination by Dr M.A. Debono

Answering questions by Dr Debono Mr Buttigieg stated that there were no formulas in the call for Tenders and the bidder himself provided a Gantt Chart as requested.

Dr Ryan Pace called Architect Chris Grech (ID NO 453074M) the TEC technical expert to the witness stand.

Answering questions of Dr Pace, Architect Grech stated that he graduated as an architect and has been specializing on calls for tenders. He explained that he was awarded a tender for architectural services, where he was to be responsible for the whole project in question and which involved the roles of all official roles and officials involved in carrying out the tender by the winning bidder. He also stated that he has his own group of experts to be able to monitor the process. He explained that after a two-year consultation period the relevant permit was announced and he was in a position to issue the first phase regarding demolition, excavation and piling. This came after a whole process which he described, involving discussions with the Contracting Authority, the bidders themselves and other entities.

Answering further questions Architect Grech explained that after the call for Tender was published and the TEC had examined the administrative section of the bids, his remit involved making a technical report after examining all registered bids. He also had calculated that the whole project would take roughly three (3) years to complete.

He also explained that the first phase of the project, and which is the subject of this appeal, could be met in roughly one (1) Year and not before.

As regards the Appellant's Gantt Chart Architect Grech remarked that:

1. In his Gantt Chart the appellant stated that he needs 10 days for site preparation, while we are saying that this would take roughly 40/50/days.
2. As regards the main issue that is that of Excavation, the Appellant said that he would take 30 days to finish. We contend that this will take roughly about 20 weeks only to remove the rubble besides the cutting of rocks etc. and this if there are no archaeological and other problems. Architect Grech calculated that excavations would take about 200 days.
3. In the Gantt Chart appellant indicated a period of 40 days for piling. Architect Grech insisted that he is calculating that this can only be done in a period between a hundred (100) and hundred and fifty days (150) days.
4. Besides all this there is also the possibility of having to clear any asbestos which might still be present on the sight thus adding more to the time factor.

Architect Grech added that besides the appellant's wrong calculations he also presented in his Gantt Chart works which do not exist in the Tender Document for example landscaping and paving and utility installations which according to the appellant will take 30 unwarranted days.

Architect Grech ended his evidence by concluding that either the Appellant did not understand the works needed or he copied details from other works or he did not study the Tender properly.

To further questions by Dr Pace, Architect Grech confirmed that he was conscious that clarifications were sent to various bidders including the appellant. This referred to his Gantt

Chart and the appellant presented the same Gantt Chart which needed clarification and he had also a chance to rectify but he didn't.

Cross examination of Architect Grech by Dr Esmail.

Answering questions by Dr Ismail, Architect Grech explained that time frames were not mentioned in the Tender Document and these had to be provided by the contractor in his own Gantt Chart and according to his resources. He again repeated that it was impossible for the appellant to meet his own calculations. He again repeated that the Tender Document stipulated that the contractors/bidders had to provide their own Gantt Chart and that the time factor was not the only prerequisite.

Intervention by Dr Mathew Paris.

Dr Paris asked the witness to indicate chapter and verse where in the Tender Document one finds the expression “**not only**” used by Architect Grech. Architect Grech answered that in the technical questionnaire contractors were asked to provide a graphic Gantt Chart of the program of works in relation to the time limit for the execution of the contract. Contractors had to list all the necessary works.

Final Submissions:

Dr Mathew Paris

Dr Mathew Paris stated that as can be seen from Architect Grech's statements and the written submissions, it is clear that new principles had been introduced after the submission of the Tender and this goes against basic principles of tendering processes, which hold that anything introduced besides what is written in the call for tender is irrelevant. He continued that there is no room for what one wishes, thinks or adds. Appellant had to be judged by what is written in the Call for Tender and not with certain principles and periods which were introduced after the tender was submitted. That which is written in the document is not the same as that given by Architect Grech in his answers, for example when he said that from the Contracting Authority's research, excavations needed about 200 days to be completed. This might be possible or not. If the Contracting Authority wanted works to be executed in a particular period, then it should have indicated the time itself. Since it did not, the Contracting Authority left it in the hands of the bidder to determine himself the time whatever that may be. He continued that, that which is indicated not being feasible and not understandable, is not found anywhere.

Dr Paris insisted that there was only one requirement which had to be addressed in the Gantt Chart and that is found in article 32 of the special conditions found on page 6 of the tender document. Here he quoted the article. He referred to the requirement which states that works had to be carried out within a 12-month period and this is what the Appellant's Gantt Chart respected.

Dr Paris insisted that there was only one requirement which had to be addressed and that is found in article 32 of the special conditions found on page 6 of the tender document where it is stated that the performance period shall be that of 12 months from the date indicated.

In fact, there is nothing in it that which Architect Grech indicated. The Gantt Chart presented respects the requirement that the period of execution is not more than 12 months. The Gantt Chart respects what was asked for, that is, the period of execution of works. Dr Paris emphasized that what appellant had to write was not his own problem as he did not choose the rules with which the bidder was to be adjudicated.

Dr Paris insisted that the adjudication was completely wrong and at this stage Dr Paris presented other unrelated documents of tenders to show if the tender in question left any leeway to the bidder for creativity or if there was any stringency, on that which the tender wanted. Referring to doc 4, that is, tender SDP6/20/24/053 to prove this point, Dr Paris stated that the instructions of this tender did not only refer to the list of works to be done in a certain period but was more open and mandatory by stating that the Gantt Chart should include the set up date, the duration of the event, the dismantling dates and the reporting thus saying clearly what has to be done in a Gantt Chart and there is no call for any discretion or flexibility.

Referring and quoting from the Tender Document in question where the sole requirement was a “a graphic work schedule Gantt Chart/program of works in relation to the time limits from the execution of the contract from date of order to the start of works” Dr Paris emphasized that this was the only requirement and the statement of Architect Grech which including the term, “as well,” (“ukoll”) does not hold, and in fact, in theory, if appellant presented just one proposition as regards works to be done within a one- year period, it could have been accepted just the same irrespective of the scope of works as appellant was not obliged to do this. Adjudication had to be done on this point only.

Dr Paris referred to the Tender Document on page 28 dealing with the scope of works i.e. the execution of excavation works of the site duration of which had to done within 12 calendar months from the commencement notice. The list envisaged is described as non-exhaustive and thus the flexibility and discretion involved, means that the bidder could include any ancillary work that, which he believes is necessary and this, apart from the fact that the appellant knows the site since he previously worked on it 6 years before. Dr Paris insisted that the appellant was clear in his answers regarding the scope of works.

On this point Dr Paris referred to and quoted from the Board’s decision in Case 1767 of 18/07/2022 where the same thing happened and this Board negated the Contracting Authority’s decision of non-compliance regarding the issue of a 60-day requirement to be met within a duration of the execution of the contract which was of a duration of 120 days stating that the requirement was tied to the pro rata of the contract.

Dr Paris emphasized that the Gantt chart is not a Holy Grail but it is a live document and there will be changes in both its submission and its execution. It is there to make sure that bidder is regulated by it and if he does not abide by it there will be penalties.

Dr Paris emphasized the fact that the Tender Document itself declares that it is a live one and 15 days after the winning bidder and the Contracting Authority signs the contract, the submitted Gantt Chart will be discarded and what will count is the document which is going to be agreed upon by both of them irrespective of what was written in the bidding document and what has been said by Architect Grech.

Dr Paris pointed out two important aspects emanating from this:

- The promise that the bidder will do the work in the required time.
- The Tender Document is creating an element of ambiguity because on one hand it is telling the bidder to submit a program of works with his offer and on the other it is telling the bidder that the contractor has to present a program of works in 15 days which will become binding at the moment of agreement with the Contracting authority.

Dr Paris after declaring that the Tender Document is superfluous and ambiguous pointed out two realities:

- The obligation of the bidders relates to a 12-month period
- The Tender Document eventually changes and the specifications no longer are tied to that evaluation but a contract performance condition which has to be judged and analysed not by the TEC, nor by Architect Grech but by a project manager of the contracting Authority in the moment the bidder is not adhering to what was agreed upon.

Dr Paris referred to Case Carmelo Stivala vs Malta Strategic Partnership Projects Limited re Chalet PCRB Case 2090 which dealt in detail with the contract performance conditions.

He also referred to the Tender Document Section 3/11.9 where it is stated that “the moment you are accepted as the contractor you shall within 7 days from the last signature date of the contract and prior to the commencement of works provide the Contracting Authority with a program of works to cover the entire period of performance stipulated in article 32.” This is again repeated in Section 3 Article 15.2 and Section 3 Article 31.1.

Dr Paris referred to the bidder’s answer to the clarification and reiterated that principles dealing with the doctrine of self-limitation were not adopted in the ensuring letter of rejection. Quoting from it Dr Paris insisted that the TEC’s concerns regarding what it termed as unrealistic and non-feasible time frames were not within the remit of the TEC to reach these conclusions, but to see whether the specifications of the call for Tender were correctly given or not. The TEC, therefore, and according to Dr Paris, acted *Ultra Vires*. Furthermore, Dr Paris said that the TEC raised hypothetical questions when one of the reasons put forward was that there was the chance that doubts, could even give rise to price hikes or cost variations. This too was not the remit of the TEC.

At this stage Dr Paris after quoting the TEC’s decision of non- technical compliancy by the bidder due to not demonstrating any proper grasp of the project ‘s scope and its requirements, referred to stringent concepts of public contract regulations which debar anyone present in this sitting including the TEC from dictating conclusions to the Director of Contracts.

Dr Paris ended his submission by asking from where do these concepts and principles rise. The answer Dr Paris insists come only from the testimony of Architect Grech and which do not justify the appellant’s exclusion.

Dr Ryan Pace

Dr Pace stated that the TEC is not a clerical entity which just check-lists entries especially since this is a major project involving an estimation of about 4 million euro. He continued that this is not a matter of a hypotheses of what can happen in the future either.

He indicated that the PCRB in its decisions where there were certain ambiguities, was not against flexibility but was against when what was being suggested could probably not materialize and which could also create more problems.

He also referred to Architect Grech's important role and suggested that if the appellant needed to challenge his decisions including his judgement of limited time frames in the Gantt Chart they should have provided an expert of their own. Architect Grech not only confirmed that the time frames in the Gantt Chart were inadequate but that they could be dangerous to the project itself.

He insisted that the TEC did not go Ultra Viris but followed Rules Governing Tenders in which TECs have to scrutinize diligently what has been submitted for evaluation. He continued that the TEC judged what appellant presented and even gave the opportunity to the appellant to clarify its presentation to be followed by further decisions. Having failed to do this the TEC cannot chase the bidder for further clarifications.

Dr Pace insisted that a bidder cannot present a written paper and this has to be accepted whatever is written in it. As regards to the presented four (4) documents presented by the appellant Dr Pace emphasized that these in their majority are irrelevant to this case.

Dr Pace stated that due to his self-declared experiences Mr Bonello, without any doubt, seems to know how to formulate a Gantt Chart and if he detected any ambiguities in the Tender Document he should have used Regulation 262. The moment he did not, he agreed with its entire contents.

Dr Pace emphasized that the program of works is the Holy Grail and the paperwork involved is supposed to be filled properly by professionals in the construction industry and not as happened in this Tender where the information presented has no clear vision of what is asked for and in fact is a threat to such a major project. This was not even clarified when asked. Perhaps Dr Pace concluded that this was through negligence or of paperwork copied from other tenders which are not relevant to this present case. He also referred to the seven (7) - day period quoted in the tender document and refuted the argument that since the program of works was to be presented 7 days after the signing of the contract this in itself offered a degree of flexibility to the Gantt Chart.

Dr Pace explained that the TEC could only analyse that which was presented to them in the context of a Note 3 requirement and one cannot expect that a non-technical TEC to present technical specifications to an experienced contractor. In fact, the Tender document reversed this and gave the contractors the chance to put forward their proposals based on their own experience and hence the importance of the paperwork. The TEC couldn't close their eyes to the ambiguities present in the Gantt Chart.

Dr Pace insisted that Architect Grech pointed out that the TEC was not concerned with what might happen after the contract but with the shortcomings which were presented in a Gantt Chart which revealed a lack of professionalism as the terms presented do not even make sense.

Dr Pace stated that it is not correct to say that certain principles were introduced at a later stage and adjudication centred on what the Tender Document stipulated. He concluded by saying that the bidder did not raise any objections, the Tender Document was clear, the Gantt Chart was a necessary requirement and the TEC was correct in its adjudication and for resting on the opinion of the appointed expert.

Dr John L. Gauci

Dr Gauci stated that:

He is convinced that the requested Gantt Chart was mandatory during the tendering stage and not after; in fact, in the technical offer the word “shall” is used and that there is also the reference to Note 3 regarding the Gantt Chart. He continued that the Tender established what the Gantt Chart should include and cover, besides the request of the Time Frame which is for the execution of the contract. He reiterated that there should not have been so much discrepancies and unwarranted items not included in the Contract.

He ended his submission by insisting that this Board should conclude that there is enough information given to bidders and that the appellant’s offer in the Gantt Chart is not in conformity to the call, hence it is non-compliant. This Board he concluded has only the technical proof of Architect Grech and hence it cannot accept the appellant’s grievance.

- Dr Mark Anthony Debono

As regards wrong evaluation Dr Debono referred to regulation 16.3 of the GRGT which states that the TEC’s remit is to verify compliance with Clause 5c of the instructions to Tenderers and which consist of the technical questionnaire and the Graphic Works Schedule i.e. a Gantt Chart of program of works. Dr Debono insists that contrary to what the appellant says, this is not a condition for the execution of the contract but exists in the process for the evaluation of the offers. If there were any doubt a Contractual Remedy could have been sought.

Referring again to Section 5c article 32 of the tender document Dr Debono insisted that if the appellant has the experience that he stated he should have been aware of the shortcomings presented in his Gantt Chart and which has been criticized and found to be non-compliant by Architect Grech. Furthermore, Dr Debono referred to Case 2802 of 2023 as an example of how this Board always supported the evidence of appointed experts regarding time factors and as it should also do with the evidence of Architect Grech.

Dr Debono also explained that TEC cannot go against the principle of equality and proportionality and once a clarification is asked this cannot be asked for again. One cannot continue chasing bidders to regularize their positions. He also referred to Case Chris Gatt vs Director of Contracts Courts of Appeal of 26/1/2022 and the fact that according to Note 3 quoted in the Tender Document once submitted a document cannot be changed. This case

also dealt with the issue of the usage of the words “should” and “must” thus opening possibilities of submissions at later stages and the fact that according to Note 3 once submitted a document cannot be changed.

Final intervention by Dr Paris

Dr Paris explained that the relevance of what Architect Grech said regarding the 200-day period would have been important if a particular period was indicated in the Tender Document and the appellant ignored it on purpose and hence I would have been challenging something which is in the Tender Document.

Dr Paris ended his intervention by stating that as long as there was no specific request about the period of the Scope of Works and not of the Time Frame, appellant had no obligation to present a witness to explain moment by moment what he had to be doing within those 12 months in question.

At this stage the Chairman thanked the parties and declared the end of the sitting.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 6th May 2025.

Having noted the objection filed by Green Building Solutions Limited (hereinafter referred to as the Appellant) on 7th April 2025, refers to the claims made by the same Appellant with regard to the tender of reference CT2333/2024 listed as case No. 2107 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris, Dr Zack Esmail & Dr Kayleigh Borg

Appearing for the Contracting Authority: Dr Ryan Pace

Appearing for the Interested Party: Dr John L. Gauci & Dr Carl Grech

Appearing for the Department of Contracts: Dr Mark Anthony Debono & Dr Audrey Buttigieg Vella

Whereby, the Appellant contends that:

- a) The rejection of its offer was based on an incorrect assessment of non-compliance. It maintains that the submitted bid, inclusive of a Programme of Works (POW), which POW ascertains that

the works shall be done in full adherence with the tender requirements, i.e. 12 months. Provision 1 of Section 3, makes it clear that,

“The duration of the contract shall be for a period of twelve (12) calendar months from the commencement notice”

- b) The appellant asserts that the evaluation committee exceeded its legal remit by interpreting project execution feasibility and scope, rather than limiting its role to verifying whether the bid met the stipulated compliance criteria. The appellant argues that whilst it is legitimate for an evaluation committee to seek clarification, introducing new conditions and seeking to interpret bids is not within the remit of the evaluation committee. The role of the committee is not to scrutinize the manner through which a contract shall be executed.
- c) It is further submitted that the evaluation committee incorrectly applied contract performance conditions as evaluation criteria. The appellant argues that such conditions should be assessed post-award and not used as a basis for exclusion during the evaluation stage.
- d) The appellant invokes the principle of proportionality, maintaining that, without any admission of non-compliance, even if there were any shortcomings, these were minor, did not distort competition, nor provided any undue advantage. As such, exclusion on such grounds would be excessive and unjustified.

This Board also noted the Recommended Bidder’s Reasoned Letter of Reply filed on 17th April 2025 and its verbal submission during the hearing held on 6th May 2025, in that:

- a) The Recommended Bidder notes that it does not have access to the Objector’s technical submission, including its Programme of Works (“POW”), and accordingly defers to the Contracting Authority for detailed clarifications. Nevertheless, it contends that the objection is manifestly unfounded based on the clear record.
- b) It is submitted that the Evaluation Committee was justified in rejecting the Objector’s bid due to a materially and irrefutably deficient POW. The proposed sequencing and durations were inadequate and raised legitimate doubts about the bidder’s capacity to manage and execute the project in line with the tender requirements. Moreover, the Objector included irrelevant and extraneous items in the POW, evidencing a fundamental misunderstanding of the project scope.
- c) The Recommended Bidder argues that the Objector misapplied the clarification process, which is not intended to rectify or cure fundamental defects in a bid. Rather than providing the necessary technical justifications to resolve the Evaluation Committee’s concerns, the Objector merely reconfirmed the original deficiencies, thus justifying the conclusion that the bid was non-compliant.

- d) The Objector’s invocation of the principle of proportionality is deemed to be legally and factually erroneous. The Recommended Bidder submits that this principle cannot be used to justify or excuse deficiencies that go to the heart of technical compliance, such as feasibility of execution and scope understanding. The Court of Appeal and European case law clearly reject attempts to shift the burden onto contracting authorities to “save” a fundamentally non-compliant bid.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 17th April 2025 and its verbal submission during the hearing held on 6th May 2025, in that:

- a) The Contracting Authority maintains that the Programme of Works (PoW) is not a mere formality but a fundamental evaluated requirement. The Appellant’s submission lacked the necessary level of detail, structure, and feasibility. As such, it failed to demonstrate the bidder’s understanding of project execution and its ability to meet contractual obligations within the required timeframe.
- b) The PoW submitted by the Appellant was found to contain two major deficiencies:
 - i. **Unrealistic Timeframes** – The proposed durations for the execution of key phases, such as excavation and demolition, were grossly underestimated for a project of this scale and complexity.
 - ii. **Inclusion of Non-Contractual Works** – The PoW included irrelevant and extraneous tasks unrelated to the project’s contractual scope, revealing a serious misunderstanding of the tender requirements.
- c) The Authority argues that when the evaluation committee, exercising its discretion to seek clarifications within the limits of law, invited the Appellant to address concerns regarding its unrealistic programme and scope of works, the responses provided were superficial, vague and speculative. The Appellant failed to demonstrate an understanding of the essential project parameters, leaving the evaluation committee with no option but to conclude that the offer was materially non-compliant.
- d) The Contracting Authority contends that the Appellant’s invocation of the principle of proportionality is inapplicable. The deficiencies identified concern the core of technical compliance, not minor or procedural oversights. Thus, the rejection of the offer was lawful, proportionate, and consistent with established jurisprudence.

This Board also noted the Department of Contract's Reasoned Letter of Reply filed on 17th April 2025 and its verbal submission during the hearing held on 6th May 2025, in that:

- a) It is the responsibility of the appellant to demonstrate that its proposed programme of works satisfies the timeframes indicated in the tender, and this independently of the ab initio eligibility to qualify for a tender. The tender evaluation committee is bound to adhere to the principle of self-limitation and prescribed procedure in accordance with the Public Procurement Regulations (S.L. 601.03 of the Laws of Malta).
- b) The Evaluation Committee acted in a just, fair and logical manner throughout the whole evaluation process and that the evaluation process was carried out in accordance with the terms and conditions as stipulated in the Tender documents. It is inconceivable how the appellant makes submissions to restrict the function of the tender evaluation committee when it had been clear what was required in the technical offer.
- c) The principle of proportionality cannot be interpreted in such a way that it causes disproportionality. The principle of proportionality may not be abused of by tenderers and stretched to such an extent that the tender evaluation committee ends up disregarding the rules established for determining compliance.

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 witness duly summoned, will now consider Appellant's grievances as follows in their entirety.

This Board notes that the grievances raised by the Appellant primarily concern the Gantt Chart/Programme of Works submitted in connection with this Tender, and specifically relate to the compliance with the stipulated contract execution period of twelve (12) months from the Order to Start Works and to the inclusion of non-scope items in the Gantt Chart/Programme of Works submitted.

On the Issue of Realistic and Feasible Timeframes

The first grievance put forward by the Appellant relates to the stated reason of rejection which reads as follows:

"The contractor has failed to provide a realistic and feasible time frame for demolition and excavation works, leading to concerns about project delays and improper execution."

The Appellant submits, firstly, that the Gantt Chart was submitted in accordance with the requirements of the Tender. Secondly, the Appellant maintains that the timeline indicated in the submitted Gantt Chart,

namely, eleven (11) months, was in full adherence with the tender specifications regarding the time frame for contract execution. The Appellant also makes reference to provision 1 of Section 3 – Terms of Reference, which makes it clear that,

“The duration of the contract shall be for a period of twelve (12) calendar months from the commencement notice”

Consequently, the Appellant argues that since the submitted Gantt chart reflected a completion period of eleven (11) months, which is well within the twelve (12) month contractual period, it should have been deemed compliant. The appellant further maintains that any additional assessment of timing, sequencing, or methodology would, according to the Appellant, contravene the principle of self-limitation and constitute an *ultra vires* evaluation criterion.

Conversely, the Contracting Authority refutes the assertion that the Evaluation Committee was precluded from assessing the substance and feasibility of the submitted Programme of Works. It submits that such an evaluation was necessary, given that it was a document requested by the tender dossier and also given the complexity and magnitude of the project.

The Contracting Authority maintains that the timeline proposed by the Appellant is fundamentally flawed and reflects a serious miscomprehension of the technical requirements of the contract.

The Contracting Authority, also engaged the services of a technical expert to assist it with the technical evaluation. In his testimony, Mr Christopher Grech, Architect and technical expert engaged by the Contracting Authority clearly stated that *“the submission of the Appellant showed timeframes which are too abbreviated”* and *“the works required cannot be realistically completed in less than 12 months”*.

The Authority argues that when the evaluation committee, exercising its discretion to seek clarifications within the limits of law, invited the Appellant to address concerns regarding its unrealistic programme and scope of works, the responses provided were superficial, vague and speculative. The Appellant, according to the Contracting Authority, therefore, failed to demonstrate an understanding of the essential project parameters, leaving the evaluation committee with no option but to conclude that the offer was materially non-compliant

Having considered the arguments submitted by both parties, the Board refers to the relevant provisions of the Tender Document, specifically Section 1 – *Instructions To Tenderers*, Article 5 - *Selection and Award Requirements*, sub-article (c)(i)(2), which mandates that the bidders include as part of their Technical Offer the following:

“A Graphic Work Schedule (Gantt Chart)/ Programme of works in relation to the time-limits for the execution of the Contract from the date of order to start works, allowed as Execution of the Contract under Article 32 of the Special conditions ^(Note3)”

Further, Article 32.1 of the Special Conditions states:

“The performance period shall be twelve (12) calendar months from the date indicated on the commencement notice (Order to start works), which shall be issued within 15 calendar days from last date of signature of the contract.”

From the submissions provided and testimonies, it is clear to the Board that the Tender explicitly required a Gantt Chart that commenced from the date of order to start works and covered the full twelve-month performance period of the Contract. This requirement is also supported by the technical expert in his testimony, where he testified that *“the works required cannot be realistically completed in less than 12 months”*.

The Board also notes that the Gantt Chart submitted by the Appellant, indicated a performance period of approximately five and a half months, spanning from 3rd March 2025 to 15th August 2025 for the relevant scope of works of the Tender. As such, the submission falls materially short of the twelve month timeframe expressly stipulated in the tender requirements.

The Board further emphasises that this shortfall cannot be regarded as a minor deviation or be remedied post-submission. The principle of self-limitation precludes the evaluation committee from rectifying what has been originally submitted.

Accordingly, the Board finds that the Appellant failed to comply with the clear and binding technical specifications concerning the Programme of Works/Gantt Chart. Consequently, the Appellant’s reliance on the principle of self-limitation, and its contention that the evaluation committee acted ultra vires, and its ability to finish works before the required timeline for the Programme of Works are deemed without merit. The failure to adhere to the mandatory timeframe requirement under the Tender renders the submission technically non-compliant. Consequently, the Board does not uphold the Appellant’s contention.

On the Issue of Scope of Works

The second grievance raised by the Appellant relates to the stated reason of rejection which reads as follows:

“The inclusion of non-existent scope items indicates a misunderstanding of the contractual requirements and raises the risk of potential cost variations and disputes.”

The Appellant submits that the Scope of Section 3 – *Terms of Reference* within the Tender Document provides a non-exhaustive list of envisaged works. Accordingly, it contends that the items included in the submitted Gantt Chart should not be construed as erroneous, since such positions were included to cover reasonably anticipated tasks within the project. The relevant text cited by the Appellant reads:

“The below, is a non-exhaustive list of envisaged works:

- a) Provision of site offices and ancillary services*
- b) Provision of project information boards*
- c) Precast Reinforced Concrete Boundary Wall*
- d) Provision of scaffolding*

- e) *Saw cutting existing asphalt layer*
- f) *Demolition of structures found on site (occupying circa 4550sq.m)*
- g) *Excavation oversite*
- h) *Piling works”*

The Appellant maintains that, in the absence of an exhaustive list, it was reasonable to interpret the tender scope more broadly. In his testimony, Mr Rhys Buttigieg, representative of Green Building Solutions Limited, cited article 21 of the special conditions within the Tender Document, which according to him provided for certain works such as landscaping. He testified under oath that he included such works so as to be on the safe side so that the Contracting Authority could not hold them responsible had such works had not been done.

On the other hand, the Contracting Authority argued that the inclusion of extraneous and non-contractual tasks, such as landscaping and paving, reflected a material misunderstanding of the tender requirements. These additions, according to the Contracting Authority, go beyond the defined scope of works and thus rendered the bid technically non-compliant.

Upon review, the Board does not find merit in the appellant’s contentions. While the Tender Document refers to a non-exhaustive list of envisaged works within the scope demolition, excavation and piling works, this cannot be interpreted to permit bidders to extend the scope of the project beyond what is expressly defined, namely, demolition, excavation and piling works. The prerogative to define project parameters rests with the Contracting Authority, and bidders are expected to adhere strictly to those parameters.

This Board is of the opinion that the appellant’s Gantt Chart, which allocates the period from 11 August to 12 January—representing approximately 48.8% of the total project duration—to activities not expressly included in the Scope of Works, clearly demonstrates that these additions are not of a merely ancillary or cosmetic nature, but rather constitute substantial works.

Given that these activities were not specifically identified in the Scope of Works, the Board considers that acceptance of the appellant’s Gantt Chart by the Evaluation Committee would have constituted a breach of the **Principle of Self-Limitation**. This principle obliges the Contracting Authority to evaluate only those aspects explicitly defined within the tender documentation. The appellant’s proposal to undertake significant additional works—namely, structural interventions, utility installations, and external works including paving and landscaping—falls outside the parameters of the current procurement procedure and as noted in the testimony of Perit Grech, is intended to be the subject of future procurement processes.

Also, the appellant could have availed of clarifications and/or pre-contractual remedies as stipulated by article 262 of the Public Procurement Regulations (S.L. 601.03).

In a number of judgements delivered by the Court of Appeal, it was held that if a bidder fails to exercise such pre-contractual remedies, the bidder cannot subsequently, and after being unsuccessful in the competition, challenge any aspect of the procurement document which it could have done before the closing date of the competition. Reference is made to the Court of Appeal decision of the 30 June 2021 in the case of **Truevo Payments Limited v Direttur tal-Kuntratti, Ministeru għall-Finanzi u x-xogħol u Credorax Bank Limited Appeal no 95/21/1**, where the court held that:

“Hu car li l-ilmenti tas-socjeta Credorax Ltd huma diretti lejn il-procedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-socjeta qed tilmenta mill-użu tal-procedura tal-għoti tal-kuntratt b’negożjati, fuq il-mod kif gie mfassal il-process ta’ din il-procedura u li ma kienx hemm l-approvazzjoni tad-Direttur tal-Kuntratti għall-użu ta’ din il-procedura. Dawn it-tlett aggravi li abbażi tagħhom il-kumpanija appellata Credorax Ltd pppreżentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-procedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taht ir-Regolament 262. Dawn l-ilmenti kellhom jitresqu qabel id-data tal-għeluq ta’ sejha għall-kompetizzjoni u mhux, bħal filkaas tallum, wara dik id-data, u saħansitra wara id-decizjoni dwar l-għoti tal-Kuntratt.”

Furthermore, article 21 of the special conditions cited by the Appellant pertains to damages and responsibility for repair costs, not to the extension of scope. It cannot, in the opinion of this Board, be interpreted as granting license to insert unsolicited items within the technical offer. Any inclusion of works not expressly required, such as landscaping or paving amongst others, introduces ambiguity and risk and therefore undermines the principles of transparency and equal treatment.

In view of the above, the Board concludes that the Appellant’s inclusion of works not defined in the Tender Document constituted a departure from the required technical parameters. Accordingly, the Board does not uphold the second ground of objection raised by the Appellant.

The Board,

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

- a) Not To Uphold Appellant's contentions;
- b) Upholds the Contracting Authority's decision; and
- c) Directs that the deposit paid by the Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Ana Thomas
Member

Mr Keith Victor Grech
Member