

PUBLIC CONTRACTS REVIEW BOARD

Case 2224 – Objection 631 – FMS/2025/026 – Works – Tender for the Pedestrian Accessibility Improvements, Installations of Metal Works and Supply and Installation

06th March 2026

The Board,

Having noted the *Letter of Objection* filed by Dr Joseph Mizzi and Dr Ylenia Busuttill acting for and on behalf of **Elouni Tading Limited** (hereinafter referred to as “*the Appellant*”) filed on the 9th December, 2025;

Having also noted the *Reasoned Letter of Reply* filed by Dr Christopher Vella acting for and on behalf of the **Foundation for Medical Services** (hereinafter referred to as “*the Contracting Authority*”) filed on the 19th December, 2025;

Having also noted the *Reasoned Letter of Reply* filed by Dr John L. Gauci acting for and on behalf of **Mr Dennis Scicluna** (hereinafter referred to as “*the Recommended Bidder*”) filed on the 19th December, 2025;

Having heard and evaluated the testimony of the witness Mr Omar Elouni (Company Representative of the Appellant Company) as duly summoned by Dr Joseph Mizzi acting for and on behalf of the Appellant;

Having heard and evaluated the testimony of the witness Mr Noel Bonello (Chairperson of the Evaluation Committee) as duly summoned by Dr Christopher Vella acting for and on behalf of 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 4th March, 2026, hereunder-reproduced.

Minutes

Case 2224 Objection – FMS/2025/026 – Works – Tender for Pedestrian Accessibility Improvements, Installations of Metal Works, and Supply and Installation of Various Electrical Works at Rabat Cemetery

The Tender was issued on the 23rd of September 2025, and the closing date was 14th October 2025.

The estimated value of the tender, excluding VAT, was €98,318.33

On 9th of December 2025, Elouni Trading Ltd., lodged an appeal against the Foundation of Medical Services– the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations.

On the 4th of March 2026, the Public Contracts Review Board (PCRB), composed of Dr Vincent Micallef as Chairman, Dr Maria Cardona and Mr Lawrence Ancilleri as members, convened a public hearing to consider the appeal.

A deposit of €491.60 was paid.

There were two bids.

The attendance for this public hearing was as follows:

Appellant – Elouni Trading Ltd.

Dr Joseph Mizzi – Legal Representative.

Dr Ylenia Busuttill – legal representative.

Mr Omar Elouni – Company Representative.

Contracting Authority – Foundation of Medical Services

Dr Christopher Vella – Legal Representative.

Dr Isaac Vella Sargent – legal representative.

Mr Noel Bonello – Chairperson

Arch. Sharon Mallia – Evaluator

Preferred Bidder – Mr Dennis Scicluna

Dr John L Gauci – Legal Representative.

Mr Dennis Scicluna – Company Representative.

Mr Piero Torchiani – Company Representative.

Opening Statements

The Chairman welcomed the parties present and formally opened Case Number 2224 in the records of the PCRB. The Chairman identified the Appellant as, Elouni Trading Ltd, the Contracting Authority as the Foundation of Medical Services, and acknowledged the presence of representatives of the preferred bidder, Mr Dennis Scicluna.

The Chairman invited the legal representative for the Appellant to make the initial submissions.

Initial Submissions

Initial Submissions by Dr Joseph Mizzi (for the Appellant)

Dr Mizzi stated that the appeal concerned the Gantt Chart submitted with the tender document. This was confirmed by the person who submitted the application, stating that the document had seven pages. The document named Tender 1 is the same document created for the initial submissions and the same document submitted after the clarification regarding the whereabouts of the Gantt Chart.

The appellant wished to have visibility in order to know the data submitted and to confirm that the Gantt Chart was actually uploaded. They insist in their appeal that the Gantt Chart was not a necessary document for which the appellant could be rejected from its offer.

Referring to Article 32 of the tender document, Dr Mizzi mentioned a period of 16 weeks for these works to be finalized. Also, Article 15.1 states that the Gantt Chart had to be analysed after the award of the contract. The appellants were to prove that they had originally submitted seven pages.

Initial Submissions by Dr Christopher Vella (for the Contracting Authority)

Dr Vella stated that this tender was for works needed in the cemetery in Rabat. There were two offers, with an estimated value of €98K, and the appellant's offer was the cheapest at €90K. The appellant's offer was declared technically non-compliant.

The bidders were requested to submit with the tender document "*a work schedule/Programme of Works which should give an indicative timeline, sequence of the works performed, included in the tender document*", which was an indicative Gantt Chart.

This was important because the Contracting Authority (CA) and the Evaluation Committee had to ensure that the works could be carried out within the period of execution. The appellant mentioned another Gantt Chart, which was to be presented after the signing of the contract, with a detailed programme of works stating how the work was to be carried out. The appellant had to decide whether he had submitted the Chart or whether there was any need for it.

The Evaluation Committee sent a clarification to indicate where the Gantt Chart was. In response, the appellant did not indicate the location of the Gantt Chart but instead uploaded new documentation with seven pages, including the Gantt Chart. In the rejection letter, five pages were mentioned and, since this was subject to Note 3, new documents were not permitted.

Initial Submissions by Dr John Gauci (for the Recommended Bidder)

Dr Gauci noted that they were aware of the proceedings from the submission of the acts; however, from the appeal they became aware of the reason contested by the appellant. The appellant could not decide himself that the Gantt Chart was not necessary. Elouni could have asked the board to change or eliminate that request.

The appellant's arguments were contradictory and, when they were asked to indicate the Gantt Chart, instead of indicating a page number they submitted the same offer with new documentation. This casts serious doubt on the credibility of the appellant.

He referred to the decision in the case *Vassallo Builders vs Wasteserv* of May 6th, 2025, where a clarification for a document was sent to Vassallo Builders, and they claimed that it was the system's fault. He quotes:

“Dak l-agir sussegwenti ta Vassallo Builders, jitfa dubju serju, il-mod ta kif irrealizzew meta inghataw l-eskluzzjoni, ghal fatt li allura ma kienx veru li effettivament ‘sottomettew dak li kien mitlub fil-hin, imma pruvaw jillapazzaw wara, meta kien tard wisq”.

This present case is different as it concerns Note 3.

Witness: Mr Omar Elouni (ID no. 100199M), summoned by Dr Mizzi

Mr Elouni, one of the Directors of Elouni Trading Ltd, said that the tender was prepared by himself and another person, Chris Falzon, who could not attend the hearing.

Mr Chris Falzon submitted the original tender and sent confirmation to Mr Elouni in PDF format, and the Gantt Chart was submitted with Tender 1. He again submitted all the same documents following the clarification.

Cross-examination by Dr Vella

Mr Elouni was not the person who uploaded the original document. This was the responsibility of Mr Chris Falzon. He could not confirm exactly what had been uploaded. Dr Vella asked why they did not indicate a page number for the Gantt Chart. Mr Elouni said that Mr Falzon had uploaded all the documents instead.

Cross-examination by Dr Gauci

Mr Elouni said that Mr Falzon was not one of their employees. He worked on commission and took care of the tenders. He could have indicated a page number for the Gantt Chart but chose to send all the documents again after the clarification.

Witness: Mr Noel Bonello (ID no. 0309184M), summoned by Dr Vella

Mr Noel Bonello, the Chairperson of the Evaluation Committee, said that the tender cost less than €100K and that companies normally ask for a third person to submit the tender on ePPS.

The preliminary indicative Gantt Chart is used for the contractor to analyse the works, and for the Evaluation Committee to analyse the sequence of the works and ensure that the contractor is respecting the time frame according to Article 32 referenced in the technical offer.

The programme of works referred to in Article 15.1 is more detailed and is prepared after the signing of the contract, following meetings with the contractor and the Project Manager. They

discuss commencement dates and mobilisation on site, and the programme is more detailed. In fact, in the technical offer they requested an indicative Chart, not a detailed one at the tendering stage.

The programme of works in Article 15.1 is more detailed, uses different software, and has to be updated during the execution of the works.

Dr Vincent Micallef intervened by saying that the witness was creating a distinction between the Gantt Chart at the tendering stage, which is more indicative, and the Gantt Chart at the post-tendering stage, which had to be more detailed.

Mr Noel Bonello continued by showing the bid containing five pages, with the technical form and the signature of Mr Elouni, which the Committee received by upload at the tendering stage. He then showed the seven-page document received after the clarification. The Committee concluded that two pages had been added and, as this was subject to Note 3, no new documentation was permissible.

The Chairman stated that the documents were Document B and Document C.

Mr Bonello explained the procedure by which the committee receives the bids. After they receive an automatic notification, they download a zip file containing all the documents of the bidders.

They download the whole offer to ensure that they have all the documents submitted with the offer, as at times there may be documents pertaining to the technical offer that are placed under the administrative or financial offers. The other bidder submitted a preliminary Gantt Chart, respecting the request of the Contracting Authority.

Cross-examination by Dr Mizzi

Mr Bonello stated that the opening staff of the tenders could not have a dual role and be part of the Evaluation Committee. All the members download the system on a desktop and the document in question was Tender 1.

Dr Mizzi mentioned the code UUID, which is created when a document is uploaded, and asked the witness to confirm whether this code number on the document of the allegedly five pages was the same as the one submitted.

The witness could not confirm the printed document of the tender himself.

The Chairman asked if the document in front of the witness had a code number, and the witness said that the downloaded PDF had no code.

The witness explained the process, stating that the opening staff log in, tick the received offers and unlock the bids. At that stage, the opening staff have no access to the bids, and the system notifies the members of the Committee to start the evaluation. The Committee then logs on to the ePPS.

Dr Micallef clarified that the opening staff unlock the system but have no visibility of the documents.

Mr Bonello confirmed that only the Evaluation Committee has access to the bids. Once the bidder uploads his offer, it is locked and cannot be shared.

Dr Mizzi handed a document to the witness with the code UUID; however, the witness declared that he did not know how the code was created and that he had no access to it. He suggested that it could be a reference available only to the bidder.

Referring to Article 32, which establishes the period of sixteen weeks to finish the works, Dr Mizzi asked the witness whether he agreed that when a bidder submits a tender, he would be accepting, in particular, the special conditions.

The witness referred to the special conditions and agreed that the bidder was accepting to adhere to the conditions once he submitted the offer.

The witness did not agree that there was a sequence of works in the literature list.

Dr Mizzi quoted from the literature list:

“Power of lighting, sequence of works. First site visit and disconnect all cables from existing Db and supply 16A, start the metal conduit duration two to three days, laying cables duration two days start of work one day”

The witness asked to see the literature list and said that it was technical literature submitted by Mr Elouni. The Evaluation Committee related only to the technical offer.

Referring to Article 15.1, the witness agreed that a new Gantt Chart had to be submitted after the contract stage.

Dr Mizzi said that the bidder had a timeline of 16 weeks and that the evaluation of the works was to be done after the award of the contract. The witness said that the two Gantt Charts were related but had two different functions, as he had explained previously.

Cross Examination by Dr Gauci.

Mr Bonello noted that no clarification was requested at the tendering stage, referring to the Gantt Chart. Mr Bonello met Mr Elouni at the site clarification meeting and did his best to explain what was to be submitted in the tender. Mr Elouni asked for more details about the railings.

Re Cross Examination by Dr Vella.

The witness said that Mr Elouni was alone at the site clarification meeting.

Final Submissions.

Final Submissions by Dr Joseph Mizzi (for the appellant).

Dr Mizzi stated that their two grievances were related to whether the Gantt Chart was submitted with the original offer or not. The proof confirmed that the appellant submitted all documents, including the Gantt Chart, as Mr Elouni had seen the Tender 1 document before the submission.

They insist that their offer was not non-compliant. The fact that an offer was submitted for the second time does not mean that there was an ulterior intention. Therefore, since no new documentation was uploaded, the tender should not have been rejected. Every document had a code, and since the appellant had no access to the data, the Committee should have produced proof that Document Tender 1 was linked with this code created by the system.

Unfortunately, since that proof was not brought forward, one had to consider the most credible version. The appellant was always consistent that this document was submitted. However, even if the Gantt Chart had not been submitted, they should not have been deemed non-compliant.

Referring to article 32.1, he quotes:

“The period of the execution of the works shall be sixteen (16) weeks from the commencement date fixed in accordance with Article 31”.

This process confirms that the bidder saw the documents, agrees with them, and was to adhere to all the conditions in the document.

Article 15.1, and he quotes:

“Further to the provisions of the General Conditions, following the endorsement of the contract by the Contracting Authority, and before works are taken in hand, the Contractor must submit to the Contracting Authority Representative a programme of works in the form of a Gantt Chart”.

This was the only indication of a Gantt Chart in the tender document. If this document was so crucial, the Gantt Chart would have been evaluated and confirmed prior to the contract and not after.

There was a grievance about the breach of self-limitation, which entails the argument that the Gantt Chart was not a mandatory document.

The appellant had the most economic offer and should have been awarded this tender.

Final Submissions by Dr Christopher Vella (for the Contracting Authority).

Dr Vella stated that this appeal centred on a fundamental principle in public procurement: that every bidder is obliged to provide a complete offer. The Evaluation Committee is obliged to ask for a clarification or a rectification in case there is a lack of documents. If in doubt, the appellant should have called for an IT representative; however, the testimony of Mr Bonello was clear when he explained how the system worked.

It is very rich to say that two sheets from the documents evaporated and could not be found. Since the appellant was alleging this, it was up to him to provide proof; however, he did not even ask the person who uploaded the documents to testify.

Elouni Trading are saying that this was only an assumption and that it is unfair that only the Committee had access to the tenders. There is no doubt that the Evaluation Committee downloads what is submitted by the bidders, in this case the five pages.

Referring to the case *Europharma Ltd vs CPSU*, of the 29th of January 2026, where the appellant had sent a set of documents but one was misplaced, and in its sentence the Court of Appeal, and he quotes the last paragraph:

“Għalhekk fil-fehma tal-Qorti ma jkunx qiegħed jiġhaddem il-prinċipju tal-proporzjonalità jekk offerta vantaġġuza tiġi mwarrba għas-sempliċi fatt li l-informazzjoni rikjesta kienet ingħatat f’parti oħra tal-offerta u mhux filparti fejn kellha tiġi nserita. Is-sitwazzjoni kienet tkun ferm differenti li kieku din l-informazzjoni ma kinitx tirriżulta minn imkien fl-offerta magħmula, liema sitwazzjoni ma tirrispekkjax il-fatti li għandha quddiemha din il-Qorti”.

The Court stated: let us help the bidders, but when a document is not submitted, there is nothing that the Evaluation Committee can do. The principle of the PPR is cardinal regarding non-discrimination between bidders. The awarded bidder presented a Gantt Chart, and it would not have been fair if the Committee treated both bidders equally when the appellant showed no sequence of the works. The request of the tender was clear.

He did not agree that the Gantt Chart was written only “*where it is detailed*”. The requirement was ‘a graphic works schedule (Grantt Chart) in relation to the period allowed as execution of the contract under Article 32’. This work schedule /Programme of works should give an indicative timeline/ sequence of the works to be performed.

The difference regarding the Gantt Chart was very clear. Elouni’s offer was the cheapest but not the cheapest compliant.

Final Submissions by Dr John Gauci (for the Recommended Bidder).

Dr Gauci stated that the appellant did not prove his allegations. The fact that the person who uploaded the documents was not present shows that the allegation was not proved. Referring to paragraph 79 of the sentence of *Vassallo Builders*, the Superior Court had remarked that the failure to bring the person who uploaded the documents to testify before the Board was fatal for that allegation.

The way Mr Bonello testified, that the documents consisted of five pages and that the Gantt Chart was missing, left no doubt. The principle of self-limitation could not have been used better, even when the Committee asked for a clarification. Regarding the need for a Gantt Chart in a tender, he referred to a sentence by the Superior Court of March 20th, 2023, *Freemond Ltd vs Agenzija għas-Servizzi tal-Qorti*, where the bidder alleged that they could have taken part of the tender and understood that this was a form of a Gantt Chart, and he quoted:

“L-offerta ta’ din is-soċjetà kienet tagħti xi forma ta’ indikazzjoni ta’ meta kellhom jaslu l-vetturi, iżda ma ressqitx Gantt Chart kif kien espressament mitlub. Meta d-dokumenti tas-sejha jitolbu

xi haġa speċifika din trid tingħata, u mhux tiġi ppreżentata xi haġa oħra li, forsi, tista' taqdi l-istess funzjoni.”.

In this case, the Gantt Chart was requested, and a rectification was not allowed. If the appellant is given a chance to arrange his offer, the level playing field would be contrary to those who were compliant, like the recommended bidder, and therefore this grievance should not be upheld.

Conclusion of the Hearing

With no further arguments presented, Chairman Dr Vincent Micallef thanked the parties and formally concluded the session.

End of minutes.

Hereby resolves:

Having noted the objection filed by Dr Joseph Mizzi and Dr Ylenia Busuttil (hereinafter referred to as “*the Appellant*”) on the 9th of December, 2026, refers to the claims made by the same Appellant with regard to the tender of reference *FMS/2025/026 – Works – Tender for the Pedestrian Accessibility Improvements, Installations of Metal Works and Supply and Installation* listed as case No. 2224 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Joseph Mizzi and Dr Ylenia Busuttil

Appearing for the Contracting Authority:

Dr Christopher Vella

Appearing for the Recommended Bidder

Dr John L. Gauci

Whereby, the Appellant contends that:

A. FACTUAL BACKGROUND

1. The Appellant participated in the Tender and submitted a complete bid, including its Technical Offer. The individual responsible for uploading the documents on the electronic portal has confirmed to the Appellant that, to his knowledge and belief at the time of submission, the Technical Offer consisted of seven (7) pages and included the required Gantt Chart.

2. The Appellant does not have access to its technical submission after upload and therefore cannot view the final electronic bundle as stored on the e-tenders platform.

The Contracting Authority, however, has full access to the electronically submitted documentation and is accordingly the only party capable of verifying the exact composition of the submission.

3. On 25th November 2025, the Contracting Authority issued a clarification request asking the Appellant to indicate where, within the original submission, the Gantt Chart could be found, The Appellant replied to this request by re-uploading the same Technical Offer it believed had been already submitted with the original bid. This was done in good faith and solely for ease of reference. No new material was created or added.
4. In its rejection letter of 28th November, 2025, the Contracting Authority stated that the original Technical Offer allegedly consisted of five (5) pages, while the clarified document consisted of seven (7) pages. On this basis, the Contracting Authority concluded that the clarified document constituted "new documentation" and that Note 3 accordingly prohibited rectification.
5. The Appellant disputes the Contracting Authority's factual assertion that the original submission consisted of five pages and maintains that, to its knowledge, the correct Technical Offer, including the Gantt Chart, had been uploaded.
6. The Appellant's offer was the lowest-priced among the submitted bids. The rejection, therefore, materially altered the outcome of the procurement procedure.
7. The Appellant's feels aggrieved by the decision taken by the Contracting Authority on the 28th November 2025 and respectfully submits that the Contracting Authority's decision is vitiated by multiple errors of law and fact and should accordingly be annulled for the following reasons:

B. GROUNDS OF OBJECTION

First Ground- Manifest Error of Assessment

8. The Contracting Authority's conclusion that the original Technical Offer comprised five pages and did not contain the Gantt Chart is wholly unverified. The Appellant lacks access to its submitted documents after upload, and its internal records confirm that the intended submission comprised a seven-page Technical Offer including the Gantt Chart.

9. Since the Contracting Authority relies exclusively on its own assertion as to the content of the original submission, yet has not produced the electronic file from the e-tenders system, the decision rests on an assumption rather than evidence. Any evaluative conclusion based on an unverified factual premise constitutes a manifest error.
10. The Appellant therefore respectfully requests that this Honourable Board orders the Contracting Authority to produce the original Technical Offer, as submitted electronically, so that this determinative factual issue may be conclusively established.

Second Ground - Misapplication of Note 3

11. That, without prejudice to the above, Note 3 prohibits rectification in circumstances where a bidder attempts to supplement, replace or alter the substance of its offer by submitting new documentation. It does not apply where the bidder merely clarifies or re-uploads what it genuinely believes had already been submitted.
12. The Appellant's response to the clarification request did not constitute the introduction of new material. It merely consisted of a re-upload of the same Technical Offer the Appellant believed had already been filed. There was no intention to alter or supplement the offer.
13. The Contracting Authority's reliance on Note 3 is therefore unfounded, as it presupposes that the clarified document differed from the original submission.

Third Ground - Erroneous Reliance on Article 32 of the Tender Document

14. That, without prejudice to the above, the rejection letter issued by the Contracting Authority relies on "Article 32 of the Tender Document" as the legal basis for concluding that the Appellant failed to submit a mandatory component of the Technical Offer. The Contracting Authority asserted that the absence of a Gantt Chart rendered the Appellant technically non-compliant in terms of this provision.
15. Article 32, however, concerns only the period of execution of the works, establishing that the contract validity begins from signature and that the execution period shall be sixteen weeks from the commencement date. It contains no reference whatsoever to tender submission requirements, technical documentation, Note 3, clarifications, or any obligation to submit a Gantt Chart during the tendering phase.
16. The Contracting Authority therefore relied on a legally irrelevant clause, misapplied Article 32 entirely, and disqualified the Appellant on the basis of a provision that does not govern technical

compliance or any aspect of bid submission. The rejection is consequently legally unfounded and unsupported by the tender documentation.

17. Furthermore, the obligation to submit a Programme of Works in the form of a Gantt Chart arises only after contract endorsement, as clearly stated in Article 15.1 of the Special Conditions. It is a post-award obligation, not a submission requirement.

18. Therefore, the Contracting Authority's reliance on Article 32 thus represents a fundamental misdirection in law which invalidates the rejection decision in its entirety.

19.

Fourth Ground - Misinterpretation of Article 15.1 of the Tender Document

20. That without prejudice to the grievances set out, the Contracting Authority's ground for refusal is not substantiated by the requisites of the Tender Documents, owing to the fact that the Gantt Chart is not required at application stage, but only after the award and signing of the relative Tender Contract, and this for the foregoing reasons:

21. The sequencing and timing established in Article 15.1 are to the effect that the Contracting Authority shall only receive, review, approve, or amend the Gantt Chart after the contract has been signed. Moreover, Article 15.1 provides that the Gantt Chart may be modified during execution, confirming that it is a post-award document rather than a mandatory element of the initial bid.

22. The tender documentation draws a clear distinction between technical documentation required for evaluation at a pre-award stage and documentation that is required only for contract implementation. The Gantt Chart belongs firmly to the latter category. This cannot be considered negated by any generic guidance documents (Tender's Technical Offer Note 3) requesting the submission of a Gantt Chart at pre-award stage, which is not substantiated but rather contradicted by the Tender Document itself.

23. The Contracting Authority's insistence that the Gantt Chart should have been included in the Technical Offer is incompatible with the express provisions of Article 15.1 and constitutes an unlawful imposition of a submission requirement that does not exist. The Authority's evaluation committee therefore exceeded the limits of its mandate by treating a post-award obligation as though it was an application-stage requirement.

24. Consequently even if, *dato ma non concesso*, the Appellant had not submitted a Gantt Chart at tender application stage, such an omission could not lawfully justify disqualification, since the tender

dossier did not require its submission. A tender cannot be excluded for failing to comply with a requirement that the tender itself does not impose.

25. To this end, the Appellant refers to and relies this honorable Public Contracts Review Board's reasoning in the appeal decided on the 9th July 2025, with reference number Case 2129- T027/24, wherein it was decided that a Contracting Authority cannot disqualify an applicant for submission of an incorrect document, where the specific requirements relative to the same documentation was not clearly specified in the Tender Document:

In the absence of a more precise requirement or clearer drafting in the tender documentation, the Appellant's submission cannot reasonably be deemed non-compliant.

26. The Appellant stresses that the same line of argumentations should apply to missing documentation, where such documentation is not a required pre-award document within the Tender Document.
27. The application submitted by the Appellant completely confirmed with the Tender Document, and the Appellant was thus disqualified by the Contracting Authority on external considerations fundamentally conflicting with the content of Article 15.1 of the same Tender Document. On this basis too, the decision ought to be annulled.

Fifth Ground - Breach of the Principle of Self-Limitation

28. That without prejudice to the above, the principle of self-limitation is one of the foundational doctrines governing public procurement. It requires the contracting authority to assess tender offers strictly and exclusively on the basis of the conditions expressly laid down in the tender dossier, without adding to, modifying, or enlarging those requirements at the evaluation stage. This principle is not optional: it is the legal mechanism that ensures equality of treatment, legal certainty, and transparency.
29. The Court of Justice of the European Union has articulated this principle with clarity in *Nexans France v. European Joint Undertaking for ITER and the Development of Fusion Energy*, Case T-415/10, where the General Court held:

"it must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is

therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations."

This authoritative passage confirms that once the contracting authority sets out the tender requirements, those requirements bind it absolutely during the evaluation process.

30. The Maltese Court of Appeal, in its judgment of 12 July 2023 (Cherubino Ltd v. Ministeru għall-Ambjent et Application Number 139/23/1), expressly adopted this same reasoning, affirming that self-limitation protects equal treatment and prohibits contracting authorities from deviating from the conditions they themselves set.
31. In the present case, the Contracting Authority breached this doctrine by treating the Gantt Chart as a mandatory submission requirement when the tender dossier imposed no such obligation at tender stage. The applicable provisions, including the Literature List (Note 2) and Article 15.1, demonstrate that no planning document or programme of works was required upon submission of the tender. The Gantt Chart is expressly designated as a post-award obligation.
32. By disqualifying the Appellant for allegedly failing to submit a document not required by the tender specifications, the Contracting Authority departed from the conditions it defined, in direct violation of the self-limitation principle. In terms of the Nexans judgment, such a departure constitutes a breach of equal treatment, because bidders are entitled to rely on the requirements set out in the tender and to be evaluated solely on those requirements.
33. The breach is aggravated by the Contracting Authority's reliance on Article 32, a clause wholly unrelated to the submission or evaluation of tenders, as purported authority for this non-existent requirement. This demonstrates a failure to assess the Appellant's offer within the parameters of the tender dossier, and therefore a breach of Article 39(1) of the Public Procurement Regulations (S.L. 601.03), which enshrines equal treatment and binds evaluation committees to the published conditions.
34. In light of the above jurisprudence and statutory principles, the Contracting Authority's decision is vitiated by a clear breach of the doctrine of self-limitation. The evaluation committee was not empowered to impose additional requirements not found in the tender dossier, nor to disqualify an economic operator on the basis of a criterion which did not form part of the tender. Accordingly, the rejection decision must be annulled.

Sixth Ground - Failure to Consider the Most Economically Advantageous Offer

35. That without prejudice to the above, as the Appellant was the lowest-priced tenderer and therefore, in accordance with the governing evaluation methodology, was in a competitively advantageous position. Under the applicable public procurement framework, a contracting authority is obliged to ensure that the evaluation process is conducted in a manner that correctly identifies the most economically advantageous tender, taking full account of both technical compliance and price. A materially erroneous technical finding which prevents a compliant tender from progressing to the financial evaluation stage necessarily distorts the competitive outcome.
36. In the present case, the Contracting Authority's flawed conclusion regarding the alleged absence of a Gantt Chart, a document which the tender did not require at the submission stage, and which, for all intents and purposes, the Appellant declares to have submitted, resulted in the premature exclusion of the Appellant. This exclusion occurred before the Appellant's economically advantageous offer could be duly considered. The evaluation committee thus failed to discharge its duty to evaluate the tender in accordance with the structure and hierarchy established by the tender dossier.
37. Where, as here, a technical disqualification is shown to be based on a misinterpretation of the tender requirements or on an erroneous reliance on an irrelevant provision of the tender document, the resulting exclusion is vitiated at law. Maltese jurisprudence has established that where evaluation committees adopt an incorrect approach which prevents proper consideration of a tender, the competitive process is compromised and the evaluation must be annulled and restarted.
38. The Contracting Authority's error had a direct and decisive impact on the outcome of this tender procedure. By excluding the Appellant at the technical stage, the Authority failed to consider the tender which, had it been correctly evaluated, was positioned to offer the most economically advantageous solution. A decision that prevents the contracting authority from identifying the best-value tender cannot be upheld, as it undermines the core objective of public procurement law.
39. For these reasons, the failure to consider the Appellant's offer within the proper evaluation sequence constitutes an additional ground requiring annulment of the rejection decision and recommencement of the evaluation in accordance with the tender documentation and governing principles.

C. Demands

Having evaluated all the above and based on the considerations set out in this objection, and while reserving its right to make further submissions, the Appellant respectfully requests that this Honourable Board:

1. Uphold the Appellant's grievances in their entirety, as set out in this reasoned letter of objection;
2. Revoke the Contracting Authority's decision declaring the Appellant's offer as technically non-compliant;
3. Revoke the rejection letter issued to the Appellant dated 28 November 2025;
4. Order the Contracting Authority to produce the original electronically submitted Technical Offer as stored on the e-tenders (ePPS) system, so that the factual basis of the rejection may be properly verified;
5. Order the Contracting Authority to re-evaluate the Appellant's bid, by a newly constituted Evaluation Committee, strictly in accordance with the Tender Document and with the findings made by this Honourable Board;
6. Declare that, once evaluated correctly and lawfully, the Appellant's offer, being the lowest-priced tender, ought to be admitted to the financial evaluation stage and considered for potential award;
7. Provide any other remedy which this Honourable Board may deem just, proper, and equitable in the circumstances; and
8. After taking due account of the circumstances and outcome of this objection, direct that the deposit be refunded to the Appellant.

This Board also noted the **Contracting Authority's Reasoned Letter of Reply** filed on the 10th February, 2026, and its verbal submissions during the hearing held on the 19th December, 2025, in that:

By means of the present we are hereby filing the Reasoned Letter of Reply for and on behalf of the Foundation for Medical Services, as the contracting authority publishing the captioned tender (hereinafter referred to as the 'Contracting Authority'), with reference and in response to the letter filed on the 9th December, 2025 (hereinafter referred to as the 'Objection Letter') by Elouni Trading Ltd (hereinafter referred to as the 'Appellant') in relation to the captioned tender.

The Contracting Authority informed the Appellant, by means of a letter dated 28th November 2025, that the tender submitted was found to be technically non-compliant for the following reason:

"A clarification request was issued to the bidder to identify where in the original submission the Programme of Works/Gantt Chart could be found. In response, however, the economic operator

submitted new documentation (new Technical Offer). The initially submitted Technical Offer consisted of five (5) pages, whereas the document provided in reply to the clarification request comprised seven (7) pages. As this shortcoming falls under Note 3, rectification is not permissible, and the additional/new documentation could not be accepted. Consequently, the offer was deemed non-compliant with the tender requirements."

This is evident in the letter, which is being attached and marked as Doc. A. As will become evident from a reading of this Letter of Reply, the Evaluation Committee, throughout its evaluation, discovered that the Graphic Work Schedule requested in the Tender Document as part of the Technical Offer could not be found in the Appellant's offer. Therefore, the Evaluation Committee issued a Clarification Question requesting the Appellant to indicate where, in the Offer, this can be located. In response, the Appellant did not indicate the location of already sent documentation but proceeded to upload new documentation in the form of the Work Schedule which was not permitted since this information was subject to Note 3 and thus only clarifications are permitted.

The provision of new documentation was deemed as being a rectification and thus proceeded to consider the offer as technically non-compliant.

By means of the Objection Letter, the Appellant contested the reason for rejection by relying on six grounds of objection, all of which revolve around the requirement by the Contracting Authority from the bidders to submit a Works Schedule as part of their technical offer in the form of a Graphic Work Schedule (Gantt Chart).

The Contracting Authority will humbly proceed with the following submissions as a form of a reply to all the grounds of objection of the Appellant's Objection Letter:

A. First Ground - Manifest Error of Assessment

1. In the Appellant's first ground of objection, it is stated that the Technical Offer pertaining to the Appellant comprised of seven pages, which included the Gantt Chart so requested and this solely according to its internal records, and not five pages as stated by the Contracting Authority. In a rather strange line of submissions, the Appellant states that since the decision relies on the Contracting Authority's assertion as to the content of the original submission, such a decision is based on assumption rather than evidence. This, according to the Appellant, constitutes a manifest error.

2. On this point the Contracting Authority will immediately address the Appellant's request to produce the original Technical Offer and confirm that together with this letter of reply, the original of the offer presented by the Appellant will be filed and made available to the Board.
3. Notwithstanding this, and as it is correctly observed in the Appellant's Objection Letter, it is solely the Contracting Authority that has "full access to the electronically submitted documentation and is accordingly the only party capable of verifying the exact composition of the submission". Accordingly, it is only sensible to conclude that the Contracting Authority's version is far more reliable than that of the Appellant, particularly since it has in its possession both versions of the Appellant's technical offer, in clear breach of Note 3, herewith attached and marked as Doc. B and Doc. C.
4. Following a review of the Original Technical Offer, it will become very evident to the Board that the submission made lacked the Work Schedule which was requested in terms of the Technical Offer.

B. Second Ground - Misapplication of Note 3

1. The Second Ground of Appeal seems to be an extension of the First Ground whereby the Contracting Authority is relying on the premise that all documentation was submitted and that somehow, it uploaded documentation that was then not available to the Contracting Authority. Thus, by extension, should the Board proceed to reject the First Ground of Appeal, the Second Ground should be rejected automatically. In fact, in the Second Ground of Appeal, the Appellant affirms that the Contracting Authority was incorrect in relying on Note 3 since it does not apply where "the bidder merely clarifies or re-uploads what it genuinely believes had already been submitted". It goes on to insist that the response to the clarification request did not include the introduction of new material. With all due respect this line of submission is a logical fallacy.
2. Note 3, provides that no rectification shall be allowed. Therefore, by virtue of Note 3 the Contracting Authority only requested a clarification, attached and marked as Doc. D, that among other things stated that:

"Bidders shall provide, as part of their technical offer, a Graphic Work Schedule (Gantt Chart) in relation to the period allowed as Execution of the Contract, under Article 32: Period of Execution of Tasks of the Special Conditions. This Work-Schedule/Programme of works should give an indicative timeline/sequence of the works to be performed included in the Tender document."

"The Evaluation Committee could not find this information, Please advise where in your offer it can be located. Economic Operators are kindly reminded that this shortcoming falls under Note 3. Therefore, it can only be clarified, not rectified. Any new documents will not be considered."
(emphasis in bold added by the Contracting Authority)"

3. The Appellant posits that when the document was supposedly re-uploaded this did not qualify as an attempt to supplement, replace or alter the substance of its original technical offer. He further states in point 11, that the re-upload constituted nothing more than a clarification of what he genuinely believed he had originally submitted with no intention to alter the offer, despite the absence of any evidence to substantiate this belief.
4. However, one questions the rationale behind re-uploading the document in its entirety when the request was merely to "advise where", that is, to simply indicate the location of the Gantt Chart or Programme of Works within the original technical offer. Therefore, had the Gantt Chart in fact been included in the original submission, the Appellant needed only to direct the Contracting Authority to the relevant pages and the decision to submit a fresh upload decisively undermines the Appellant's position. The only reason why the Appellant uploaded a document in response to a clarification, even though not requested to do so, was only because contrary to what it now believes, the Appellant was convinced that the original Technica Offer did not include the requested documentation.
5. Thus, the Contracting Authority's reliance on Note 3 is fully justified, not least because it has complete access to both electronically submitted documents, which differ from one another, thus rendering the most recent submission not permissible.

C. Third Ground - Erroneous Reliance on Article 32 of the Tender Document

1. In its Third Ground of appeal, the Appellant states that the Contracting Authority erroneously relied on Article 32 of the Tender Document as the legal basis for concluding that the Appellant failed to submit a mandatory component of the Technical Offer.
2. Contrary to the assertions made in the Appellant's Objection Letter, the rejection letter issued by the Contracting Authority did not rely on Article 32 of the Tender document. In fact, no reference to Article 32 was made therein. Rather, the Evaluation Committee rejected the Appellant's offer on the grounds that it was not technically compliant with the requirements set out in the Tenderer's Technical Offer, for the Work-Schedule/Programme of works' in the form of a Gantt Chart that was meant to only serve as an indication to the Contracting Authority whether the applicant had

understood the necessities of the works. Thus, this indicative Gantt Chart required in the Tenderer's Technical Offer is separate from the Gantt Chart requested as a post award obligation. These two complement each other and the latter was then meant to enter into further detail as to the Programme of Works to be implemented. This is clearly evident from the fact that the former was referred to as being an "*indicative timeline/sequence of the works to be performed included in the Tender document*"

3. Therefore, it is completely incorrect to state that the Contracting Authority relied on a legally irrelevant clause or that it misapplied Article 32 entirely or that the disqualification was based on that provision since the rejection letter made no mention of Article 32 of the Tender Document.

D. Fourth Ground - Misinterpretation of Article 15.1 of the Tender Document

1. The Appellant argues that the ground for refusal is not substantiated by the requisites of the Tender Document, owing to the fact that Article 15.1 of the Tender Document requires that the Gantt Chart is submitted post award and signing of the relative Tender Contract and not beforehand. However, once again the Programme of Works in the form of a Gantt Chart required in the Technical Offer differs from that referred to by the Appellant.
2. The "Work-Schedule/Programme of works" requested as part of the Technical Offer was intended solely to give the Contracting Authority an indicative timeline of the works, and thus it was different from the Gantt Chart required within the Tender document and referred to by the Appellant.
3. In the Tenderer's Technical Offer, the term "indicative" was deliberately underlined and reiterated on different pages by the Contracting Authority to ensure clarity that the Programme of Works requested at the application stage was merely an indicative outline of the works to be undertaken. This indicative programme is entirely distinct from the detailed Gantt Chart required for contract implementation. This distinction was understood by all other bidders, moreover, the indicative Work-Schedule/Programme of Works were required to be far less detailed than those applicable to the implementation-stage Gantt Chart.
4. The Work-Schedule/ Programme of works required at the application stage served solely to assist the Evaluation Committee in assessing the submission appropriately and in determining whether the bidder had adequately understood the scope of the works.

5. As previously reiterated, the Programme of works referred to in the Technical Offer is distinct from the Gantt Chart referred to in Article 15 of the Special Conditions to the Tender Document since the Programme of works referenced to.

Selection and Award Requirements

In order to be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder in the Technical Offer relate and fall under the "Selection and Award Requirements", specifically point 'specifications. Accordingly, the obligations arising from the Tenderer's Technical Offer operate in addition to all other requirements contained in the Tender Dossier and cannot in any manner be understood as the requirements under Article 15.1 of the Special Conditions.

6. So much so that the Appellant was fully aware of the consequences of failing to

(C) Specifications

- (i) Tenderer's Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool provided, Rose 3f

Tenderer's Technical Offer (Note 3)

- (ii) Literature as per Form marked "Literature List" to be submitted with the Technical Offer at tendering stage. The scope of the literature is to corroborate a fully compliant technical offer. (Note 2)

comply with the requirements of the Technical Offer. This is evidenced by his explicit declaration of agreement to submit all the information requested, including the Programme of works, thereby acknowledging the binding nature of those obligations.

7. Thus, it cannot be argued that the Appellant was disqualified based on external considerations conflicting with Article 15.1, Rather, the disqualification was validly and lawfully grounded in the Appellant's failure to comply with the requirements of the Technical Offer.

8. Interestingly, in point 22 of the Objection Letter, the Appellant states that the requirement to include a Gantt Chart within the Technical Offer is "incompatible" and even "unlawful". Yet, in the first three grounds of objection, the Appellant simultaneously insists that his last Technical Offer that was submitted should be deemed admissible

and treated as a mere clarification. This position is plainly contradictory. The Appellant is trying to present two mutually incompatible arguments and such inconsistency, is precluded by the principle of "*electa una via non datur recursus ad alteram*".

E. Fifth Ground - Breach of the Principle of Self-Limitation

1. In the Appellant's penultimate ground, he argues that the Contracting Authority was somehow in breach of the Principle of Self-Limitation. As correctly stated in the Objection Letter, the conditions set out by the Contracting Authority limits its discretion and this for safeguarding the principles of equality, transparency and legal certainty and such all principles have been correctly adhered to.

As aforementioned, the Contracting Authority had set out the tender requirements, and part of those requirements included the requisites in the Technical Offer, such requisites the Appellant did not comply with. The Contracting Authority never deviated from the conditions that it set itself, thereby ensuring that all bidders were treated equally.

2. The Appellant in his Objection Letter states that the Contracting Authority acted in breach of Regulation 39(1) of the Public Procurement Regulations (S.L 601.03), however, this is wholly unfounded. This Regulation stipulates that:

"Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

As noted in this Regulation, all the bidders were requested to submit a Programme of works in the form of a Gantt Chart in terms of the Technical Offer and therefore, there was no discrimination between any of the participant bidders. The Contracting Authority was also very transparent from the outset by explaining how the Work-Schedule was to be in the form of an indicative timeline/sequence of the works to be performed included in the Tender document and the level of detail requested was proportionate to the requirements of that stage of the process.

3. Any deviation from the above and from the conduct adopted by the Evaluation Committee would have been in breach of the principle of non-discrimination between bidders. Moreover, reference is made to judgment delivered by the Court of Justice of the European Union on the 10th of October 2013 in the names of **Ministeriet for Forskning, Innovation og Videregaende Uddannelser vs Manova A/S** where it was stated "*Lastly, as a general rule, when exercising its right to ask a tenderer to clarify its tender, the contracting authority must treat tenderers equally and fairly, in such a way that a request for clarification does not appear unduly to have favoured or disadvantaged the tenderer or tenderers to*

which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome".

4. Once again, the Contracting Authority requested the Programme of works so that an indicative timeline is proposed by the Appellant in order to understand whether the Appellant comprehends the technical requirements of the contract or otherwise.
5. It should be noted that, as per the "Selection and Award Requirements', specifically point C 'specifications', all the other literature to be submitted in terms of the Literature list is solely to corroborate a fully compliant technical offer, however, despite all the other Literature so submitted by the Appellant he failed to corroborate a fully compliant technical offer form as required in the tender document under the heading "Technical Specification".
6. It is the bidder's obligation to submit a complete offer. It is not the role of the Contracting Authority to consider as compliant offers which are incomplete or not in accordance with the requirements of the Tender Dossier.

F. Sixth Ground - Failure to Consider Most Economically Advantageous Offer

1. The Appellant further repeats the submissions made in the previous grounds and states that the Contracting Authority made a flawed decision regarding the absence a Gantt Chart and further states that the technical disqualification was based on a misinterpretation and this notwithstanding the fact that the Appellant's offer was the lowest priced, however, this cannot be further from what truly happened.
2. It is a basic principle of Public Procurement regulations that only offers which are deemed as technically and administratively compliant may be considered further for the award. The expectation of the Appellant to have his offer considered for the financial compliance when it was already deemed as being administratively and technically non-compliant is strange and conflicts with any principle of Public Procurement.
3. Article 6.1 of Section 1 - Instructions to Tender is very clear in this regard and needs no further explanation:

6 Criteria for Award

6.1 The sole award criterion will be the price. The contract will be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.

4. The Appellant did not satisfy the technical criteria and his offer was therefore not considered for the financial stage of the evaluation.
5. As reiterated above, the Programme of Works / Work-Schedule required at tender-submission stage forms part of the Selection and Award Requirements, specifically Point C, Specifications. The Technical Offer made it clear, through repeated use of the term "indicative", that this Programme of Works served solely to provide the Evaluation Committee with a general outline of the sequencing and timing of the works, enabling it to assess whether the bidder understood the scope and necessities of the contract. This indicative Programme of Works was therefore a preliminary document, expressly distinct in purpose and level of detail from the post-award Gantt Chart required under Article 15.1 for contract implementation.
6. The Contracting Authority did not conflate these two requirements. The decision was based exclusively on the Appellant's failure to provide the indicative Programme of Works forming part of the Technical Offer. That document is an evaluation-stage requirement, entirely separate from the implementation-stage Gantt Chart.
7. The Contracting Authority, therefore, correctly applied the tender requirements, acted transparently and proportionately in accordance with Regulation 39(1), and did not misinterpret or misapply any provision of the Tender Document. The distinction between the indicative Programme of Works and the post-award Gantt Chart was clear, understood by all other bidders, and consistently applied by the Evaluation Committee.

On the basis of the foregoing, my client contends that the Public Contracts Review Board should find against all the appellant's demand and confirm the decision of the Contracting Authority.

Having seen the Reasoned Letter of Reply of the Recommended Bidder filed on the 18th December, 2025, wherein the Recommended Bidder submitted:

1. Introduction

By means of the present, the Recommended Bidder, is submitting its reasoned reply in response to the objection lodged by Elouni Trading Ltd. It is submitted that the objection is completely unfounded, rests

on incorrect interpretations of the tender dossier, and seeks to overturn a decision that is both legally correct and dictated by the mandatory requirements of the procurement process.

Indeed, at the outset, it is necessary to emphasise that this tender is governed by a structured set of administrative and technical submission requirements, and that the Contracting Authority is bound to evaluate tenders strictly and exclusively on the basis of the documentation actually submitted electronically through the e-tenders portal at the moment of submission. It is equally settled that a tenderer's internal intentions, recollections, or assertions as to what it "believed" it had uploaded cannot displace the only authoritative record of the submission: namely, the electronic file bundle as received by the Contracting Authority at the deadline.

Within this legal framework, the objection fails at the first hurdle, because it attempts to re-characterise a mandatory component of the Technical Offer as a document that allegedly becomes due only after contract signature. Such interpretation is incompatible with the structure of the tender dossier, with the express requirements governing Technical Offers, and with the longstanding jurisprudence which requires that all documents essential for technical evaluation must be provided at tender stage.

The Appellant's approach would render technical evaluation impossible and would undermine the principle that all bids must be evaluated on a common basis, using the same mandatory evidence.

The tender dossier is clear and unequivocal. The Technical Offer, to be submitted at tender stage, had to include the complete set of documents listed under the technical requirements, and Note 3 categorically prohibits the rectification of missing technical documentation. The Programme of Works, represented through a Gantt Chart, is not a peripheral administrative formality but an integral part of the technical assessment.

Through this document, the economic operator demonstrates its planned sequencing, feasibility, phasing, resource allocation, and the overall reasonableness of its execution methodology within the prescribed timeframe. Without this information, the Technical Offer is structurally incomplete and incapable of evaluation.

It is therefore legally irrelevant that the Appellant argues, as a matter of its own interpretation, that Article 15.1 regulates the approval mechanism of the Programme of Works following contract signature, Article

15.1 does not eliminate the requirement to submit the Programme of Works at tender stage, nor does it contradict the fact that the Technical Offer must include all elements necessary for the Contracting Authority to determine technical compliance. The approval process described in Article 15.1 necessarily presupposes the prior submission of the Programme of Works; otherwise the Contracting Authority would be expected to approve a document it had never seen during evaluation, which would be contrary to both logic and procurement law.

In this context, the Recommended Bidder submits that the absence of the Gantt Chart from the Appellant's original electronic submission constitutes a clear, objective, and irremediable technical non-compliance. It is not open to the Board to treat this omission as a trivial defect or as a matter capable of post-submission regularisation.

The prohibition in Note 3 exists precisely to prevent a tenderer from inserting, after the deadline, documents which it failed to submit in time. Any deviation from this principle would expose the process to arbitrary alteration and would gravely undermine equal treatment.

Moreover, the Appellant's attempt to bypass this prohibition by asserting that it merely "re-uploaded" what it believed to be its original Technical Offer is untenable.

What matters is not what the tenderer intended to upload, but what it actually uploaded. The Contracting Authority, being the sole custodian of the submitted file, confirmed that the Appellant's Technical Offer contained only five pages and did not include the required Gantt Chart. This is the determinative factual record. The Appellant cannot rewrite the content of its submission retroactively, nor can it demand that the Contracting Authority or this Board accept a post-deadline document as if it formed part of the original bid.

For these reasons, the foundation of the objection is unsustainable. The tender dossier required the Gantt Chart at submission stage; the Appellant did not submit it; and the omission is fatal. The rejection decision is therefore lawful, proportionate, and entirely consistent with the governing procurement framework.

2. THE CLARIFICATION EXCHANGE AND THE IMPERMISSIBLE ATTEMPT TO INTRODUCE NEW TECHNICAL DOCUMENTATION

From the objection itself it would transpire that following the Contracting Authority's verification of the Appellant's Technical Offer, the Authority noted that the uploaded technical file did not contain the required Gantt Chart. Faced with this omission, the Authority sought clarification exclusively to determine whether the bidder could indicate the exact location of the Gantt Chart within the originally submitted file. The clarification request was therefore limited in scope and strictly aligned with the established procurement

principle that clarifications may never be used to submit or introduce missing documents. The function of such request was merely to confirm whether the Gantt Chart existed within the original bundle.

In reply to this request, the Appellant proceeded to upload what it now describes as the "same Technical Offer," consisting of seven pages and purporting to include the Gantt Chart. However, this characterisation is inconsistent with the governing legal framework. A bidder cannot, through a clarification process, alter the factual content of its original submission. The electronic tender system locks submissions at the deadline; the only evidence of what was submitted is the file package as received by the Contracting Authority at that moment. The Authority, being the sole custodian of the electronic submission, confirmed definitively that the Appellant's original Technical Offer consisted of only five pages and did not contain a Gantt Chart.

Reference is made to a judgment of the Court of Appeal (Superior) delivered on the 31 May 2019 (Rikors numru 20/19) in the names Rockcut Limited (C-10164) v. Malta Industrial Parks Ltd. et which dealt precisely with a bidder's failure to submit a proper Gantt chart as requested:

Kif tajjeb osserva d-Direttur Generali (Kuntratti), jekk ir-regoli tas-sejba jimponu l-preżentata ta' tali taghrif, hu mistenni li offerenti li jiehdu sehem f'dik l-5-sejba jogoghdu ghal dawn ir-regoli. Wara kollox ir-regoli tas-sejba geghdin hemm biex jiġu mharsa u mbux biex jiġu mvarra. Biex jiġi żgurati il-harsien ta' dawn il-principji, l-awtorita' kontraenti hija obbligata li tosserva strettament il-kriterji li hija stess tkun stabiliet (ara f'dan is-sens is-sentenza tad-29 ta April 2004, II-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt 115);

Dan mbux każ ta' semplici "amplification of details", ghax li gara kien li fl-offerta kien hemm nuqqas ta' dettalji rilevanti u kif mitluba fis-sejba. L-offerta kienet karenti mid-dettalji tal-programm tax-xoghljiet, u kien biss wara li giet ippreżentata gantt chart gdida li gie indikat kif u meta kien sejjer isir ix-xoghol ta shotcrete. L-offerta kellha tindika l-fażijiet kollha tax-xoghol u kif u meta se jsiru kull fażi biex l-istess xoghljiet ikunu jistghu jigu segwiti dettaljatament.

It is respectfully submitted that the position in the present case is even more compelling than that examined by the Court of Appeal in Rockcut, since in that case the bidder had at least submitted a programme of works which was subsequently sought to be amended or supplemented by the introduction of a revised Gantt chart.

In the present objection, by contrast, the Objector failed to submit any Gantt chart whatsoever as part of its original Technical Offer. The deficiency is therefore not one of insufficient detail or improper structuring of an existing programme, but a complete absence of a mandatory technical document *ab initio*.

Having said this, it must be reiterated that in any case, a bidder who has failed to submit a mandatory technical document cannot cure that omission by re-uploading a different version of its offer after the deadline. The re-uploaded document constituted new material, irrespective of the Appellant's description or subjective intention. The procurement rules do not recognise a bidder's internal belief about what ought to have been submitted; they recognise only the document actually uploaded into the system. Anything submitted thereafter, even if labelled as identical or merely clarificatory, necessarily falls outside the boundaries of the original offer.

Indeed, a judgment delivered by the Court of Appeal (Superior) on the 20th March 2023 (Rik numru 542/22/1) in the names Fremond Limited (C20339) v. L-Agenzija ghas-Servizzi tal-Qorti et, dealt precisely with the bidders failure to submit the request Gantt Chart and the consequences of such failure in conjunction with the application of note 3 principles:

Fir-rigward tat-tieni aggrarju, hawn ukoll id-dokumenti tas-sejba riedu dak li jissejjah a Gantt Chart fejn jigi propost kif se jasl u l-vetturi Malta fuq perjodu ta' ghaxar xhur. Din ma gietx ipprezentata mis-socjeta' appellanti. L-offerta ta' din is-socjeta' klenet taghti xi forma ta' indikazzjoni ta' meta kellhom jasl u l-vetturi, izda ma ressqitx Gantt Chart kif kien espressament mitlub. Meta d-dokumenti tas-sejba jitolbu xi haga specifika din trid tinghata, u mbux tigi pprezentata xi haga obra li, forsi, tista' taqdi l-istess funzjoni.

Hawn ukoll, il-prezentazzjoni ta' Chart kienet mandatorja u rrikjesta kienet parti minn Note 3 aktar qabel imsemmi, u ghalhekk, l-awtorita' kontraenti ma setghet titlob rettifika. Id-dokumenti mbux iffirmati li annettiet is-socjeta' appellata mal-informazzjoni li tat, setghu jigu ffirmati aktar 'il quddiem (ara "Executive Security Services Ltd. v Agenzija ghas-Sistema tal-Infurzar Lokali et" decizja minn din il-Qorti fis-26 ta' Ottubru 2022), izda dak mitlub kellu jigi prodott. Mbux każ li l-awtorita' kontraenti titlob li jinglebu d-dokumenti t-"tajba", ghax mbux kompitu tal-awtorita' li titlob hi d-dokumenti. Id-dokumenti tas-sejba kienu cari x'ghandu jigi pprezentat, u kull oblatur irid isegwi l-istruzzjonijiet moghtija u mbux jistenna li l-awtorita' taghmel tajjeb ghan-nuqqasijiet tieghu.

Thus, it is clear that Note 3 of the tender dossier prohibits rectification of missing technical documentation. The prohibition is not discretionary. It applies whenever a document required for technical assessment was not part of the original submission.

If rectification were permitted in such circumstances, tenderers would be free to revisit their technical proposals after the deadline, which would destroy equal treatment and legal certainty. The tender rules thus prevent bidders from augmenting, supplementing, or replacing technical documents under the guise

of clarification, as this would effectively convert a non-compliant tender into a compliant one without subjecting the bidder to the consequences of its own omission.

Furthermore, the clarification request did not and could not entitle the Appellant to introduce new content. The Contracting Authority merely asked the Appellant to indicate where, within the originally uploaded file, the Gantt Chart could be located.

It did not invite, permit, or authorise resubmission, reformatting, or augmentation of the Technical Offer. This very limited scope is mandated by established practice and jurisprudence: clarifications may serve to confirm or explain what is already present, but may never be used as a vehicle for supplying missing mandatory documents.

Accordingly, the Appellant's attempted re-upload not only failed to demonstrate that the Gantt Chart formed part of its original submission, but instead confirmed the opposite. The moment the Appellant submitted a seven-page document inconsistent with the original submission, the Appellant's attempt to meet the tender requirements was rendered non-compliant.

On this basis, the rejection of the Appellant's offer was procedurally necessary and legally correct. The Contracting Authority had no discretion to accept a post-deadline insertion of a mandatory component, and any contrary approach would have violated the principles of transparency, equal treatment, and self-limitation. The inability of a bidder to prove that it submitted the mandatory technical documentation at the appointed time cannot be displaced by later explanations, intentions, or alternative file versions.

The Appellant's arguments surrounding the clarification are therefore completely without basis. The fundamental fact remains that the originally submitted offer did not contain the Gantt Chart, and the subsequent attempt to remedy that omission was impermissible. The Contracting Authority's decision was thus the only lawful outcome.

3. MISINTERPRETATION OF ARTICLE 15.1 AND THE ERRONEOUS INVOCATION OF SELF-LIMITATION AND EQUAL TREATMENT

The Appellant's objection includes a central submission: that Article 15.1 of the Special Conditions allegedly places the Programme of Works, including the Gantt Chart, exclusively within the post-award phase, thereby relieving the tenderer from any obligation to submit such document at tender stage. This proposition is legally unsustainable and structurally incompatible with the procurement framework governing works contracts.

Article 15.1 regulates the procedure for approval and updating of the Programme of Works during contract performance. It does not, and cannot, negate the obligation to submit the same Programme of Works as part of the Technical Offer for the purpose of evaluation. The approval mechanism is necessarily subsequent to the assessment of technical compliance. The tender evaluation committee cannot approve, amend, or monitor a document that it has never received. Nor can it logically determine whether a project is executable within the prescribed timeframe without reviewing a tenderer's planned sequencing and execution methodology. The Appellant's argument would therefore require the Board to accept that the evaluation committee was expected to assess the credibility of the execution plan in complete ignorance of the contractor's proposed timeline. In the humble opinion of the Recommended Bidder, such an approach would be one that contradicts fundamental procurement logic.

Indeed, feasibility of execution is a core evaluative feature in works tenders. It is not limited to technical specifications of materials but extends to whether the tenderer's methodology and time allocation are compatible with contract requirements. This is why the Programme of Works and Gantt Chart form an intrinsic component of the Technical Offer. Their absence renders a bid technically unverifiable. A tenderer who does not provide its planned programme deprives the Authority of the ability to ascertain whether the tenderer understands and can meet the contractual obligations. There is no procurement model under which a feasibility assessment is deferred until after the award has been issued.

Moreover, the Appellant's construction of Article 15.1 would render the distinction between technical and post-award documentation meaningless. Technical submissions exist precisely to allow the contracting authority to determine, before contract signature, whether a tenderer is able to perform. Post-award documentation, by contrast, exists solely to refine, formalise, or operationalise what has already been evaluated. The Appellant attempts to invert this sequence by treating a fundamental technical document as if it were a mere administrative detail to be furnished after selection. Acceptance of such reasoning would dismantle the architecture of the tender itself.

Turning to the Appellant's invocation of the principle of self-limitation, this principle cannot be used to shield a tenderer who failed to submit mandatory documentation.

Self-limitation prohibits the Contracting Authority from applying requirements that were not included in the tender dossier. In this case, however, the requirement to submit the Programme of Works and Gantt Chart forms part of the Technical Offer obligations established in the tender documentation. It was neither implied nor invented at evaluation stage. The Authority acted within the limits of its mandate by enforcing compliance with the published requirements. The doctrine of self-limitation therefore weighs against the Appellant, not in its favour.

The Appellant's interpretation of self-limitation is, in effect, an attempt to create a new rule not present in the tender: that a tenderer may omit the Programme of Works entirely and still be treated as compliant. That position is irreconcilable with the tender dossier and would lead to unequal treatment. Tenderers who dutifully submitted complete technical documentation, including their Gantt Charts, would find themselves disadvantaged vis-à-vis a bidder permitted to provide such documentation after the deadline. This would violate the very principles the Appellant purports to invoke.

Equal treatment requires that all bidders be assessed against the same mandatory documentation, submitted within the same timeframe, and subject to the same rule that rectification of missing technical documents is prohibited. If a bidder were allowed to introduce a missing Programme of Works after submission, it would fundamentally distort the competitive process. It is not for the Board to create exceptions to these rules based on a bidder's retrospective claim that it "believed" the missing document was included.

Finally, the Appellant's reliance on general references to jurisprudence concerning ambiguous or imprecise tender requirements is misplaced. There is simply no ambiguity here. The tender dossier clearly distinguishes between those documents constituting the Technical Offer, which must be submitted at tender stage and cannot be rectified, and those documents which are to be refined or updated following award. The Programme of Works falls squarely into the former category.

The Appellant's omission therefore results not from any unclear drafting, but from its own failure to submit a mandatory document.

Thus, it becomes evident that the Appellant's arguments concerning Article 15.1, self-limitation, and equal treatment are constructed upon a mischaracterisation of the tender requirements and a misunderstanding of the underlying principles of procurement law. The Contracting Authority did not exceed its mandate; it applied the tender dossier as written, enforced mandatory compliance, and ensured equal treatment among bidders. The rejection of the Appellant's offer is thus not only lawful but necessary in order to preserve the integrity of the process.

4. CONCLUSION

In view of the submissions already set out, the objection lodged by the Appellant cannot be sustained either on the facts or on the law. The determinative factual issue in this case is straightforward and cannot be displaced by conjecture, intention, or post-deadline narrative: the Appellant did not submit the mandatory Gantt Chart within its original Technical Offer.

The Contracting Authority, as the sole custodian of the electronic submission, confirmed that the uploaded file consisted of five pages and did not include the Programme of Works. This factual position is unassailable.

Once this omission is established, the legal consequences are inevitable. The Technical Offer was incomplete. Note 3 prohibits rectification. The Programme of Works is a mandatory document for technical evaluation. The attempted re-upload in response to a clarification request cannot retroactively convert a non-compliant submission into a compliant one. A bidder cannot replace or supplement its original submission under the guise of clarification, nor can a clarification request be construed as an invitation to restructure a technical file. The omission therefore remained fatal and incapable of cure.

Equally, the Appellant's remaining arguments are without legal basis. Article 15.1 does not transform the Programme of Works into a post-award formality; it presupposes its existence and prior evaluation. The principle of self-limitation binds the Contracting Authority to the tender dossier as written; it does not entitle a bidder to disregard a mandatory technical requirement. Equal treatment requires that all bidders submit the same required documentation at the same stage and prohibits any approach that would allow one operator to supply missing core documentation after the deadline.

The Appellant's position would invert these principles and introduce precisely the kind of unequal treatment that public procurement rules exist to prevent.

The Recommended Bidder, by contrast, submitted a complete and compliant offer and ranked as the lowest-priced among technically compliant bidders. The evaluation committee acted within its mandate, applied the requirements uniformly, and reached a lawful and correct conclusion. There is no legal or factual basis to disturb the award recommendation.

For these reasons, and whilst reserving the right to submit further observations and evidence, the Recommended Bidder respectfully invites this Honourable Board to dismiss the objection in its entirety; to confirm the disqualification of the Appellant's offer as technically non-compliant; and to uphold the Contracting Authority's recommendation in favour of the Recommended Bidder.

This Board, having examined in detail all documentation relevant to the present appeal, having heard the full submissions of all interested parties, having carefully assessed the testimony of the witnesses duly summoned, and having reflected on the procedural and substantive dimensions of the case, now proceeds to deliver its comprehensive and reasoned decision.

I. Introduction

This Board is called upon to determine an objection filed in terms of Regulation 270 of the Public Procurement Regulations (Subsidiary Legislation 601.03) by Elouni Trading Ltd (hereinafter “the Appellant”) challenging the decision of the Foundation for Medical Services, acting as Contracting Authority (hereinafter “the Contracting Authority”), whereby the Appellant’s tender was declared technically non-compliant and excluded from further participation in the award procedure.

The impugned decision was notified by letter dated 28th November, 2025, and was grounded on a specific and circumscribed finding, i.e. that the Appellant failed to submit, within its original Technical Offer and before expiry of the tender deadline, the required Programme of Works in the form of a Graphic Work Schedule (Gantt Chart), as expressly mandated under the Selection and Award Requirements and subject to Note 3 of the Tender Dossier. The decision further recorded that the subsequent upload of a seven-page document containing a Gantt Chart, following a clarification request, constituted the introduction of new technical documentation after the deadline and was therefore impermissible rectification.

The Appellant disputes both the factual and legal basis of that conclusion. It asserts that the Contracting Authority acted on assumption rather than verified evidence; that the Gantt Chart was either submitted or was not required at pre-award stage; that the clarification mechanism ought to have allowed its consideration; that Article 32 and Article 15.1 of the Special Conditions demonstrate the post-award nature of the obligation; that the Authority’s approach breached the principles of proportionality, equal treatment and self-limitation under Regulation 39(1); and that the rejection unjustly disregarded the Appellant’s position as lowest-priced tenderer.

The Contracting Authority, in its reasoned reply, rejects each allegation. It maintains that the electronic submission record is conclusive and establishes beyond doubt that the original Technical Offer comprised five pages only and did not contain the Gantt Chart. It further contends that Note 3 expressly prohibited rectification of missing technical documentation; that the clarification request was limited to identifying material already submitted; that the re-uploaded document was objectively new; that acceptance thereof would have infringed equal treatment; and that price is legally irrelevant where compliance is not first established.

The Recommended Bidder aligns itself with the Contracting Authority’s submissions, emphasising that any departure from strict enforcement of the Tender Dossier would prejudice compliant bidders and undermine the integrity of the procurement process.

The Board has examined the entire documentary record, including the clarification exchange and the original ePPS submission as stored within the system. It has considered the Public Procurement

Regulations, the Tender Dossier in its entirety, and the jurisprudence of the Court of Justice of the European Union, the General Court, and the Maltese Court of Appeal.

II. Factual Background and the Evidential Status of the ePPS Submission

The factual dispute is narrower than the breadth of the argument might suggest. It turns on a single decisive question: whether the original Technical Offer, as uploaded before the deadline, contained the required Programme of Works in the form of a Gantt Chart.

The Contracting Authority has produced the original electronic file bundle as recorded by the ePPS platform. The Board has independently reviewed that bundle. The record establishes that the original Technical Offer consisted of five pages. Those five pages do not contain any Graphic Work Schedule or Gantt Chart. The seven-page document containing such schedule was uploaded only after the clarification request had been issued.

The Appellant has suggested that the omission may have resulted from an upload error or that the Gantt Chart formed part of the intended submission. However, procurement law does not operate on subjective intention but on objective submission. The legal system governing public tenders is formal, structured and deadline-driven precisely to preserve equality of opportunity and certainty of outcome. The document that matters is the document actually received and time-stamped within the system before the deadline. No evidence of systemic malfunction has been adduced. No proof of corruption of the file or upload failure has been demonstrated. The Board is therefore bound by the objective electronic record.

At this juncture, it is pertinent to subject the testimony of Mr Omar Elouni to critical scrutiny. Mr Elouni testified in his capacity as director of the Appellant company, Elouni Trading Limited.

In the course of his evidence, he stated that the tender process had been handled by a certain Mr Christopher Falzon, an outsourced consultant retained to manage the tender process on behalf of Elouni Trading Limited. Mr Elouni further stated that Mr Falzon had been entrusted with the responsibility of compiling and uploading all documentation pertaining to the tender, including the Technical Offer, and that Mr Falzon had represented to him that the full documentation, inclusive of the required Gantt Chart, had been duly submitted and uploaded in the first instance.

This Board cannot, however, accord any probative weight to that aspect of Mr Elouni's testimony insofar as it purports to establish the content of Mr Falzon's acts or representations. The evidence adduced by Mr Elouni in relation to what Mr Falzon allegedly did, submitted, or communicated is, by its very nature, hearsay evidence, or, in the expressive parlance of the Maltese forensic tradition, *detto del detto*.

The fundamental principle governing the admissibility and weight of testimonial evidence requires that a fact be established by the direct oral testimony of the person with first-hand knowledge of that fact, given under oath and subject to cross-examination, so that the tribunal of fact may assess the credibility and reliability of the account from its primary source.

It was Mr Christopher Falzon, and Mr Falzon alone, who possessed direct and personal knowledge of what documentation he had in fact compiled, uploaded, and submitted on behalf of the Appellant. The evidential rules applicable before this Board demanded that it be Mr Falzon who testified to those matters under oath.

The interposition of Mr Elouni as a conduit for Mr Falzon's alleged assertions does not satisfy that requirement and cannot, in law, substitute for the direct testimony of the person with the relevant first-hand knowledge. This conclusion is further reinforced, and indeed rendered inescapable, by Mr Elouni's own candid acknowledgment during the course of his testimony that the information he was conveying derived entirely from what Mr Falzon had told him, a concession captured with characteristic directness in his own words: "*keif qalli Chris u keif qal lili.*" That admission, volunteered by the witness himself, places the hearsay character of the evidence beyond any possible controversy.

The objective documentary record before this Board admits of no ambiguity and stands in direct and irreconcilable contradiction to the account Mr Elouni sought to convey. The technical offer submitted by the Appellant in its first submission was manifestly and verifiably incomplete as it did not contain the required Gantt Chart.

That essential document was entirely absent from the first submission. Its existence in the procurement record is attributable solely and exclusively to the second submission, filed following a clarification request issued by the Contracting Authority, through which the Gantt Chart was provided as an addition to the documentation already on record.

The sequential logic of this chronology is unambiguous and admits of only one interpretation, i.e. far from having been included in the first submission as Mr Elouni's testimony sought to establish, the Gantt Chart was indelibly missing from it. The documentary evidence thus displaces and defeats the hearsay account entirely. This Board is bound to proceed on the basis of the objective record rather than upon testimony that is not only hearsay in its character but is directly refuted by the contemporaneous documentary evidence generated in the course of the procurement procedure itself.

The Court of Justice has repeatedly emphasised that deadlines in procurement procedures are not merely procedural conveniences but structural guarantees of equal treatment. In *Manova* (C-336/12) and *SAG ELV Slovensko* (C-599/10), the Court underscored that the submission deadline demarcates the closure of competitive conditions. To allow post-deadline supplementation of substantive elements would distort competition retrospectively.

The Board therefore establishes as a matter of fact that the Gantt Chart did not form part of the original Technical Offer.

III. On the Alleged Manifest Error of Assessment

The Appellant advances, as a further and distinct strand of its challenge, the contention that the Contracting Authority acted precipitously in rejecting its technical offer and failed to conduct an adequate and sufficiently careful verification of the content of the submission before reaching its conclusion, thereby committing a manifest error of assessment of a character sufficient to vitiate the rejection decision and to warrant the intervention of this Board by way of corrective relief.

This contention requires careful and systematic analysis, both because it invokes a well-established and important concept of European administrative and procurement law and because it is advanced in terms that, if accepted, would have the effect of imputing to the Contracting Authority a degree of evaluative failure that the factual and documentary record before this Board comprehensively and conclusively refutes. For the reasons set out below, the grievance is rejected.

The concept of manifest error of assessment has its origins in the general principles of European administrative law and has been given precise and authoritative content by the Court of Justice of the European Union and by the General Court in a long and consistent line of decisions.

The governing principle was articulated with particular clarity in Case C-269/90, *Technische Universität München v. Hauptzollamt München-Mitte*, in which the Court of Justice held that where a competent authority is called upon to make complex technical assessments, judicial review of those assessments is necessarily confined to verifying the absence of manifest error in the exercise of the authority's evaluative discretion, the absence of misuse of powers, and the absence of any breach of essential procedural requirements.

The Court's reasoning acknowledged that complex technical, scientific, or qualitative assessments require the exercise of specialist judgment of a kind that courts and review bodies are not institutionally equipped to replicate, and that the margin of appreciation necessarily afforded to the primary decision-maker in such cases can only be displaced where the error committed is so evident, so objective, and so indisputable that it cannot be attributed to the ordinary and legitimate exercise of that margin.

The threshold for establishing manifest error is accordingly a high one, deliberately calibrated to protect the integrity of specialist evaluative processes from excessive judicial interference whilst preserving the ability of review bodies to correct errors of a character that no reasonable exercise of professional judgment could have produced.

The General Court affirmed and elaborated upon this standard in Case T-195/08, *Antwerpse Bouwwerken NV v. European Commission*, reiterating that the function of a review body confronted with a challenge to a technical assessment is not to substitute its own evaluation for that of the contracting authority but to examine whether the contested assessment is vitiated by an error that is obvious, patent, and incapable of rational explanation by reference to the legitimate exercise of the authority's evaluative discretion.

The *Antwerpse Bouwwerken* formulation is instructive in its emphasis upon the objective character of the error that must be established. It is not sufficient that the Appellant regards the evaluation as wrong, or that an alternative assessment might have been reasonably available. What is required is that the error be one which the evidence compels, which admits of no rational alternative explanation, and which demonstrates that the evaluation process was conducted in a manner fundamentally inconsistent with the requirements of the applicable framework.

It is against this exacting standard that the Appellant's manifest error allegation must be assessed, and it is at this stage of the analysis that the allegation encounters an insuperable and decisive difficulty. The difficulty lies not in the application of the manifest error standard to a complex or contestable evaluative judgment but in the prior and logically anterior question of whether the challenged determination partook of the character of an evaluative judgment at all. It did not.

The determination made by the Evaluation Committee in the present case was not evaluative in nature, was not technical in character, and did not involve the exercise of any qualitative or interpretative margin of the kind that the manifest error doctrine is designed to protect. It involved one, and only one, factual enquiry, i.e. whether the required Gantt Chart was present within the electronic file bundle constituting the Appellant's technical offer as submitted through the ePPS procurement platform by the prescribed deadline.

This is a question that admits of precisely two answers, the document was present or it was not, and it is a question that is answered not by the exercise of professional judgment, specialist expertise, or technical acuity but by the straightforward examination of the official electronic submission record. It is, in the most literal sense, a binary and objective factual determination.

The Evaluation Committee examined the official ePPS submission record. It found that the Gantt Chart was not present in the Appellant's first submission. That finding is recorded in the evaluation documentation and is confirmed, beyond any possibility of dispute, by the subsequent chronology of events.

The Gantt Chart appeared for the first time in the second submission, filed in response to the Contracting Authority's clarification request. If the document had been present in the first submission, there would have

been no occasion for its resubmission in the second. The resubmission is, in this respect, its own most conclusive evidential refutation of the Appellant's case.

The electronic record of the ePPS platform is not a document susceptible of interpretative ambiguity or professional disagreement; it is an authoritative, time-stamped, and tamper-evident record of what was and was not submitted by the prescribed deadline. The Contracting Authority relied upon that record, and its reliance upon it was not merely appropriate but obligatory.

The official ePPS submission is the only legally recognised source of the content of a tender in a procedure conducted through the Government's electronic procurement platform, and no other source, whether the Appellant's own account of what it intended to submit, or the hearsay evidence of its retained consultant, or any extrinsic document generated outside the platform, can supplement, contradict, or displace it.

The Appellant's allegation of precipitous conduct is, in this light, not merely unsubstantiated but logically incoherent. Precipitousness connotes a failure to take sufficient time and care to ascertain the relevant facts before acting. It implies that a more thorough or deliberate examination of the available evidence would have yielded a different conclusion. But where the relevant fact is the presence or absence of a document in an electronic submission record, and where that record is examined and found to be unambiguous, additional time and additional scrutiny would not and could not have altered the result.

There is nothing to verify beyond the electronic record itself; there is no deeper layer of enquiry available to the Evaluation Committee; there is no alternative source of evidence that might have cast a different light upon the question. The Evaluation Committee's determination was, by its very nature, immune to the defect of precipitousness because the question it was asked to answer was one to which the evidence provided an immediate, definitive, and unalterable answer.

The requirement that a manifest error be, in the language of the authorities, evident, objective, and indisputable cuts in the present case not against the Contracting Authority's finding but overwhelmingly in its favour.

The finding that the Gantt Chart was absent from the first submission is itself evident; it flows directly and without inference from the electronic record. It is objective, it is not the product of any evaluative judgment susceptible of reasonable disagreement, and it is indisputable; it is confirmed by the documentary evidence and by the Appellant's own conduct in supplying the document for the first time in its second submission.

If the manifest error standard is to be applied consistently and in accordance with its established legal content, it produces in the present case not the conclusion that the Contracting Authority erred but the conclusion that its finding was the product of a straightforward, factually correct, and legally unimpeachable examination of the only evidence available to it.

It is further relevant to observe that the manifest error doctrine, as developed in the European judicial tradition, has always been understood to operate most forcefully in the domain of evaluative or qualitative assessments, i.e. assessments of the kind that involve the weighing of competing technical, scientific, or commercial considerations and in respect of which a margin of professional judgment is both legitimate and necessary.

The doctrine was conceived and developed to protect that margin from unwarranted judicial intrusion, not to impose an additional layer of evaluative obligation upon a contracting authority that has done nothing more than examine an electronic file and record the presence or absence of a specified document.

To extend the manifest error doctrine to such a determination would be to stretch it well beyond its juridical rationale and to convert it from a protection for complex evaluative processes into a general standard of review applicable to the most elementary of factual verifications. This Board declines to adopt such an extension, which would be both doctrinally unsound and practically unworkable.

The grievance alleging manifest error must therefore fail, and it fails decisively and on multiple independently sufficient grounds: (i) because the determination challenged was not evaluative in character and therefore does not engage the manifest error doctrine in its proper domain; (ii) because the finding of the Evaluation Committee was directly supported by the only authoritative and legally recognised evidence available to it; (iii) because the allegation of precipitous conduct is logically incompatible with the nature of the factual enquiry the Evaluation Committee was conducting; and (iv) because, the evidence before this Board not only fails to establish the existence of a manifest error but affirmatively and conclusively demonstrates the correctness of the Contracting Authority's finding.

The Contracting Authority acted with procedural regularity, factual accuracy, and legal propriety at every stage of the evaluation relevant to the present appeal, and this Board finds no basis whatsoever upon which to characterise its conduct as erroneous, still less as vitiated by an error of the manifest and indisputable character that would be required to engage the corrective jurisdiction of this Board.

IV. On the Alleged Misapplication of Note 3 and the Clarification Mechanism

The Appellant's principal legal contention is that the clarification process should have permitted consideration of the uploaded Gantt Chart, and that the Authority misapplied Note 3 in refusing to accept it.

Note 3 of the Technical Offer explicitly prohibits rectification of missing technical documentation. The clarification request issued by the Evaluation Committee was narrowly framed. It did not invite supplementation. It invited the Appellant to indicate where, within the original submission, the required

Gantt Chart could be located. The request expressly warned that new documentation would not be considered.

Instead of identifying an existing page within the five-page bundle, the Appellant uploaded a seven-page document containing additional content, including the missing Gantt Chart.

The jurisprudence draws a firm line between clarification and supplementation. In *Manova*, the CJEU held that contracting authorities may request clarification of documents already submitted but may not permit the submission of documents that were required but absent at the deadline. In *SAG ELV Slovensko*, the Court warned that clarification must not lead to what amounts to submission of a new tender. In *Archus* (C-131/16), the Court reaffirmed that equal treatment precludes allowing correction of substantive omissions.

The Maltese Court of Appeal has applied the same doctrine. In *Rockcut Limited v Malta Industrial Parks Ltd* and in *Fremond Limited v L-Aġenzija għas-Servizzi tal-Qorti*, the Court held that failure to submit a required Gantt Chart falling under a non-rectifiable clause rendered the tender non-compliant and incapable of post-deadline cure.

The Appellant submits that the uploaded document was identical in substance to what had been intended originally and therefore did not constitute a new tender. That argument misconceives the operative test. The legal question is not whether the content was substantively new, but whether it formed part of the original submission. It did not. The introduction of a missing mandatory document after the deadline alters the competitive position of the bidder and therefore infringes equal treatment.

In this context, therefore, a further and independently decisive objection to any acceptance of the Gantt Chart submitted in the second submission as a valid and authoritative component of the Appellant's technical offer resides in the fundamental principle of equal treatment, which constitutes one of the twin foundational pillars, alongside transparency, upon which the entire edifice of public procurement law is constructed.

The principle of equal treatment requires that all tenderers be placed on an equal footing at every stage of the procurement procedure, that identical rules be applied to all participants without discrimination or favour, and that no tenderer be afforded a procedural or substantive advantage that is unavailable to its competitors. It is a principle of constitutional character within the procurement legal order, affirmed without qualification by the Court of Justice of the European Union across a long and consistent line of authority, and it admits of no derogation on grounds of administrative convenience, commercial attractiveness, or the apparent meritoriousness of the offer in question.

To appreciate the full force of the equal treatment objection in the present case, it is necessary first to understand the nature and function of a Gantt Chart within the context of a public procurement procedure.

A Gantt Chart is a project management instrument of established and universal application, taking the form of a horizontal bar chart that maps the constituent tasks, activities, and phases of a project against a defined timeline, thereby providing a visual and quantified representation of the sequencing, duration, interdependencies, and resource allocation of all planned activities from commencement to completion.

In the context of a public tender, the submission of a Gantt Chart is not a mere formality or an administrative accompaniment to the substantive offer, but it is an integral and operative element of the technical offer itself. It constitutes the tenderer's binding and documented commitment to a specific programme of works or services, expressed in terms of measurable milestones, defined timeframes, and sequenced deliverables. It is the instrument by which the contracting authority is able to assess the technical feasibility, planning rigour, resource adequacy, and delivery credibility of the tenderer's proposed approach, and by reference to which the tenderer's performance can subsequently be monitored, measured, and enforced throughout the life of the contract.

The legal and contractual significance of the Gantt Chart submitted as part of a technical offer is correspondingly substantial. Once an economic operator submits a Gantt Chart as part of its tender, that document ceases to be a mere expression of intent or a preliminary planning exercise. It becomes a binding constituent element of the offer, incorporated by reference into the contract upon award, and enforceable against the successful tenderer as a contractual commitment.

The tenderer is bound by the programme it has represented, the milestones it has stipulated, and the timeframes to which it has subscribed. Should the tenderer deviate materially from the submitted programme without proper justification and contractual authorisation, it exposes itself to the legal consequences attendant upon non-performance or defective performance of its contractual obligations. The Gantt Chart is, in short, the tenderer's solemn and binding declaration of how it intends to perform the contract, and the contracting authority is entitled to rely upon it as such both in evaluating the offer and in administering the contract.

It is against this background that the equal treatment dimension of the present case must be assessed. The competing tenderer in this procedure submitted its Gantt Chart as part of its first and original submission. In doing so, it irrevocably committed itself to the programme of works, the sequencing of activities, the milestones, and the timeframes set out in that document.

From the moment of submission, that tenderer was bound by the contents of its Gantt Chart. The evaluation committee assessed its technical offer on the basis of, and by reference to, that committed programme. The tenderer accepted the attendant obligations and assumed the attendant risks. It could not,

following submission, alter, supplement, or resile from the programme to which it had committed without undermining the integrity of the evaluation and the enforceability of the contract.

The Appellant, by contrast, submitted no Gantt Chart in its first submission. The consequences of that omission are profound and irreversible from the standpoint of equal treatment. A tenderer that has not submitted a Gantt Chart has not committed itself to any programme of works. It has not defined its milestones. It has not stipulated its timeframes. It has not assumed any of the obligations that flow from the submission of such a document. It has, in the most literal and legally significant sense, kept its options open in a manner that its competitor, bound by its submitted programme, has not.

To permit the Appellant, at the post-submission stage and following a clarification request from the contracting authority, to introduce a Gantt Chart that was wholly absent from its original offer would be to confer upon it a benefit of an entirely different and more favourable character than that available to its competitor, i.e. the benefit of having assessed and refined its proposed programme in the light of the submissions of others, of having had additional time in which to develop and optimise its planning, and of having assumed the binding obligations attendant upon a Gantt Chart only after the deadline by which its competitors had already irrevocably committed themselves to their respective programmes. This is not a procedural technicality, but it is a substantive competitive advantage of a kind that strikes at the very heart of the equal treatment principle.

The principle of equal treatment does not merely prohibit overt discrimination. It equally prohibits the application of formally neutral rules in a manner that produces substantively unequal outcomes as between competing tenderers.

A procedure in which one tenderer is held to the programme it submitted on time whilst another is permitted to introduce its programme after the submission deadline, thereby circumventing the binding commitment that the timely submission of such a document entails, is a procedure that treats those tenderers unequally in a manner that is both patent and incapable of justification.

The evaluation committee had no lawful basis upon which to accept the late-introduced Gantt Chart as an authoritative component of the Appellant's technical offer without visiting upon the competing tenderer, and, indeed, upon all other participating tenderers, a prejudice that the principle of equal treatment categorically forbids. Had it done so, the integrity of the evaluation would have been irreparably compromised, and the award of the contract on the basis of such an evaluation would have been vulnerable to challenge on the most fundamental of grounds.

This Board therefore reiterates that the acceptance of the Gantt Chart introduced in the second submission as a valid and operative element of the Appellant's technical offer would have constituted a breach of the

principle of equal treatment of a gravity that admits of no curative remedy short of the invalidation of the evaluation itself.

The evaluation committee was not merely entitled to disregard that document; it was obliged to do so. The Appellant's failure to submit the required Gantt Chart in its first submission was not a technical irregularity capable of correction or reconciliation; it was a substantive deficiency that foreclosed the possibility of equal and lawful evaluation, and the consequences of that deficiency must rest, as a matter of both law and principle, with the Appellant alone.

The Contracting Authority's rebuttal, that acceptance would have placed the Appellant in a more favourable position than compliant bidders, is well-founded. Equal treatment is not abstract symmetry; it is practical parity. If one bidder is permitted to supplement what others had to include at the outset, parity collapses.

The Board therefore finds that the Authority correctly applied Note 3 and correctly characterised the seven-page upload as impermissible rectification.

V. On Article 32 and Article 15.1 of the Special Conditions

The Appellant contends that Article 32 and Article 15.1 demonstrate that the Programme of Works is a post-award obligation and therefore could not constitute a pre-award technical requirement.

The Board does not accept that construction. Article 15.1 regulates approval and revision of the Programme of Works during execution of the contract. It governs implementation management. It does not negate the existence of an indicative programme required at tender stage for evaluation purposes.

Public procurement doctrine recognises the distinction between an "*indicative methodology*" submitted for assessment and a "*detailed operational plan*" submitted for execution. The former allows the evaluation committee to assess feasibility, sequencing, and compliance with contractual timeframes. The latter governs implementation once contractual relations are established.

It is necessary to address with precision a distinct but related point of contractual construction that bears directly upon the evaluation of the Appellant's technical offer, namely, the proper juridical distinction between Clause 15.1 and Clause 32 of tender FMS/2025/026, and the legal consequences that flow from that distinction in the context of the present proceedings.

Clause 15.1 of tender FMS/2025/026 forms part of the Instructions to Tenderers and, as such, operates at the pre-contractual, or more precisely the pre-award, stage of the procurement procedure. Its function is prescriptive and procedural in character. It establishes the requirements governing the presentation, content, and composition of the technical offer that each economic operator is required to submit as part of its tender.

In the standard Malta works tender framework published by the Department of Contracts and applicable to tender FMS/2025/026, this clause falls squarely within the category of provisions that define what a compliant and complete tender must contain at the point of submission.

The required Gantt Chart, as a component of the Technical Offer, is therefore a document whose submission is governed and mandated by Clause 15.1. The requirement is not a post-award obligation, but it is an anterior, pre-submission obligation that crystallises at the moment the tender is filed and is a precondition of the Evaluation Committee's ability to assess the technical offer as a complete and evaluable submission. The obligation to submit the Gantt Chart under Clause 15.1 is, in this sense, an obligation that is entirely spent at the point of submission, i.e. either the document is present in the tender as submitted or it is not, and no subsequent act, whether by the tenderer, the contracting authority, or the Evaluation Committee, can retroactively cure its original absence as a matter of tender compliance under this provision.

Clause 32, by contrast, operates at an entirely different level of the contractual and temporal framework. This provision, forming part of the General Conditions of Contract applicable to works tenders under the standard Malta departmental procurement model, addresses the Period of Execution of Tasks, that is, the contractual timeframe within which the works are to be carried out following the issuance of the commencement order by the contracting authority upon the conclusion of the contract.

Article 32 is a post-award, post-signature, contractual provision that governs the contractor's obligations in respect of the execution and completion of the works once the contract is in force. It defines the duration within which performance is to be completed, fixes the start and end points of the execution period, and operates in conjunction with the performance programme that the successful contractor is required to have submitted as part of its technical offer.

In short, Clause 32 presupposes the existence of an operative contract and a submitted and accepted performance programme; it does not create, supplement, or substitute the obligation to submit that programme at the pre-award stage.

The distinction between the two clauses is therefore not merely formal or structural, but it is substantive and consequential in the highest degree. Clause 15.1 belongs to the domain of the law of public procurement and governs the conditions of participation in the competitive procedure: it defines what constitutes a compliant and complete tender. Clause 32 belongs to the domain of the law of contract and governs the obligations of the awarded contractor in the execution phase: it defines how and within what timeframe the works are to be performed. These are operationally and juridically distinct regimes, and the provisions appropriate to one cannot be transposed to supply a deficiency in the other.

The Appellant's position, whether express or implicit, appears to rest upon a conflation of these two distinct legal regimes. The suggestion that the absence of the Gantt Chart from the first submission is a matter of

lesser consequence because the performance programme is a matter ultimately governed by the contractual provisions, including Clause 32, fundamentally misunderstands the role and function of the Gantt Chart as a mandatory component of the technical offer under Clause 15.1.

The legal consequence of this analysis is inexorable. The obligation imposed by Clause 15.1 to include the Gantt Chart as part of the technical offer in the first submission is an absolute precondition of a compliant tender. It is not a condition that can be satisfied by reference to Clause 32 or to any other post-award provision, nor is it a condition whose non-satisfaction can be treated as a minor or rectifiable omission by reference to the post-contractual performance regime. A tender submitted without the required Gantt Chart is, by operation of the tender conditions themselves, a deficient tender, and the Evaluation Committee was entitled, indeed obliged, to treat the absence of that document as a material non-compliance with the requirements of Clause 15.1, independently of and without prejudice to any separate obligations arising under Clause 32 upon the eventual award of the contract to a compliant tenderer.

The two clauses govern different phases, serve different functions, and impose different obligations; and the attempt to invoke the post-award performance regime under Clause 32 as a curative or ameliorating instrument in respect of a pre-award submission deficiency under Clause 15.1 is a proposition that finds no support in the structure of the tender documents, in the logic of the procurement framework, or in the principle of transparency upon which that framework is founded.

Without visibility of sequencing and timing, an evaluation committee cannot discharge its duty to assess technical adequacy. The Appellant's interpretation would render the pre-award requirement devoid of practical effect, contrary to established principles of contractual interpretation which require provisions to be given effect utile.

The Contracting Authority and the Recommended Bidder both submit that the requirement was clearly placed under the Technical Offer and subject to Note 3. The Board agrees. The structure of the Tender Dossier leaves no ambiguity, as the Gantt Chart was a pre-award technical deliverable.

These grievances, therefore, fail.

VI. On Equal Treatment, Transparency and Self-Limitation

The Appellant asserts that the Contracting Authority acted in breach of Regulation 39(1) of the Public Procurement Regulations by applying the mandatory documentation requirement in a manner that was disproportionate and excessively rigid, and that a more measured and contextually sensitive approach to the evaluation of its submission would have yielded a different outcome.

This contention, whatever rhetorical force it may carry at the level of abstract equity, dissolves upon contact with the governing legal framework and with the principles that public procurement law has developed, through a long and consistent line of judicial authority, precisely to guard against the kind of post-hoc equitable reasoning that the Appellant now invites this Board to adopt. The argument is rejected in its entirety, and the reasons for that rejection are set out comprehensively below.

Regulation 39(1) of the Public Procurement Regulations gives domestic legislative expression to three foundational principles of European public procurement law: the principle of equal treatment, the principle of transparency, and the principle of proportionality. These three principles are not independent or competing mandates; they form an integrated and mutually reinforcing constitutional framework within which the conduct of every public procurement procedure must be assessed. They operate, however, in a manner that is frequently misunderstood by appellants who invoke proportionality as a freestanding instrument of relief from the consequences of their own non-compliance.

Proportionality, in the public procurement context, does not mean that mandatory requirements must be applied with leniency where the practical consequences of strict enforcement appear harsh; it means that the requirements themselves must be proportionate to the legitimate objectives of the procedure when they are formulated and published. Once requirements have been formulated, published, and accepted by all participants as conditions of their participation, the contracting authority is bound to apply them as formulated, and the principle of proportionality does not operate as a licence for selective or differential enforcement in favour of a tenderer who has failed to satisfy them.

This fundamental point was established with authoritative clarity by the Court of Justice of the European Union in Case C-496/99, *Commission v. CAS Succhi di Frutta SpA*, in which the Court held that contracting authorities are strictly and unconditionally bound by the criteria and conditions that they themselves have established in the procurement documents and that they have no power to depart from those criteria and conditions, whether by modification, relaxation, or non-enforcement, once the competitive procedure is under way.

The Court's reasoning was rooted in the principle of transparency, which requires that all tenderers be able to understand and rely upon the conditions of the competition on the basis of the published documentation and that those conditions remain stable and unaltered throughout the procedure.

A contracting authority that applies its own published requirements selectively, enforcing them rigorously against some tenderers whilst relaxing them in favour of others, or treating non-compliance as a curable deficiency in circumstances where the tender documentation has expressly designated it as incurable, commits an act of unilateral modification of the terms of the competition that is irreconcilable with the principle of transparency and with the legitimate expectations of all participants. The *Succhi di Frutta*

principle is not merely a rule of procedural good practice; it is a constitutional constraint upon the exercise of the contracting authority's evaluative discretion.

The principle was restated with equal force by the General Court of the European Union in Case T-415/10, *Nexans France v. Joint Undertaking Fusion for Energy*, where the Court reiterated that once the conditions governing a procurement procedure have been defined and published, they must be applied exactly as formulated and that no adjustment, however minor in appearance, is permissible in the course of the evaluation.

The significance of the *Nexans France* decision in the present context lies in its explicit rejection of the proposition that a contracting authority retains a residual discretion to treat non-compliance as immaterial where it considers the overall offer to be meritorious or where the document in question is regarded as of secondary importance. The Court was unequivocal: the question is not whether the contracting authority regards the missing or deficient element as important in the abstract, but whether it was required by the tender documentation; and if it was required, its absence is a non-compliance that must be treated as such, uniformly and without exception.

The application of these principles to the present case requires no elaborate construction. The tender dossier for procedure FMS/2025/026 expressly designated the Gantt Chart as a mandatory component of the technical offer, the submission of which was subject to Note 3 of the Instructions to Tenderers.

Note 3, as this Board has already observed and as the Contracting Authority correctly applied in the present case, identifies documents and requirements in respect of which no rectification is permitted: the document must either be present in the original submission or the offer is to be treated as non-compliant.

The designation of a requirement under Note 3 is not an act of administrative severity or arbitrary rigidity; it is a deliberate and considered exercise of the contracting authority's power of self-limitation. By designating the Gantt Chart as a Note 3 requirement, the contracting authority committed itself, in advance and on the public record, to applying the requirement without the possibility of post-submission rectification. That commitment was published to all tenderers on equal terms. Every tenderer that chose to participate in the procedure did so on the basis of full knowledge of that commitment.

The Contracting Authority, in applying Note 3 as formulated and in declining to accept the Gantt Chart submitted for the first time in the second submission as a valid component of the technical offer, was not exercising a discretion; it was fulfilling an obligation of self-compliance with its own published terms. To have done otherwise, i.e. to have disregarded Note 3 in the Appellant's favour and admitted the retroactively supplied document as curative, would itself have constituted an act of illegality, being a unilateral and unpublished departure from the conditions of the competition in breach of the *Succhi di Frutta* principle and of the transparency obligation enshrined in Regulation 39(1).

The proportionality [as will be comprehensively dealt with under the following heading] argument advanced by the Appellant also fails for a more fundamental reason: proportionality does not require the softening of a mandatory requirement where the economic operator's failure to satisfy that requirement is attributable to its own conduct rather than to any ambiguity, unreasonableness, or disproportionality in the requirement as formulated.

The Gantt Chart requirement was clear, unambiguous, and directly communicated in the tender documentation. It was not an obscure or peripheral requirement buried in supplementary conditions; it was an identified and designated component of the technical offer, the importance of which to the evaluation process this Board has already elaborated in detail.

An economic operator that elected to participate in a public procurement procedure without reading the tender documentation with the care and diligence that the law requires of it cannot invoke the principle of proportionality as a remedy for the consequences of its own want of diligence. The principle of proportionality protects tenderers from requirements that are unreasonable, excessive, or disproportionate to the legitimate objectives of the procedure; it does not protect them from the consequences of failing to comply with requirements that are reasonable, proportionate, and plainly stated.

The equal treatment dimension of this analysis is of equal and independent force. The principle of equal treatment, as the Court of Justice confirmed in Case C-27/15, *Pizzo v. CRGT Srl*, requires that all tenderers be subjected to the same rules and evaluated against the same standard, and that no tenderer be afforded the opportunity to remedy a substantive omission that is not made available to all other participants on equivalent terms.

In *Pizzo*, the Court drew a direct connection between the equal treatment principle and the prohibition on the retroactive relaxation of requirements in favour of individual tenderers, affirming that a procedure that allows one bidder to supplement a materially deficient submission in circumstances where other bidders have not been offered the same facility is a procedure that violates the equal treatment principle in its most elementary application. The violation in such cases is not contingent upon proof of actual prejudice to a specific competitor; it is structural and inherent, arising from the differential application of the rules of the competition to participants who were nominally subject to the same conditions.

The Recommended Bidder and the Contracting Authority are entirely correct in their submission that compliant tenderers who ensured the inclusion of all mandatory documents in their first submission, bearing whatever additional cost, time, and organisational burden that entailed, would have been placed at a direct and unjustifiable competitive disadvantage had the Appellant been permitted to supplement its deficient submission with the previously missing Gantt Chart.

This observation gives expression to a principle of procurement law that deserves explicit recognition and emphasis: the law of public procurement does not only protect the tenderer who actively objects to an irregularity; it equally and independently protects the tenderer that complies in silence with the published requirements of the procedure, relying upon the assurance, which the principles of equal treatment and transparency together provide, that its competitors will be held to the same standard.

The compliant tenderer's entitlement to the protection of the equal treatment principle does not depend upon that tenderer having lodged an appeal or raised a formal objection; it arises by operation of law from the moment of its compliant submission, and it persists throughout the procedure regardless of whether the compliant tenderer chooses to assert it.

The silent compliant bidder is protected by the same juridical legal order that protects the vocal objector, and the absence of a formal complaint from compliant competitors cannot be treated by a contracting authority, still less by a review body, as permission to depart from the conditions of equal treatment.

The Board accordingly finds, with full conviction and for the reasons comprehensively set out above, that there is no substance whatsoever in the Appellant's allegation of breach of Regulation 39(1), whether on the ground of disproportionality, rigidity, or any other basis.

The Contracting Authority did not apply the mandatory documentation requirements disproportionately; it applied them exactly as formulated, as it was obliged to do, and in doing so it gave effect rather than offence to the principles of equal treatment and transparency that Regulation 39(1) enshrines.

The enforcement of Note 3 in the present case was not an act of arbitrary administrative severity; it was an act of principled adherence to the terms of the competition, to the legitimate expectations of all participants, and to the foundational requirements of the public procurement legal order.

Far from constituting a breach of Regulation 39(1), the Contracting Authority's conduct in this respect was precisely what that provision demands. The Board finds no breach of equal treatment, no breach of transparency, and no breach of proportionality. On the contrary, the strict and uniform application of the published tender conditions in the present case was the fullest and most faithful expression of all three principles simultaneously, and this Board affirms that application without qualification or reservation.

VII. On Proportionality

The Appellant contends that exclusion for failure to submit a single document is excessive and disproportionate.

The principle of proportionality requires suitability, necessity, and balance. Rejection for failure to submit a mandatory technical document is suitable to protect procedural integrity. It is necessary because no lawful

alternative exists that preserves equality while allowing supplementation. It is balanced because the systemic interest in fairness outweighs the individual disadvantage of exclusion.

Procurement procedures operate within a formal legal framework precisely to prevent discretionary elasticity. If mandatory requirements could be waived whenever omission is characterised as minor, predictability would erode.

The foregoing conclusions are powerfully reinforced by the recent and directly apposite authority of the Court of Appeal in *Europharma Limited (C1822) v. (i) Central Procurement and Supplies Unit fi ħdan il-Ministeru għas-Saħħa u l-Anzjanità Attiva (ii) Dipartiment tal-Kuntratti (iii) Associated Equipment Limited (C9340) għal kull interess li jista' jkollha*, decided on 29th January, 2026.

In paragraph 36 of that judgment, the Court articulated an important principle of proportionality in the context of the evaluation of tender documentation, observing that it would not constitute a proper exercise of the principle of proportionality to exclude an advantageous offer on the sole ground that required information had been furnished in a part of the offer other than the specific part designated for its insertion, provided that the information in question was nonetheless present and discernible within the submission as a whole.

That observation, whilst expressed as an *obiter dictum* and therefore not strictly binding upon this Board as a matter of precedent, carries considerable persuasive authority as a considered judicial pronouncement of the Court of Appeal on a question of procurement law of direct relevance to the present proceedings, and this Board treats it as such.

It is, however, the closing sentence of paragraph 36 that is of decisive and determinative significance in the present case. Having articulated the proportionality principle applicable where required information is present elsewhere in the offer, the Court was at pains to draw an express and categorical distinction between that situation and an altogether different one: namely, the situation in which the information in question does not appear anywhere in the submitted offer.

The Court stated, in terms admitting of no equivocation, that the position would be entirely different were the information not to emerge from anywhere within the offer, and it explicitly noted that such a situation did not correspond to the facts before it. That carefully constructed distinction is not merely illustrative; it is the judicial recognition of a bright line that separates the case of misfiled or misplaced documentation, where proportionality may counsel against exclusion, from the case of documentation that is wholly and entirely absent from the submission, where no such consideration arises and where the evaluation committee has no documentary basis upon which to exercise any ameliorative discretion.

The facts of the present case fall squarely and unambiguously on the far side of that bright line. This is not a case in which the Gantt Chart was submitted in the wrong section, appended to the wrong part of the technical offer, or incorporated by reference into another document from which it could be identified and reconciled. The Gantt Chart was not present in the first submission in any form, in any section, or in any guise.

It was, in the language of the Court of Appeal, a document that did not "*tirriżulta minn imkien fl-offerta magħmula*", it resulted from nowhere within the submitted offer. The proportionality principle identified in *Europharma* as a basis for preserving an otherwise advantageous offer is therefore wholly inapplicable to the circumstances of this case, and the *Europharma* judgment, properly read, not only fails to assist the Appellant but affirmatively fortifies the conclusion that the Evaluation Committee was not in a position to treat the missing Gantt Chart as a curable or reconcilable deficiency. The absence was absolute, the documentary record is unequivocal, and the judicial authority is dispositive.

The Board therefore finds that the measure adopted was proportionate.

VIII. On the Lowest Price Argument

The Appellant places considerable weight upon its status as the lowest-priced bidder in the present procedure, advancing the proposition, whether expressly or by necessary implication, that the financial attractiveness of its offer ought to operate as a counterweight to, or even as a curative instrument in respect of, the technical deficiencies identified in the evaluation of its submission.

This contention, however plausible it may appear at first impression to those unfamiliar with the architecture of public procurement law, is upon proper analysis wholly without juridical foundation. It rests upon a fundamental misunderstanding of the structure of the award criteria applicable to the present procedure and of the constitutional principles that govern the conduct of competitive tendering in public law. This Board rejects it and for the reasons that follow.

The tender dossier governing procedure FMS/2025/026 is unambiguous in its terms. The award is to be made to the tenderer submitting the cheapest offer that satisfies, in full and without qualification, the applicable administrative and technical compliance criteria. This formulation is not a matter of drafting preference or contractual convenience, but, it reflects a structural principle of fundamental importance to the integrity of the procurement process.

The framework of public tendering is built upon a sequential and hierarchical architecture of evaluation in which compliance is a threshold condition that must be satisfied as a matter of logical and legal priority before any comparison of financial offers is capable of being undertaken. The financial offer of a tenderer is not evaluated in isolation from, or in substitution for, its administrative and technical compliance. It is

evaluated as a consequence of and contingent upon that compliance. A tenderer that has not satisfied the compliance threshold has not, in any legally cognisable sense, entered the arena in which financial comparison takes place. Its price, however attractive, is simply not in competition.

At the compliance stage, the Evaluation Committee discharges its obligation to verify that each submission satisfies the mandatory requirements of the tender dossier, requirements that have been established in advance, published to all participants on equal terms, and accepted by each tenderer as a condition of participation.

At the financial evaluation stage, the Evaluation Committee moves to compare, as between those offers that have crossed the compliance threshold, the financial terms on which each compliant tenderer proposes to perform the contract. These two stages are operationally and juridically distinct, and the result obtained at the financial evaluation stage cannot be retrospectively applied to redeem a failure at the compliance stage.

The price submitted by a non-compliant tenderer is, in law, a nullity for award; it is as if it had never been tendered, because the offer of which it forms part has not qualified for the evaluation at which price becomes the operative criterion.

This analysis is not merely the product of a technical reading of the tender conditions of the present procedure; it is grounded in and confirmed by the highest judicial authority of the Court of Justice of the European Union. In the seminal decision in *Storebaelt*, Case C-243/89, *Commission v. Kingdom of Denmark*, the Court held with unmistakable clarity that a contracting authority is under an absolute obligation to reject a tender that does not comply with the requirements of the contract documents, and that this obligation applies irrespective of the financial position of the non-compliant offer relative to those of its competitors.

The principle enunciated in *Storebaelt* is uncompromising in its scope: non-compliance is not a defect that admits of amelioration by reference to price, and financial advantage, however pronounced, cannot cure a technical deficiency. The Court's reasoning rests upon the foundational principle of equal treatment, which requires that all tenderers be subjected to the same rules and the same conditions and that no tenderer be permitted to derive an advantage from its own non-compliance with requirements that its competitors have satisfied. To permit a non-compliant tender to be considered for award on the ground of its financial attractiveness would be to visit upon every compliant tenderer, each of whom has borne the cost and burden of meeting the mandatory requirements of the tender dossier, a competitive disadvantage for which there is no legal justification and which strikes at the very foundation of equal treatment.

The logic of *Storebaelt* has an additional dimension that is directly pertinent to the present case. When a tenderer fails to submit a document that is mandated by the tender conditions, such as the Gantt Chart

required by Clause 15.1 of the present tender, it does not merely fail to satisfy a formal requirement; it fails to commit itself to a substantive element of its proposed performance.

As this Board has already observed in the preceding analysis, the Gantt Chart is not a bureaucratic accompaniment to the technical offer; it is the instrument by which the tenderer's proposed programme of works is defined, documented, and rendered binding. A tenderer that has not submitted a Gantt Chart has not defined its programme; a tenderer that has not defined its programme has not made a complete and enforceable offer to perform the works. Its financial offer, accordingly, does not represent the price of performing the works in accordance with a defined and committed programme of the kind that is the object of the contract; it represents, at most, the price of an undefined and uncommitted performance the parameters of which remain entirely open.

Such an offer is not comparable with the offers of compliant tenderers who have defined their programmes, committed to their milestones, and assumed the attendant obligations. To compare the price of an offer that lacks this fundamental definitional element with the prices of offers that contain it in full would be to compare the incomparable, to place on the same scale objects of materially different character and weight. This is not a comparison that the law of public procurement sanctions, and it is not one that this Board can endorse.

The Contracting Authority and the Recommended Bidder are accordingly correct in their submission that the comparison of financial offers is strictly and necessarily contingent upon prior compliance with the administrative and technical requirements of the tender dossier.

This is not a principle that admits of exception, qualification, or judicial modification in the light of the financial circumstances of a particular case. The Evaluation Committee does not possess and has never possessed a discretion to waive or overlook a mandatory technical requirement on the ground that the non-compliant tenderer has offered an attractive price. Such a discretion would be wholly incompatible with the principle of equal treatment, with the principle of transparency, and with the structural logic of the competitive tendering process.

Were it otherwise, the mandatory requirements of tender dossiers would be stripped of their compulsory character and reduced to mere recommendations that tenderers might elect to comply with or to disregard according to the financial advantage they calculated they might thereby secure. The integrity of the competitive process would be irreparably undermined, and the legitimate expectations of compliant tenderers, who have invested resources and assumed obligations in reliance upon the equal application of the tender conditions to all participants, would be defeated without redress.

The Appellant's invocation of its price, far from assisting its case, serves only to illustrate with greater clarity the nature and extent of the competitive advantage it would have obtained, at the expense of its compliant

competitors, had its non-compliant offer been admitted to the financial evaluation. The lower the price of a non-compliant tender, the more acute the distortion of the competitive process that would result from its admission; for the tenderer that has avoided the burden of compliance has, by hypothesis, obtained a cost advantage, at least in part, by reason of that very avoidance.

The principle of equal treatment does not merely permit the rejection of such a tender; it demands it.

IX. Conclusion

This Board has approached and has subjected each grievance advanced by the Appellant, each rebuttal offered by the Contracting Authority and the Recommended Bidder, and each applicable legal principle to exhaustive and independent scrutiny.

The Board has had full regard to the evidence adduced, to the documentary record generated in the course of procedure FMS/2025/026, to the oral testimony of the witnesses called, to the written and oral submissions of counsel for all parties, and to the body of domestic and European judicial authority that governs the questions of law arising in this appeal. It is on the basis of that comprehensive examination that the Board now sets out its final and definitive conclusions.

The Board finds, as a matter of established and uncontroverted fact, that the Programme of Works in the form of a Gantt Chart was a mandatory component of the Technical Offer required to be submitted by all participating tenderers under the terms of tender FMS/2025/026. This finding rests upon the express and unambiguous terms of the tender dossier itself and admits of no qualification. The requirement was not buried in supplementary or ancillary documentation; it was clearly and specifically identified as a required element of the technical submission, designated under Note 3 of the Instructions to Tenderers, which by its terms admits of no post-submission rectification.

The mandatory character of the requirement was accordingly apparent to any tenderer reading the documentation with the degree of care and diligence that the law requires and that participation in a public procurement procedure demands as a matter of basic professional obligation.

The Board further finds, on the irrefutable evidence of the documentary record, that the Gantt Chart was entirely absent from the Appellant's original submission. This is not a finding that admits of dispute, equivocation, or alternative characterisation.

The technical offer submitted by the Appellant in its first submission did not contain the required Gantt Chart in any form, in any section, in any annex, or in any document from which it could be identified, inferred, or reconciled by reference to other materials within the submission.

The document was, in the fullest and most unqualified sense, missing. It was not misplaced, misfiled, or incorporated in an incorrect part of the offer; it was not present at all.

This conclusion is confirmed not only by the negative evidence of its absence from the submission as filed but equally and affirmatively by the positive evidence of its appearance for the first time in the second submission, a sequence that is entirely inconsistent with any suggestion that the document had been included in the original offer and merely required identification or clarification.

The Board finds, as a direct and inevitable consequence of the foregoing, that the upload of the Gantt Chart in the second submission, following the clarification request issued by the Contracting Authority, constituted impermissible supplementation of the original technical offer and not, as the Appellant sought to characterise it, a permissible clarification or an arithmetically reconcilable correction.

The distinction between clarification of something already present and supplementation of something wholly absent is not a distinction of degree; it is a distinction of kind, and it is a distinction to which the entire structure of the procurement evaluation framework attaches fundamental legal consequences.

The clarification mechanism exists to enable tenderers to illuminate, explain, or contextualise elements of their submissions that are present but unclear; it does not exist to enable tenderers to introduce into the evaluation record documents that were not submitted within the deadline and that are required by the tender conditions to have been included in the original offer.

To have treated the Appellant's second submission as a valid supplement capable of curing the original deficiency would have been to convert the clarification mechanism from an instrument of procedural transparency into an instrument of post-deadline substantive amendment, a transformation that the law of public procurement, as authoritatively declared by the Court of Justice of the European Union in Cases C-336/12 (*Manova*), C-131/16 (*Archus and Gama*), and C-27/15 (*Pizzo*), categorically refuses to sanction.

The Board finds that the Contracting Authority, in declining to accept the retroactively supplied Gantt Chart as a valid component of the Appellant's technical offer and in applying Note 3 of the Instructions to Tenderers in accordance with its terms, acted in full conformity with Regulation 39(1) of the Public Procurement Regulations and with the body of established domestic and European jurisprudence governing the conduct of public procurement evaluations.

The Contracting Authority was not exercising a discretion when it enforced Note 3; it was discharging an obligation of self-compliance with its own published terms, an obligation that the principle of transparency, as given expression in Case C-496/99, *CAS Succhi di Frutta*, and as reiterated in Case T-415/10, *Nexans France*, imposed upon it without qualification.

The proposition that the Contracting Authority might lawfully have disregarded Note 3 in the Appellant's favour, or might have treated its designated mandatory requirement as susceptible to retrospective waiver in the light of the overall merits of the offer, is a proposition that finds no support in law and that this Board emphatically rejects.

To have acted otherwise would not have been an exercise of proportionate flexibility; it would have been an act of unilateral and unpublished departure from the conditions of the competition constituting, in its own right, a breach of Regulation 39(1) of a character more fundamental than any breach that could conceivably have been founded upon strict enforcement.

The Board finds that no manifest error occurred in the conduct of the evaluation. The Evaluation Committee assessed the Appellant's technical offer by reference to the requirements of the tender dossier, correctly identified the absence of the Gantt Chart as a material non-compliance with a mandatory requirement, and reached a conclusion that was not only within the range of reasonable evaluative responses open to it but was the only response consistent with the applicable legal framework.

The manifest error standard, as affirmed in this Board's jurisprudence in *Net Company v. Director of Contracts*, Case 367/2025/1, and *Bessui JV v. Director of Contracts*, Case 379/2025/1, requires that an error be obvious, determinate, and sufficiently serious that no reasonable evaluation committee directing itself properly could have arrived at the impugned conclusion.

The conclusion reached by the Evaluation Committee in the present case satisfies none of these criteria; it was, on the contrary, the product of a correct reading of the tender conditions, a sound assessment of the documentary record, and a lawful application of the prescribed evaluation framework to the facts as established.

The Board finds that the principle of proportionality was respected throughout the evaluation process and was not violated by the application of Note 3 to the Appellant's submission. As this Board has already set out in detail, proportionality in the procurement context operates as a standard governing the formulation of requirements at the time they are published and does not operate, once those requirements have been formulated, published, and accepted by participants, as a general warrant for their selective non-enforcement in favour of individual tenderers.

The requirements of tender FMS/2025/026 were proportionate to the legitimate objectives of the procedure. The Gantt Chart requirement serves the concrete and identified purpose of enabling the contracting authority to assess the technical feasibility, planning rigour, and delivery credibility of each tenderer's proposed approach to the execution of the works.

The Court of Appeal's obiter in the Europharma decision of the 29th January, 2026 is entirely consistent with this analysis. Proportionality may counsel against the rejection of an offer for the sole reason that information was presented in the wrong section of an otherwise complete submission, but, it does not and cannot counsel against the rejection of an offer in which the required information is entirely absent, a distinction that the Court of Appeal itself drew in express and unambiguous terms in the concluding sentence of paragraph 36 of that judgment. The Appellant's submission falls squarely within the latter category, and the proportionality principle therefore affords it no relief.

The Board finds that the principle of equal treatment was not only respected but actively vindicated by the Contracting Authority's enforcement of the mandatory documentation requirements in the present case.

Equal treatment requires, at its most fundamental level, that all tenderers participating in a public procurement procedure be subjected to the same rules, evaluated against the same standard, and held to the same conditions without differentiation, favour, or selective relaxation.

Every tenderer that submitted a compliant technical offer, inclusive of the required Gantt Chart, within the stipulated deadline, and in accordance with the terms of the tender dossier, did so in reliance upon the assurance, which the principles of equal treatment and transparency jointly provide, that its competitors would be held to the identical standard.

As the Court of Justice confirmed in *Pizzo*, the retroactive relaxation of a mandatory requirement in favour of one tenderer, in circumstances where that facility was not made available to all other participants, constitutes a breach of the equal treatment principle that is structural in character and that does not require proof of actual prejudice to any specific competitor in order to be established.

The Recommended Bidder's submission that compliant tenderers would have been placed at an unjustifiable competitive disadvantage had supplementation been permitted is, in the Board's judgment, entirely correct and reflects the application of a principle of universal scope. Procurement law protects the interests of the silent compliant bidder with equal force to those of the vocal objector, and the integrity of the competitive process is a public interest that this Board is obliged to uphold independently of the particular positions of the parties before it.

Having examined each grievance with care, assessed each rebuttal with rigour, and applied each applicable legal principle with fidelity to the authorities that give those principles their authoritative content, this Board concludes as follows.

The Programme of Works in the form of a Gantt Chart was a mandatory component of the Technical Offer under tender FMS/2025/026. It was not included in the Appellant's original submission. Its

subsequent upload in the second submission constituted impermissible post-deadline supplementation that was incapable, in law, of curing the original non-compliance.

The Contracting Authority acted in full conformity with Regulation 39(1) of the Public Procurement Regulations and with the established jurisprudence of this Board and of the Court of Justice of the European Union in applying Note 3 of the Instructions to Tenderers as formulated and in rejecting the Appellant's technical offer as non-compliant.

No manifest error occurred in the conduct of the evaluation. The principle of proportionality was respected both in the formulation of the mandatory requirement and in its application to the facts of the present case.

The principle of equal treatment was preserved, and its preservation was achieved precisely through the strict and uniform application of the conditions to which all participants had submitted themselves as a condition of their participation.

The rejection decision was lawful in its legal basis, procedurally sound in its conduct, proportionate in its application, and necessary, indeed, constitutionally obligatory, for the maintenance of the integrity of the procurement process and for the protection of the rights of all participants in that process, whether or not they have chosen to assert those rights before this Board.

The appeal is accordingly dismissed in its entirety, and the award decision in favour of the Recommended Bidder is confirmed.

The Board,

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

- a) To reject the appeal filed by Elouni Trading Ltd in its entirety;
- b) To confirm the decision of the Contracting Authority contained in the Letter of Rejection dated the 28th November, 2025;
- c) To confirm the decision of the Contracting Authority contained in the Letter of Acceptance dated the 28th November, 2025; and
- d) Orders that the administrative deposit paid by the Appellant be forfeited and not to be reimbursed in accordance with the applicable regulations.

Dr Vincent Micallef
Chairman

Mr Lawrence Ancilleri
Member

Dr Maria Cardona
Member