

# PUBLIC CONTRACTS REVIEW BOARD

## Case 2169 – 578 – RAM/001/2025 Pre-Qualification Questionnaire (PPQ) for the Award of a Concession for Design, Build, Finance, Operate and Transfer Back of a National Farm Waste Treatment Facility

29<sup>th</sup> October 2025

The Board,

Having noted the letter of objection filed by Dr John L. Gauci acting for and on behalf of **Bonnici Bros Services Limited**, (hereinafter referred to as “the Appellant”) filed on the 5th August, 2025;

Having also noted the Reasoned Letter of Reply filed by Drs’ Clement Mifsud Bonnici, Dr Antoine Cremona and Dr Calvin Calleja acting for and on behalf of **Rizorsi Agrilkoli Malta (RAM)** (hereinafter referred to as “the Contracting Authority”) filed on the 11th August, 2025;

Having heard and evaluated the testimony of the witness Mr Julian Mizzi (Representative of Bonnici Brothers Services Limited) as summoned by Dr John L. Gauci acting for Bonnici Brothers Services Limited;

Having heard and evaluated the testimony of the witness Mr Joseph Musumeci (Representative of Rizorsi Agrilkoli Malta) as summoned by Dr Damien Degiorgio;

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 16th October, 2025 hereunder-reproduced.

### Minutes

#### **Case 2169 RAM/001/2025 Pre-Qualification Questionnaire (PQQ) for the Award of a Concession for the Design, Build, Finance, Operate and Transfer Back of a National Farm Waste Treatment Facility.**

The tender was issued on the 20<sup>th</sup> of May 2025, and the closing date was the 18<sup>th</sup> of August 2025. The estimated value of the tender, excluding VAT, was €511,000,000.

On 5<sup>th</sup> August 2025 Bonnici Bros. Services Limited, lodged an appeal against the Rizorsi Agrilkoli Malta (RAM).

On the 16th of October 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Vincent Micallef and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

#### **Appellant – Bonnici Bros. Services Limited.**

Dr John L Gauci – Legal Representative.

Mr Julian Mizzi – Company Representative.

**Contracting Authority – Rizorsi Agrikoli Malta (RAM).**

Dr Clement Mifsud Bonnici – Legal Representative.

Dr Calvin Calleja – Legal Representative.

Dr Lara Spiteri – Legal representative.

Dr Marielise Tabone – Representative of CA.

Mr Joseph Musumeci – Representative of CA.

**Interested Parties.**

Mr. Christopher Ciantar Representative (FCCS).

Dr Carl Grech Representative Interfinance Ltd.

**Department of Contracts.**

Mr. Joseph Borg Giuliano -- DOC Representative.

Ms. Marisa Gauci -- DOC Representative.

**Opening Statements.****Initial Submissions.*****Initial Submissions by Dr. John Gauci (for the Appellant).***

Dr. Gauci stated that this appeal was filed by Bonnici Bros. Ltd. to clarify or exclude certain requirements in order to minimise restrictions on competition. When we reviewed the initial tender, the PQQ, and the clarifications issued by the Contracting Authority, we were left uncertain about several points — what was being clarified, what was being changed, and the presence of contradictory clauses. However, there may be points of convergence that could help our understanding, and with the assistance of the Board, we hope to determine which version of the requisites should be followed.

The issue of reliance was excluded in the tender document and confirmed in the clarifications by the Contracting Authority. However, the other party's response suggests that reliance would be allowed. There is therefore doubt as to whether reliance is permissible or not. It is essential to clarify this matter, as reliance provided for in law cannot be excluded. Once this issue is resolved, the other arguments can be addressed.

The first argument concerns the requirement for an average annual turnover for the years 2021–2023 in Biogas. In our application, we questioned this requirement: I have the turnover requested but no experience in Biogas. I am a local operator and do not have €50 million in Biogas. Why can't I bid for this tender?

If the issue of reliance is resolved, I would be able to participate through a consortium. However, another issue arises, not clearly expressed in the application, concerning the type of reliance permitted. If reliance is allowed, there remains the problem of how it is applied. When I accept foreign partners in a joint venture, as stated in B1.3.3 Pg 25 of the response format, it reads:

*'For scoring, the individual turnovers of each of the joint-venture/consortium members add to the consolidated total turn-over below weighted according to their share in the joint venture/consortium.'*

The moment I accept this consortium, Bonnici Bros. Ltd. will be subject to weighting. However, according to the principle of reliance, and since the Contracting Authority requires joint and several

liability in this tender, my share would effectively become zero, whereas under reliance, my share would be one hundred.

What I am requesting is that the concept of weighting be removed so that the joint venture's total share is considered collectively, rather than each individual being assessed separately, which carries a risk of disqualification.

The parameters of this tender have changed slightly through the clarifications. If reliance is permitted, the issue of the €50 million turnover and the Biogas requirement will fall into place, leaving only the issue of weighting.

Mr. Swain noted that the Board was particularly interested in the issue of reliance and was eager to hear from both parties

***Initial Submissions by Dr. Clement Mifsud Bonnici (for the Contracting Authority).***

Dr. Mifsud Bonnici stated that this was a competitive dialogue consisting of three phases within a concession framework. The government retains a degree of discretion in formulating such tenders.

The Contracting Authority maintains that reliance is permissible but may be subject to limitations. When reliance concerns economic and financial aspects, the law allows that if a party depends on a subcontractor for financial support, that subcontractor becomes jointly liable. Therefore, reliance is permissible under certain conditions — through an SPD, a declaration, and with joint and several liability.

The appellant raised a new issue not included in the appeal and outside the Board's parameters. The issue of weighting is standard in this type of complex project, particularly where the PQQ is designed to shortlist candidates. In this case five. The suggestion to remove weighting is therefore not applicable, even when assessing merit.

**Witness.**

***Mr. Julian Mizzi (ID 365694M) — summoned by Dr. John Gauci.***

Mr. Mizzi, a Financial Advisor at Bonnici Bros. Ltd. for the past ten years, assists in identifying suitable partners and acts as Project Manager on behalf of the company.

He explained that the priority in this case was to find the right partner, and a company (referred to as X) was identified, willing to be jointly and severally liable. The issue, however, is that Bonnici Bros. Ltd., which is economically strong, when entering into partnership with the technically competent company, finds that despite exceeding the PQQ's revenue requirements from a Biogas turnover perspective, its own turnover is effectively treated as zero. Referring to PQQ Clarification Note 4, Question 1, he quoted:

*'For the scoring, please note that such a partner (with no direct experience in biogas construction and/or operation) cannot enter any turnover value.'*

He continued by quoting the final part:

*'A JV member may contribute 'unlimited' annual turnover as long as it ticks the box of having, or having had, biogas plant constructions or operation activities (the Activities Requirement). A sole bidder*

*Candidate not meeting the minimum average total annual turnover of €50 million will be disqualified; therefore, any intention to sub-contract has to be legally binding and presented with the PQQ submissions.'*

This means that a company such as Bonnici Bros. Ltd., despite its strong turnover, is being penalised, while a sole candidate can contribute unlimited annual turnover if exceeding €50 million.

We interpret this to mean that if a sole candidate has, for instance, €150 million in turnover, €50 million from Biogas, they can apply with €150 million for scoring purposes. However, a joint venture, even with a consolidated turnover exceeding €50 million, will have a member's turnover counted as zero if that member individually does not meet the €50 million in Biogas turnover.

**Mr. Joseph Musumeci (ID 465465M)** — summoned by Dr. John Gauci.

Mr. Musumeci, a Project Manager, handles the drafting and publication of PQQs on ePPS. Rizorsi Agrikoli Malta (RAM) engaged three consultants — technical, financial, and legal. The financial consultant was Dr. Gordon Cordina. The drafts were prepared by COWIE in consultation with E-CUBED.

Dr. Gauci asked who could best answer questions on the weighting of the scoring — someone from COWIE or Dr. Cordina.

Dr. Mifsud Bonnici objected, arguing that the witness could only speak to the document itself, while the issue of weighting went beyond the scope of the appeal. Dr. Gauci replied that although weighting was not mentioned explicitly in their objection, it was intrinsically linked to the issue of reliance.

The Chairman allowed the question.

Mr. Musumeci confirmed that a specific individual had drafted the document. Dr. Gauci indicated that if the witness could not answer, he would summon another. Mr. Musumeci explained that members of a joint venture who meet the document's criteria are scored according to the combined financial value of the consortium.

Dr. Gauci remarked that Mr. Mizzi's concerns were valid.

Dr. Mifsud Bonnici interjected, suggesting that Mr. Mizzi's explanation had been unclear and invited Dr. Gauci to rephrase the question.

Mr. Swain agreed and asked Dr. Gauci to restate it.

Dr. Gauci repeated the question, noting that Mr. Mizzi had said Bonnici Bros. Ltd. would benefit more by applying alone than by relying on a partner in a joint venture. He asked the witness if he agreed.

The Chairman considered it unfair for the witness to comment directly on a company participating in the bid.

Dr. Gauci rephrased: a tenderer lacking the €50 million Biogas turnover relies on the capacity of another entity. If that tenderer secures a letter of understanding, the tenderer retains 100% capacity. However, if that same entity is formally accepted into a joint venture, the tenderer's rate decreases proportionally.

Mr. Musumeci confirmed this to be correct.

## **Final Submissions.**

### ***Final Submissions by Dr. John Gauci.***

Bonnici Bros. Ltd. has demonstrated that the Contracting Authority does not exclude reliance as permissible under the law. In response to the claim that weighting was not mentioned in the appeal, we insist on the principle of full reliance, both when the tenderer uses a letter of undertaking and when the financial supporter becomes part of the joint venture.

If reliance is not accepted in its entirety, the tender would contravene established case law. In addition to the *Holst* decision, we refer to *FM Core Ltd. vs The Gozo Ministry* (Superior Appeal 374/22, 25 January 2023), which stated:

*'Apart from the legal story and the present law about this issue, the position of the consortium appellant finds additional comfort in the jurisdiction of the European Court, about the fact that an economic operator can rely on financial help of other entities. In the case SWM Construction, in pg. 21, the Court found that the Public Procurement laws permits the accumulation of the skill of economic several operators, not just one to be compliant with the requisites requested by the Contracting Authority, with the condition that the Contracting Authority is given proof that the candidate will resort for the skills of the entity.'*

The Court thus held that in a joint venture, the skills of each member should be accumulated, not diminished, merely because a consortium model is chosen. Reducing individual contributions has the adverse effect of disadvantaging local entities when competing with foreign ones.

Mr. Mizzi's interpretation was confirmed by the witness: a tenderer benefits more when applying alone and relying entirely on another's capacity than by entering a joint venture. The essential premise of our request for a pre-contractual remedy is that the concept of reliance must remain whole. The tender, as currently designed, fragments this reliance. For fair competition, reliance must remain intact as required by law.

Dr. Mifsud Bonnici asked about the first grievance regarding the Biogas turnover requirement. Dr. Gauci replied that if both parties agree on the grievances, there would be no further contest.

### ***Final Submissions by Dr. Clement Mifsud Bonnici.***

Dr. Mifsud Bonnici stated that he had no further comments on the appeal. As for the first grievance, there is no issue concerning the Biogas turnover requirement, and the reliance issue has been clarified. However, he emphasised that the matter of weighting was not part of the appeal, appearing only as a vague mention at the end. From a fair-hearing perspective, neither the Contracting Authority nor the interested parties were prepared for this argument.

The government maintains discretion in drafting tender specifications, a principle upheld by the Maltese Courts. He cited *Malta Chamber for SMEs vs Prime Minister* (834/2007/1), which reiterated that private parties cannot dictate what the government must procure, and *VJ Salamone vs CPSU* (336/19), which confirmed that discretion rests with the government, subject only to objectively justified and proportionate limitations.

The weighting criterion, he argued, is justified. The contract, valued at half a billion euros over twenty-five years, requires financial robustness. Weighting ensures that the financially strongest member carries appropriate responsibility.

He distinguished *FM Core* as an open procedure for a smaller contract (€10–15 million over seven years). In that case, the government sought the accumulation of capacities within the joint venture, and the Court of Appeal agreed. However, deviation from the general rules is permissible, and that is what occurred here.

In this PQQ, the government deliberately applied weighting. Regulation 59 of the Concession Contracts Regulations provides that, where necessary, the Contracting Authority may clarify how groups of economic operators should meet requirements, provided such clarification is objectively justified. The government has that discretion.

The question, therefore, is whether the weighting is objectively justified and proportionate — a fundamental principle in concessions and complex procurements. A sole tenderer would benefit by winning the contract and later engaging a subcontractor, who would not be part of the contract but merely a guarantor in case of default. To be part of the contract, the subcontractor must be in the joint venture — hence the need for weighting.

The law does not intend to limit competition but to ensure the fair participation of SMEs. Regulations 77 and 78 govern subcontractors differently from Regulation 59, which states:

*‘With regards to financial standings the Contracting Authority may require the operator, and those entities are jointly liable for the execution of the contract.’*

***Replica by Dr. John Gauci.***

Dr. Gauci stated that he did not understand what benefit the Contracting Authority would derive from this approach. The result would be that instead of the tenderer joining forces with large entities and signing the contract jointly, he would sign it alone, relying on their financial standing and presenting a letter with the submission confirming joint and several liability. The concept of reliance should not be limited, as the law establishes the necessary conditions for its validity.

**Conclusion of the Hearing.**

With no further arguments presented, Chairman Mr. Kenneth Swain thanked the parties and formally concluded the session.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 16<sup>th</sup> October, 2025.

Having noted the objection filed by Mr John L. Gauci for and on behalf of **Bonnici Bros Services Limited** (hereinafter referred to as *“the Appellant”*) on the 5<sup>th</sup> August, 2025, refers to the claims made by the same Appellant with regard to the tender of reference 578 - RAM/001/2025 Pre-Qualification Questionnaire (PQQ) for the Award of a Concession for the Design, Build, Finance, Operate and Transfer Back of a

National Farm Waste Treatment Facility listed as case No. 2169 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr John L Gauci

Appearing for the Contracting Authority:

Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant contends that:

Whereas the Applicant is an interested prospective participant in the above-captioned PQQ procedure issued by the Contracting Authority for the award of a concession concerning the design, build, financing, operation and transfer of a National Farm Waste Treatment Facility;

Whereas Section B1.3.3 of the PQQ requires that candidates demonstrate a minimum average total annual turnover of €50,000,000 for the years 2021-2023, and the accompanying footnote specifies that the turnover must be derived from biogas plant construction and/or operation activities;

Whereas the Contracting Authority has, by means of Clarification Note 4 dated 25th July 2025, confirmed that turnover from other relevant industrial or infrastructure sectors will not be accepted, and that the €50 million threshold may only be satisfied by turnover linked directly to biogas activities;

Whereas the Clarification Note further confirms that in the case of a consortium or joint venture, only those members with current or recent biogas experience may contribute turnover, and that any candidate or grouping failing to satisfy this criterion from biogas-derived activity will be automatically disqualified from the Procedure;

Whereas the Applicant is a financially sound operator with a long-established track record in the delivery of large-scale industrial and environmental infrastructure, and is ready to undertake this concession in full collaboration with biogas-qualified partners, but is nevertheless excluded under the interpretation adopted by the Contracting Authority solely because its turnover does not originate from biogas;

Whereas the effect of this restrictive interpretation is to preclude participation by operators with demonstrable financial and operational capacity, despite their ability to comply fully with the PQQ requirements by relying on the capacities of other entities — a right expressly conferred under Regulation 78(1) and (2) of the Concession Contracts Regulations (S.L.601.09), subject to a commitment of resources and, where appropriate, joint liability for contract performance;

Whereas this exclusionary approach undermines the principle of genuine competition that lies at the heart of concession procedures and runs counter to the enabling framework established by law to facilitate access and participation by suitably qualified economic operators;

Now, therefore, in accordance with Regulation 98 *et seq.* of the Concession Contracts Regulations (S.L. 601.09), the Applicant respectfully submits this application for review prior to the closing date of the call for competition.

## **1. Background and Facts**

The present application arises in the context of a pre-qualification procedure (RAM/001/2025) issued for the award of a concession concerning the design, build, financing, operation, and transfer back of a National Farm Waste Treatment Facility.

In terms of Section B1.3.3 of the PQQ, all candidates are required to demonstrate a minimum average total annual turnover of €50,000,000 for the three-year reference period covering 2021, 2022 and 2023. The relevant footnote to this section specifies that the turnover is to be derived from "*biogas plant construction and/or operation activities*".

Subsequently, by means of Clarification Note 4 dated 25th July 2025, the Contracting Authority confirmed and entrenched a restrictive interpretation of Section B1.3.3, namely that:

- An economic operator that has not undertaken biogas plant construction or operation activity may not include any of its turnover in the calculation of the €50,000,000 threshold;
- A joint venture or consortium member may only contribute its turnover if it has current or recent biogas activity (no older than from 2014);
- The €50 million threshold must be satisfied exclusively through turnover originating from biogas activity, and candidates intending to rely on other forms of industrial or infrastructure turnover will not be considered compliant;
- A candidate lacking biogas-specific turnover, even if technically competent or intending to subcontract to qualified biogas entities, will be disqualified.

For completeness' sake, the clarification request and the reply are being reproduced verbatim hereunder:

PQQ Response Format Table B1.3.3: Average Total Turnover states:

*"Where the Candidate is a joint venture / consortium of partner companies, the fulfilment of the minimum annual turnover of €50 million shall be based on the consolidated turnovers of the members of the joint venture / consortium, without any weighting according to their shares in the joint venture/consortium.*

*A Candidate not meeting the minimum average total annual turnover of €50 million will be disqualified.*

*For scoring, the individual turnovers of each of the joint-venture/consortium members add to the consolidated total turn-over below weighted according to their share in the joint venture/consortium."*

*In the above, it is stated that for the minimum turnover requirement, the consolidated turnover of all partners is considered without weighting based on their respective shares. However, for scoring purposes, the individual turnovers of the partners are weighted according to their share in the joint venture/consortium.*

*Could you please clarify the following:*

*If the unweighted consolidated turnover meets the €50 million threshold (and therefore satisfies the minimum requirement), but the weighted turnover used for scoring falls below €50 million will the Candidate:*

- 1. simply receive a lower score in the turnover criterion, or*
- 2. be disqualified, as the scoring table suggests that a turnover below €50 million results in disqualification?*

*Example for Clarification:*

*Assume Partner A (with 90% share) has an annual turnover of €40 million, and Partner B (10% share) has €20 million. The consolidated turnover is €60 million, which meets the minimum requirement. However, the weighted turnover is only €42 million ( $€40M \times 0.9 + €20M \times 0.1$ ). In this case, does the candidate proceed with a reduced score, or is disqualified due to the weighted turnover being below €50 million?*

**Answer:** *For scoring, the individual turnovers of each of the joint-venture/consortium members add to the consolidated total turn-over weighted according to their share in the joint-venture/consortium. If the total consolidated turn-over weighted according to these shares is below 50 MEUR, the Candidate is disqualified, see PQQ Response Format Table 1.3.3.*

This clarification confirms the Contracting Authority's position that the financial capacity requirement is not merely quantitative, but is also restricted to turnover from a particular sub-sector. In consequence, any economic operator whose revenue originates from broader infrastructure or environmental works - no matter how substantial or relevant - is automatically excluded from the procedure if it lacks a recent biogas track record.

The Applicant is a leading Maltese operator with an extensive and longstanding presence in the civil, environmental and infrastructure sectors. Its financial capacity exceeds the threshold established in Section B1.3.3 when measured on the basis of total turnover. It is also ready and able to undertake the concession in full partnership with biogas-specialised operators. Nevertheless, under the restrictive interpretation confirmed by Clarification Note 4, the Applicant is precluded from qualifying on the sole ground that its turnover does not originate from biogas plant construction or operation.

The effect of this interpretation is not merely procedural or theoretical. It creates a substantive exclusion that materially restricts the Applicant's right to participate in a concession procedure for which it is financially and operationally suited. This restrictive interpretation does not arise from the contract's subject-matter, but from an excessively narrow formulation of the eligibility criterion. It has the consequence of distorting access to the procedure and contradicts the principle of open participation that underpins the regulatory framework governing the award of concessions.

Accordingly, the Applicant brings this request for review to challenge the legality of the interpretation adopted by the Contracting Authority and seeks the appropriate remedial measures to ensure compliance with the principles of equal treatment, proportionality, and genuine competition.

## **2. Grounds for Review**

The Applicant submits that the restrictive interpretation adopted by the Contracting Authority in relation to Section B1.3.3 of the PQQ is unlawful and contrary to the fundamental principles applicable to concession procedures, including proportionality, non-discrimination, and the right to rely on third-party capacities. The interpretation unjustifiably limits access to the procurement process and distorts competition. The grounds for review are set out below.

### *A. Disproportionate Restriction Contrary to Regulation 77*

Regulation 77 of the Concession Contracts Regulations provides that:

*"The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition."*

The Applicant does not contest the €50,000,000 threshold *per se*, but rather the requirement: that such turnover must derive exclusively from biogas plant construction and/or operation.

This additional qualitative filter lacks objective justification and goes beyond what is necessary to assess a candidate's economic and financial standing.

The proper test is whether the candidate's financial basis - regardless of sectoral origin provides a reasonable assurance of its ability to perform the concession. Imposing a sector-specific turnover requirement effectively transforms a financial criterion into a technical one, which is not the function of Section B1.3.3. Moreover, it excludes candidates whose overall turnover is demonstrably sufficient, simply because it was not generated in the biogas industry.

This principle was affirmed in the Judgment of the Court (Seventh Chamber), 18 October 2012, *Eszök-dunántúli Környezetvédelmi és Vízügyi Igazgatóság (Édukövizig) and Hochtief Construction AG Magyarországi Fióktelepe, now Hochtief Solutions AG Magyarországi Fióktelepe v Közbeszerzések Tanácsa Közbeszerzési Döntőbizottság, Case C-218/11*, where the Court held that:

*"a minimum level of economic and financial standing... must be adapted to the size of the contract concerned in that it constitutes objectively a positive indication of the existence of a sufficient economic and financial basis for the performance of that contract, without, however, going beyond what is reasonably necessary for that purpose" (para. 29)".*

The Contracting Authority has provided no explanation as to why only turnover from biogas activities is a valid measure of economic and financial standing. In the absence of such justification, the requirement is disproportionate and in breach of Regulation 77.

#### *B. Violation of Regulation 78(1) and (2) - Right to Rely on Other Entities*

Regulation 78(1) of the Concession Contracts Regulations allows an economic operator, for a particular concession, to rely on the capacities of other entities, regardless of the legal nature of its link with them, provided it can prove that those resources will be available throughout the concession period.

Regulation 78(2) extends this principle to groups of economic operators, including consortia, who may rely on the capacities of other group members or third parties.

The interpretation confirmed by Clarification Note 4 renders these provisions meaningless. It disqualifies candidates whose turnover is not biogas-derived, even if the candidate is part of a consortium where other members have biogas turnover and have agreed to assume joint and several liability. This nullifies the mechanism by which operators are entitled at law to pool capacities and collectively meet eligibility requirements.

The refusal to recognise such reliance is incompatible with the enabling purpose of Regulation 78 and restricts lawful forms of participation that are expressly permitted under the Concession Contracts Regulations.

This approach is consistent with the reasoning adopted by the Public Contracts Review Board in *Case 1768 - CT 2281/2019*, where it stated:

*"although initially it is clear and evident that joint ventures need to satisfy criteria 'as a whole', it is also very much accepted and legally permissible to rely on the capacities of certain members making up the joint venture, always within certain requisites that must be reached and honoured"*

This case supports the Applicant's position that the outright exclusion of candidates based solely on the absence of biogas-derived turnover, even when reliance structures are in place, is incompatible with both the spirit and the operative provisions of the Concession Contracts Regulations.

The ability of an economic operator to rely on the resources of other entities, whether technical or financial, is a cornerstone of EU procurement law.

In Case *C-176/98, Holst Italia*, it was held that:

*"It is permissible for a tenderer to rely on the experience, resources or capacities of third parties, provided it can demonstrate that those resources will be available for the execution of the contract."*

This line of reasoning has been affirmed in more recent judgments. In Case *C-324/14, Partner Apelski Dariusz*, it was emphasised that reliance on third-party capacities is not exceptional, and that an economic operator is:

*"free to choose the legal nature of the links it intends to establish with the entities on whose capacities it relies, provided it proves that it actually has at its disposal the resources of those entities."*

- Judgment of 7 April 2016, *Case C-324/14*, paras. 36-38

Similarly, in *Case C-234/14, Ostas celtnieks*, the Court struck down a national requirement that forced bidders to enter into a formal legal partnership in order to rely on third-party capacities. The Court held that a bidder:

*"must be allowed to rely on the capacities of other entities regardless of the legal nature of its link with them," and that "a contracting authority may not require the prior establishment of a specific legal form."*

- Judgment of 14 January 2016, paras. 28-29

These principles apply directly to the interpretation adopted by the Contracting Authority in the present procedure, which disallows reliance on financial capacity unless the contributing entity itself has recent biogas turnover. This position represents not merely a narrow reading of the applicable legal provisions but a total disregard of the fundamental principle of reliance as developed by the Court of Justice of the European Union and now expressly enshrined in both the Directive and local legislation. That principle recognises the autonomy of the economic operator to establish lawful reliance arrangements, whether through consortia, parent-subsidiary undertakings, or other cooperative mechanisms, provided that the necessary resources will in fact be available for the performance of the contract. The Contracting Authority's refusal to accept financial capacity unless it stems from biogas turnover held directly by the applicant, and its refusal to acknowledge capacity sourced through otherwise compliant reliance arrangements, therefore constitutes a breach of this fundamental tenet of EU and Maltese procurement law.

### *C. Breach of the Principles of Equality and Non-Discrimination*

Finally, the interpretation of Section B1.3.3 amounts to a breach of the overarching principles of equal treatment and non-discrimination under Article 3(1) of Directive 2014/23/EU. The restriction in question operates to the advantage of a narrow class of operators — namely those with current or recent biogas experience - and excludes others with demonstrable financial strength and operational capacity but no direct biogas turnover.

This amounts to an unjustified restriction on market access. It creates a structural preference for incumbents or foreign biogas specialists while preventing legitimate local or cross-sectoral operators from participating, even through consortium or reliance arrangements. The result is a distortion of the competitive field that cannot be reconciled with the purpose of open and inclusive procurement.

### 3. Requested Remedies

In view of the foregoing, and whilst reserving the right to make further submissions and to produce any evidence and witnesses, the Applicant respectfully requests that the Public Contracts Review Board:

1. Declares that the interpretation of Section B1.3.3 of the PQQ as confirmed in Clarification Note 4, is unlawful in that it imposes a disproportionate and unjustified restriction on access to the procedure and frustrates the lawful right to rely on the capacities of other entities;
2. Orders the necessary measures to ensure that Section B1.3.3 is applied or interpreted in a manner consistent with the principles of proportionality, non-discrimination, and genuine competition, including by recognising consolidated turnover from relevant industrial or infrastructure activities and permitting lawful reliance on third-party capacities;
3. Grants any other relief or direction that it deems appropriate in the circumstances.

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This Board also noted the **Contracting Authority's Reasoned Letter of Reply** filed on 11<sup>th</sup> August, 2025 and its verbal submission during the hearing held on the 16<sup>th</sup> October, 2025, in that:

RAM's reply is structured in the following manner:

- SECTION A: FACTUAL BACKGROUND TO THE PUBLICATION OF THE PQQ
- SECTION A: THE PQQ CLAUSES SUBJECT-MATTER OF THE APPLICATION
- SECTION C: REPLY TO THE FIRST REQUEST: THE BIOGAS TURNOVER REQUIREMENT CAN ONLY BE SATISFIED BY AN ECONOMIC OPERATOR WHO HAS CONSTRUCTED OR OPERATED A BIOGAS PLANT TO THE TUNE OF €50 MILLION
- SECTION D: REPLY TO THE SECOND REQUEST: THE PQQ DOES NOT EXCLUDE THE RIGHT TO RELY ON OTHER ENTITIES, WHICH REMAINS AVAILABLE TO CANDIDATES

- SECTION E: REPLY TO THE ALLEGATION REGARDING THE BREACH OF THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION: THIS GRIEVANCE HAS BEEN RENDERED SUPERFLUOUS

## **FACTUAL BACKGROUND TO THE PUBLICATION OF THE PQQ**

On 20 May 2025, RAM published the PQQ, the first in a 3-stage process which is meant to identify 5 shortlisted candidates to move forward to the Invitation to Participate in Dialogue ("ITPD") stage.

This tender process is intended to result in the award of a concession by RAM to the successful concessionaire to design, finance, construct, and operate a national farm waste treatment facility for the collection and processing of animal waste into renewable energy and organic soil enhancers. The estimated procurement value of the concession, based on an aggregate turnover estimate over a 25-year period, is €511 million.

The facility to be built is a biogas plant with gas-upgrading, gas and CO<sub>2</sub> liquefaction and fertiliser. In layman's terms, biogas is the renewable energy source that results when animal waste is broken down.

The purpose of the PQQ is to identify those market participants who meet the specific selection criteria set by RAM, particularly in relation to the economic and financial stability, as well as the technical expertise, that RAM expects the future concessionaire to demonstrate.

These criteria shall be explained in more detail in the upcoming sections to RAM's reply.

### **B. THE POQ CLAUSES SUBJECT-MATTER OF THE APPLICATION**

Before addressing the claims raised by the Claimant, RAM shall set out and explain the relevant PQQ clause which appears to be central to the Application.

There are 2 turnover requirements.

Firstly, Candidates must have at least €50 million in turnover which has been generated through biogas plant construction or operation activities (the "*Biogas Turnover Requirement*").

Secondly, Candidates must have a minimum annual average turnover of €50 million regardless of how that turnover has been generated (the "*Average Turnover Requirement*").

Both requirements must be satisfied as a minimum for the candidate's PQQ to qualify and to be awarded points.

RAM understands that the issues being raised by the Claimant are with respect to the Biogas Turnover Requirement. To submit turnover values, the bidder must have experience in biogas plant construction or operation- which, after all, is the purpose of this tender process. This requirement arises from the data which bidders must enter in the first row to Section B.1.1 entitled '*Company Financial Data*' and which reads: Turnover for company involved in the construction and operation of biogas plants.

The Biogas Turnover Requirement is further corroborated by a footnote which expressly puts bidders on notice that: *The company turnover is not limited to biogas plant construction and operation only. However, it is required that the company has current biogas plant construction and/or biogas plant operation activities (or past experiences no older than from 2014).*

Separately, Section 1.3.2 of the PQQ Response Format-which forms part of the PQQ documentation and which has to be completed by the bidders-requires bidders to provide certain information on their economic and financial standing, including their total annual turnover.

Section B1.3.3 implements a scoring mechanism for the Average Turnover Requirement as follows:

<b>Average Total Annual Turnover</b>	<b>Marks</b>
Above €110 million	8
Above €85 million up to €110 million	6
Above €60 million up to €85 million	4
Above €50 million up to €50 million	2
Below €50 million	Disqualified

The Biogas Turnover Requirement does not exclude consortium members who possess turnover unrelated to biogas plant or operations from contributing that turnover to meet the Average Turnover Requirement. However, as reiterated in the answer to Question 1 of Clarification Note 4 posted on 25 July 2025, as a minimum, both the Biogas Turnover Requirement and the Average Turnover Requirement have to be satisfied:

*A JV member may contribute 'unlimited annual turnover as long as it ticks the box of having, or having had, biogas plant constructions or operation activities.*

The Claimant claims that the Biogas Turnover Requirement is disproportionate and hinders genuine competition and that there is no justification to imposing this requirement-which rather relates to technical

experience— in relation to the economic and financial standing of a bidder. This claim forms the basis of the Claimant's first request for a remedy (the *'First Request'*).

The PQQ also allows the Candidate—be it a sole economic operator or an association of economic operators (i.e. joint venture or consortium—to rely on the capacities of other entities in terms of Regulation 78 of the Concession Contracts Regulations. This is established in para. (ii) to Clause 3.9.7 of the PQQ which states that:

*with regard to economic and financial standing, where the Candidate relies on the capacities of other entities, the relevant entities shall, be jointly and severally liable for the execution of the Contract.*

The right of reliance was reiterated in Clarification Note 4 where RAM was asked whether, in the case of a sole bidder—with no direct experience in biogas construction or operation, but intending to subcontract all the works—would be automatically disqualified, since no turnover value can be provided, and a turnover below €50 million results in disqualification.

In reply, RAM stated that:

*A sole bidder Candidate not meeting the minimum average total annual turnover of €50 million will be disqualified. Therefore, any intention to sub-contract has to be legally binding and presented with the PQQ submission.*

The Claimant interpreted this clarification to mean that RAM was excluding its right of reliance and asks the Board to intervene by restating that right (the *"Second Request"*).

By means of its Application, the Claimant is now requesting the PCRB to accede to the following remedies:

1. that RAM's interpretation of Section B1.3.3 of the PQQ Response Format, as allegedly confirmed in Clarification Note 4 published on 25 July 2025, is declared unlawful; and
2. that the Board ensures that Section B1.3.3 is interpreted in a proportionate manner which promotes genuine competition.

**REPLY TO THE FIRST REQUEST: THE BIOGAS TURNOVER REQUIREMENT CAN ONLY BE SATISFIED BY AN ECONOMIC OPERATOR WHO HAS CONSTRUCTED OR OPERATED A BIOGAS PLANT TO THE TUNE OF €50 MILLION**

The Claimant feels aggrieved by the Biogas Turnover Requirement which it describes as 'disproportionate' and 'lacking objective justification'.

This statement is unfounded both in fact and at law. A €50 million turnover requirement in the area covered by the concession contract—where the turnover is estimated to reach €511 million—is on the face of it reasonable and proportionate. The Biogas Turnover Requirement reaches c. 9% of the total contract value.

There can therefore be no doubt that it is within the legal turnover threshold of twice the contract value, which in this case, would translate into a permissible turnover requirement in excess of €1 billion.

Nor is the Biogas Turnover Requirement a deterrent to genuine competition, particularly when the objective of the concession is to design, finance, construct, operate and transfer a biogas plant back to RAM (the "*Concession's Objective*"). The requirement checks all the boxes in the Concession Contracts Regulations and there is no basis under Regulation 98 for its removal.

The Contracting Authority shall now proceed to explain the Biogas Turnover Requirement in more detail. To ensure that the Concession's Objective is achieved, RAM has established that a bidder can enter turnover values only if it satisfies the Biogas Turnover Requirement and the Average Turnover Requirement cumulatively.

This means that any candidate must possess both: (a) a minimum of €50 million turnover generated in biogas plant construction or operation activities and (b) a minimum annual average turnover of €50 million regardless of how it is generated.

Regulation 77 of the CCR requires the conditions for participation to be: (a) related and (b) proportionate to the need to ensure the ability of the concessionaire to perform the concession, (c) taking into account the subject-matter of the concession and (d) the purpose of ensuring genuine competition. In view of the fact that the Concession's Objective is to build and operate a biogas plant with an estimated turnover of €511 million, it is difficult to understand how the Claimant claims that the Biogas Turnover Requirement is disproportionate and lacks objective justification.

The Claimant claims that the Biogas Turnover Requirement transforms "*a financial criterion into a technical one*". Aside from being incorrect, this claim has no basis at law.

The Biogas Turnover Requirement is not intended to demonstrate technical capabilities, but rather to prove that the candidate has relevant experience in managing the commercial and financial aspects of projects in the area covered by the contract. Developing and running a biogas plant over a 25-year period is not only a technical task—it also requires the ability to secure financing and manage revenue streams. Turnover from

comparable biogas projects is therefore a relevant indicator of the operator's market presence and financial management experience, which is essential for long-term project success.

Furthermore, the only requirements which bind a contracting authority such as RAM when it is formulating its selection criteria are set in the law: relatedness, proportionality and genuine competition.

There is no other limitation which restricts the contracting authority's discretion. It was not the intention of the authors of Directive 2014/23/EU' (the "*Concessions Directive*") to circumscribe the power of contracting authorities. On the contrary, the Concessions Directive offers a more flexible regime in comparison to the stricter rules implemented in Directive 2014/24/EU2 (the "*Classic Directive*") which regulates standard procurement for public works, public supplies, and public services.

That being said, even the Classic Directive recognises the right of contracting authorities to demand turnover as an economic and financial standing criterion which is sector-specific.

Article 58(3) of the Classic Directive stipulates that contracting authorities may require: "*in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract*" (emphasis added).

This rule has been constant throughout the development of the current procurement law framework and was passed down to the Classic Directive by its predecessor, that is, Directive 2004/18/EC.4 Article 47(1)(c) of the now repealed directive allowed proof of economic and financial standing to be supplied by means of "*a statement of the undertaking's overall turnover and, where appropriate, of turnover in the area covered by the contract*".

The claim that the Biogas Turnover Requirement somehow converts this financial criterion into one of technical experience is unfounded in fact and in law and should be dismissed as such by this Board.

Further, given the €511 million estimated concession value, the threshold of €50 million applicable to the Biogas Turnover Requirement, represents only c. 9% of the total. This would not even exceed the safe harbour threshold of "*two times the estimated contract value*" permitted by Article 58(3) of the Classic Directive with respect to minimum yearly turnover.

The Claimant also claims that RAM has not provided any justification for the Biogas Turnover Requirement. While respectfully, RAM submits that there is no such legal obligation in terms of Regulation 77 of the CCR to justify the selection criteria that it has chosen, this reply will invariably serve to shed light on the rationale behind these requirements.

In view of the foregoing, RAM humbly requests the PCRB to dismiss the First Request of The Claimant in its entirety.

**REPLY TO THE SECOND REQUEST: THE PQQ DOES NOT EXCLUDE THE RIGHT TO RELY ON OTHER ENTITIES, WHICH REMAINS AVAILABLE TO CANDIDATES**

By means of its Second Request, The Claimant asks the Board to intervene and reinstitute the right of reliance which it claims has been excluded by RAM in the PQQ.

RAM rejects that it has excluded the right of reliance from the PQQ. The right to rely on the capacity of other entities, whether that other entity is a joint venture partner or a sub-contractor, is expressly reiterated in Clause 3.9.7 of the main PQQ document (see para. 18).

Therefore, RAM chose to impose the requirement of joint and several liability upon those entities whose capacities are relied on to satisfy the economic and financial standing component of the selection criteria. This includes the Biogas Turnover Requirement.

The Claimant claims that RAM's reply to Question 1 of Clarification Note 4, which was published on 25 July 2025, nullifies the right of reliance. This is not correct for the answer to that first question expressly refers to the right of candidates to rely on the capacities of other entities provided "*any intention to sub-contract has to be legally binding and presented with the PQQ submission*".

While the right to rely on other entities is available to candidates replying to the PQQ, it is not a substitute for satisfying either the Biogas Turnover Requirement or the Average Turnover Requirement.

RAM is humbly clarifying its position in view of the interpretation put forward by the Claimant that the PQQ prohibits reliance unless the entity relied on satisfies the Biogas Turnover Requirement. A candidate may rely on the capacity of other entities to satisfy either the Biogas Turnover Requirement or the Average Turnover Requirement as long as that other entity agrees to be jointly and severally liable for the execution of the contract.

Moreover, both the Biogas Turnover Requirements and the Average Turnover Requirement must be satisfied in order for the candidate to qualify and to be awarded turnover points.

In view of the foregoing, RAM humbly requests the PCRB to dismiss the Second Request of The Claimant in its entirety.

**E. REPLY TO THE ALLEGATION REGARDING THE BREACH OF THE PRINCIPLES OF EQUALITY AND NON-DISCRIMINATION: THIS GRIEVANCE HAS BEEN RENDERED SUPERFLUOUS**

The Claimant claims that RAM's interpretation of Section B1,3.3 of the PQQ Response Format has put those economic operators with biogas experience at an advantage,

In view of its reply to the First and Second Request, RAM respectfully submits that this '*grievance*' has been made redundant.

RAM has clarified that bidders are expected to satisfy 2 turnover requirements:

- (a) the Biogas Turnover Requirement: bidders must have at least €50 million in turnover which has been generated through biogas plant construction or operation activities; and
  
- (b) the Average Turnover Requirement bidders must have a minimum annual average turnover of €50 million regardless of how that turnover has been generated.

These are the requirements that RAM wishes to impose on economic operators who wish to participate in the PQQ and this tender process.

The Claimant also claims that its right to satisfy the conditions for participation by relying on other entities has been limited. By means of its reply to the Second Request, RAM reiterates that candidates are free to rely on the capacities of other entities to satisfy the economic and financial standing criteria as long as those entities relied on are jointly and severally liable for the execution of the contract.

In view of the foregoing, RAM humbly requests the PCRB to dismiss this grievance of The Claimant in its entirety.

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This Board, having examined all documentation relevant to this appeal and having heard the submissions of all interested parties, including the testimony of witnesses duly summoned, now proceeds to consider the Appellant's grievances in their entirety.

## **I. Introduction**

The Board finds that the appeal concerns the interpretation and application of Section B1.3.3 of the Pre-Qualification Questionnaire ("PQQ") issued by the Contracting Authority in connection with the *578 – RAM/001/2025 Pre-Qualification Questionnaire (PQQ) for the Award of a Concession for the Design, Build, Finance, Operate and Transfer Back of a National Farm Waste Treatment Facility's* concession procedure. It is determined that the Appellant challenges the PQQ on three grounds: (i) that the minimum turnover requirement constitutes a disproportionate restriction on access to the procedure; (ii) that the drafting impinges on the right to rely on third-party capacities; and (iii) that the PQQ breaches principles of

equality and non-discrimination. The Board has considered the appeal strictly within the scope of these grounds and the prayers for relief submitted.

## **II. Alleged Disproportionate Restriction on Access**

The Board determines this argument to be unfounded. In the context of a concession estimated at approximately €511 million, the €50 million threshold represents less than ten percent of the total value. Established jurisprudence and European guidance permit pre-qualification thresholds of up to twice the contract value, provided that such conditions remain proportionate to the nature and scale of the project.

Accordingly, the Board finds that the requirement is both legally permissible and objectively justified. It is directly related to the complexity and value of the concession — involving the design, financing, construction, operation, and transfer of a biogas facility — and reflects the minimum financial capacity necessary to ensure sound execution of such an undertaking.

The Board therefore concludes that this requirement does not constitute a disproportionate or unjustified restriction on competition, and this grievance is accordingly dismissed.

## **III. Impingement on the Right to Rely on Third-Party Capacities and Compliance with Articles 77 and 78**

The Board finds that Article 77 of the Concession Contracts Regulations provides as follows:

*77. “Contracting authorities and contracting entities shall verify the conditions for participation relating to the professional and technical ability and the financial and economic standing of the candidates or tenderers, on the basis of self-declarations, references or references to be submitted as proof in accordance with the requirements specified in the concession notice that shall be non-discriminatory and proportionate to the subject-matter of the concession. The conditions for participation shall be related and proportionate to the need to ensure the ability of the concessionaire to perform the concession, taking into account the subject-matter of the concession and the purpose of ensuring genuine competition.”*

The Board finds that Articles 78(1) and (2) provide as follows:

*78.(1) “With a view to meeting the conditions for participation laid down in regulation 77 an economic operator may, where appropriate and for a particular concession, rely on the capacities of other entities, regardless of the legal nature of its links with them. Where an economic operator wants to rely on the capacities of other entities, it shall prove to the contracting authority or the contracting entity that it will have at its disposal, throughout the period of the concession, the necessary resources, for example, by producing a commitment by those entities to that effect. With regard to financial standing, the contracting*

*authority or the contracting entity may require that the economic operator and those entities are jointly liable for the execution of the contract.”*

78.(2) *“Under the same conditions, a group of economic operators as referred to in regulations 58 and 59 may rely on the capacities of participants in the group or of other entities.”*

The Board finds that Article 77 establishes the general legal framework for pre-qualification requirements. It requires that such requirements be proportionate, non-discriminatory, and genuinely related to the ability to perform the concession, while safeguarding the principle of genuine competition. Articles 78(1) and (2) specifically guarantee candidates the right to rely on third-party capacities, ensuring that aggregation of resources is fully recognised for eligibility purposes. Together, these provisions create a dual obligation: conditions for participation must be proportionate and related to performance, and candidates must be able to rely on third-party capacities without undue burden or ambiguity.

The Board notes that the second grievance raised by the Appellant has been considered not strictly within the context of the content inscribed in the grievance *per se*, but rather in light of the ambiguous character of the drafting of Section B1.3.3 of the PQQ Response Format. While the reasoning of this Board does not fully embrace the precise framing of the Appellant’s second grievance, it is nonetheless apparent that the grievance implicates a potential violation of Regulation 78(1) and (2) of the Concession Contracts Regulations, which was indeed raised by the Appellant, albeit under a different contextual argument.

In exercising its adjudicatory function, the Board finds that, in the interest of equity, procedural fairness, and administrative justice, it is appropriate to consider the grievance from this alternative angle. The Board emphasises that this approach remains fully *intra petita*, as it does not extend beyond the scope of the relief sought by the Appellant, but rather addresses the underlying legal principle upon which the grievance was founded.

The Board refers to Section B1.3.3, as drafted, contains the following relevant provisions:

- *“Where the candidate is a joint venture/consortium of partner companies, the fulfilment of the minimum annual turnover of Euro 50 million shall be based on the consolidated turnovers of the members of the joint venture/consortium, without any weighting according to their shares.”*
- *“A Candidate not meeting the minimum average total annual turnover of Euro 50 million will be disqualified.”*
- *“For scoring, the individual turnovers of each of the joint-venture/consortium members add to the consolidated total turn-over below weighted according to their share in the joint venture/consortium.”*

The Board finds that the first clause (unweighted aggregation) aligns with Articles 77 and 78. It ensures that candidates can rely on the full contribution of all consortium members, facilitating the exercise of the right

to rely on third-party capacities and maintaining proportionality relative to the subject matter of the concession.

The Board finds that the third clause (weighted scoring) and the interpretation of Clarification Note 4 introduce an internal inconsistency. This weighting methodology may reduce the effective contribution of partners, creating practical and legal ambiguity. A candidate may meet the minimum threshold under the unweighted calculation but face uncertainty when the weighted methodology is applied for scoring or eligibility.

The Board finds that this ambiguity materially impinges on the right to rely on third-party capacities, contrary to Articles 78(1) and (2). By diminishing the recognised contribution of third-party partners, the drafting imposes a disproportionate and unjustified burden on candidates.

The Board further finds that this inconsistency engages Article 77 because the ambiguity affects:

1. **Proportionality:** the weighted method does not accurately reflect candidates' actual capacity to perform, undermining the requirement that pre-qualification conditions relate proportionately to the concession.
2. **Transparency and fairness:** candidates relying on third-party capacities are exposed to a risk of arbitrary or inconsistent evaluation.
3. **Genuine competition:** the uncertainty created may exclude or disadvantage candidates who otherwise satisfy the turnover requirement, contrary to the purpose of Article 77.

The Board therefore finds that Section B1.3.3, in its current form, breaches both Articles 77 and 78. The Appellant's grievance is upheld, and the Board directs the Contracting Authority to clarify and reconcile the drafting to ensure that candidates can exercise the right to rely on third-party capacities without ambiguity, undue burden, or disproportionate restriction, while preserving the proportionality, transparency, and fairness required under Article 77.

#### **IV. Alleged Breach of Equality and Non-Discrimination**

The Board finds that the Appellant contends that Section B1.3.3 and the PQQ generally breach equality and non-discrimination principles. It is determined that this grievance is without merit. The Board finds that the provisions of Section B1.3.3 are applied uniformly to all candidates and no differential treatment is applied on any impermissible basis. The internal inconsistency affects all candidates relying on third-party capacities in an identical manner. The Board therefore dismisses this ground of appeal.

#### **V. Conclusion and Disposition**

The Board finds and determines as follows:

1. On the first grievance that Section B1.3.3 requires that the turnover be derived from biogas plant construction and/or operation in the context of a concession for the design, financing, construction, operation, and transfer of a national farm waste treatment facility, this sector-specific requirement is directly related to the subject-matter of the concession. It ensures that candidates possess relevant financial experience in activities that are material to the performance of the concession. The Board finds that this requirement is proportionate, justified, and consistent with Article 77, and does not impose a disproportionate or undue restriction on access to the procedure.
2. On the second grievance regarding the impingement on the right to rely on third-party capacities it is hereby being upheld. Section B1.3.3, insofar as it contains the inconsistency between “unweighted” and “weighted” calculation of turnover, materially affects the exercise of this right and constitutes a breach of Regulation 78(1) and (2) of the Concession Contracts Regulations.
3. The third grievance of the Appellant’s regarding equality and non-discrimination is hereby being dismissed. Section B1.3.3 applies equally to all candidates.
4. The Contracting Authority is directed to clarify and reconcile the drafting of Section B1.3.3 to remove ambiguity and ensure that candidates may exercise the right to rely on third-party capacities without uncertainty or undue burden.

**The Board,**

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

- a. Not to uphold Appellant’s first grievance in the context as explained therein;
- b. Upholds the second grievance and directs the Contracting Authority to clarify and reconcile the drafting of Section B1.3.3 to remove ambiguity and ensure that candidates may exercise the right to rely on third-party capacities without uncertainty or undue burden;
- c. Not to uphold the third grievance in the context as explained therein;
- d. To direct the Contracting Authority to extend the ‘*Closing Date for the Submission of Tenders*’ to the 1<sup>st</sup>, December, 2025;

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Mr Lawrence Ancilleri**  
Member