

## **PUBLIC CONTRACTS REVIEW BOARD**

### **Case 2132 – MSPP/02/2022 – Request for Proposals for a Works Concession for the Regeneration and Design, Management, Operation, Maintenance and Handback of the Evans Building (Valletta) Site as a Superior Quality Tourism Accommodation Establishment**

**12<sup>th</sup> March 2026**

The Board,

Having noted the letter of objection filed by Dr Ryan C. Pace acting for and on behalf of Katari Hospitality JV (hereinafter referred to as the appellant) filed on the 12<sup>th</sup> February 2024;

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

Having also noted the letter of reply filed by Dr Joseph Camilleri on behalf of Mamo TCV Advocates acting for and on behalf of Valletta Luxury Projects (hereinafter referred to as the Preferred Bidder) filed on the 22<sup>nd</sup> February 2024;

Having heard and evaluated the testimony of the witness Dr Claudette Fenech (Representative of the Malta Business Registry) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Matthew Vella (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Sharlo Camilleri (Member of the Evaluation Committee) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Alan Craig (Representative of Forvis Mazar Malta) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Ivan Faure (Representative of European School of English Limited) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Raphael Aloisio (Representative of Deloitte Malta) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Jason Grech (Representative of the Department of Contracts) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

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<sup>1</sup> Reference to the Procedural Note: Joint Management of Hearings Records (see Minutes section)

Having heard and evaluated the testimony of the witness Prof Saviour Formosa (Chairperson of the Evaluation Committee) as summoned by Dr Adrian Delia acting for European School of English Limited;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Matthew Xuereb (Representative of Deloitte Malta) as summoned by Dr Adrian Delia acting for European School of English Limited;  
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Having heard and evaluated the testimony of the witness Dr Gordon Cordina (Technical Expert of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for the Contracting Authority;<sup>1</sup>

Having heard and evaluated the testimony of the witness Prof Philip von Brockdorff (Technical Expert of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for the Contracting Authority;<sup>1</sup>

Having heard and evaluated the testimony of the witness Mr Godwin Mifsud (Member of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for the Contracting Authority;<sup>1</sup>

Having heard and evaluated the testimony of the witness Ms Marisa Marmara (Representative of the Contracting Authority) as summoned by Dr Clement Mifsud Bonnici acting for the Contracting Authority;<sup>1</sup>

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

Having noted and evaluated the minutes of the Case Management Board sittings of the 8<sup>th</sup> July 2025, 28<sup>th</sup> October 2025 and 16<sup>th</sup> January 2026 hereunder-reproduced.

Having noted and evaluated the minutes of the Board sittings of the 23<sup>rd</sup> January 2026, 27<sup>th</sup> January 2026, 28<sup>th</sup> January 2026 and 29<sup>th</sup> January 2026 hereunder-reproduced.

## **Minutes**

### Procedural Note: Joint Management of Hearing Records

*In accordance with the decision taken during the management meetings held in the context of cases 2131 and 2132, it was agreed between all parties to both proceedings that the minutes recorded in the course of case no 2131, including the record of all witness testimony heard therein, would be referred to, adopted, and applied in case number 2132 as if fully reproduced therein. For the sake of completeness, and in order that the present decision stands as a self contained and authoritative record of the proceedings upon which it is based, the said minutes, together with the full record of the witness evidence and used in case number 2131 are hereby reproduced in full and form an integral part of the record of the present proceedings accordingly.*

### **Case 2131. MSPP/02/2022 – Request for Proposals for a Works Concession for the Regeneration and Design, Management, Operation, Maintenance and Hand back of the Evans Building (Valletta) Site as a Superior Quality Tourism Accommodation Establishment.**

The tender was issued on the 27<sup>th</sup> of November 2022, and the closing date was the 28<sup>th</sup> of April 2023.

The estimated value of the tender, excluding VAT, was €300,025,420.

On 12<sup>th</sup> February 2024, European School of English Limited, lodged an appeal against the Malta Strategic Partnership Projects Ltd. – the Contracting Authority, in accordance with Regulation 106 of the Concession Contracts Regulations.

A deposit of €50,000. was paid.

There were twenty-one bids.

### **First Day – July 8<sup>th</sup>, 2025**

On the 8<sup>th</sup> of July 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Vince Micallef, and Dr Ing. Damien Gatt as members, convened a Case Management meeting.

The attendance for this public hearing was as follows:

#### **Appellant: European School of English Limited.**

- Dr Adrian Delia – Legal Representative
- Dr Damien Degiorgio – Legal Representative

#### **Appellant: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative

#### **Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative
- Mr. Andre Grech Debattista – Company Representative
- Mr. Simon DeCesare – Company Representative

#### **Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.

### **Case Management Meeting Summary**

The Chairman opened the meeting by stating that it was a Case Management meeting, specifically convened to determine the ideal dates for the commencement and conclusion of this appeal.

He explained that the matter involves two separate appeals: one containing a single grievance and the other comprising four grievances. Notably, the single grievance closely resembles one of the grievances in the second appeal.

The main objective of the meeting was to establish the procedure, timeline, and sequence of the hearings.

Following a cordial discussion among all parties, it was agreed that the two appeals will be handled through separate processes. However, the testimony of a witness in the first process may be used in the second. A final decision is yet to be made on whether cross-examination will take place once for both processes and separately for each.

As for the hearing dates, it was agreed that the appeal will be heard on the 28<sup>th</sup>, 29<sup>th</sup>, 30<sup>th</sup>, and 31<sup>st</sup> of October 2025, between 09:00 and 13:00.

- The first two days (28<sup>th</sup> and 29<sup>th</sup> October) will be dedicated to Case 2131, the objection filed by European School of English Limited.
- The third day (30<sup>th</sup> October) will be allocated to Case 2132, the objection filed by Katari Hospitality JV.
- The fourth day (31<sup>st</sup> October) is reserved primarily for any contingencies.

It was also agreed that the decisions for both cases will be issued on the same day.

### **Second Day – October 28<sup>th</sup>, 2025**

On October 28<sup>th</sup>, 2025, at 09:00 am, the PCRB reconvened, for an administrative sitting following the first hearing held on the 8<sup>th</sup> of July 2025.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallek – Member
- Mr Lawrence Ancilleri – Member

### **Attendance:**

#### **Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative. (online).
- Dr Damien Degiorgio – Legal Representative. (online).
- Dr Raoul Ciappara – Legal Representative. (online).

**Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative. (online).

**Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative. (online).

**Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative. (online).
- Dr Calvin Calleja – Legal Representative. (online).

**Case Management Meeting Summary**

The Chairman opened the meeting by stating that it was a Case Management meeting, specifically convened to determine the ideal dates for the commencement and conclusion of this appeal. This was due to the cancellation of the agreed previous dates due to Dr Damien Degiorgio counsel to European School of English Ltd. being indisposed.

Everything had to remain unchanged that is:

*The two appeals will be handled through separate processes. However, the testimony of a witness in the first process may be used in the second. It was also agreed that any cross examination held in the first appeal may also be valid and included as cross examination in the second appeal. However, legal representatives will have the right to ask further relevant questions in the second appeal as they deem fit.*

*It was also agreed that the decisions for both cases will be issued on the same day.*

It was agreed that the new dates of the appeal were to be heard on the 23<sup>rd</sup>, 27<sup>th</sup>, 28<sup>th</sup>, and 29<sup>th</sup> of January 2026, between 09:00 and 13:00.

- The first two days (23<sup>rd</sup> and 27<sup>th</sup> January) will be dedicated to Case 2131, the objection filed by European School of English Limited.
- The third day (28<sup>th</sup> January) will be allocated to Case 2132, the objection filed by Katari Hospitality JV.
- The fourth day (29<sup>th</sup> January) is reserved primarily for any contingencies.

Deadline for submissions of Documents Friday 16<sup>th</sup> January 2026.

**Adjournment.**

The Chairman thanked all parties for their participation and formally adjourned the appeal to January 23<sup>rd</sup>, 2026, at 9:00 am.

**Third Day January 16, 2026.****Minutes – 16th January 2026.**

## **Case Management Meeting Summary**

On January 16th, 2026, at 09:00 am, the PCRB reconvened, for a Case Management Meeting following the second hearing held on October 28<sup>th</sup>, 2025.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallek – Member
- Mr Lawrence Ancilleri – Member

### **Attendance:**

#### **Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative.
- Dr Damien Degiorgio – Legal Representative.

#### **Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative.
- Dr Kyle Decelis – Legal Representative.
- Dr Andrea Gera de Petri – Legal Representative.

#### **Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative.

#### **Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.

## **Case Management Meeting Summary**

The Chairman Commenced by thanking all parties for attending after a short notice. The Board was making an official Verbal, for the acts of the Case for both appeals 2131 and 2132.

Verbal By Mr. Kenneth Swain.

“Referenzi normattivi: Regolament 86 tal-tar-Regolamenti Dwar l-Akkwist Pubbliku (Ligi Sussidjarja 601.03)

Din is-seduta ta' case management meeting giet imsejja llum sabiex il-partijiet kollha jigu infurmati dwar cirkostanzi professjonali rilevanti li jirrigwardaw il-proceduri ta' dawn l-appelli, u sabiex jigu osservati b' mod car ir-retti principji ta' trasparenza, imparzjalita u amministrazzjoni tajba.

Sa llum, l-appell per se' ghadu ma bediex. L-appell kien originarjament skodat sabiex jinstema' fix-xahar ta' Ottubru 2025, u sussegwentement, wara talba formali minn wahda mill-partijiet, gie koncedut differiment. Ghalhekk, sehħ case management meeting iehor sabiex l-appell jibda fis-sessjoni ta' Jannar 2026.

Fil-frattemp, Kenneth Swain, jiena, fil-kapaċità professjonali tiegħi, ġejt maħtur bħala Non-Executive Director kif ukoll membru tal-Internal Audit Committee tal-kumpanija SD Finance plc, li hi sussidjarja ta DB Group of Companies. Kumpanija sussidjarja oħra ta DB Group u cioe Seabank Hotel and Catering Ltd, kienet ukoll economic operator li ppartecipat fil-koncessjoni li hija s-sugġett ta' dawn l-appelli.

Huwa enfasizzat illi, skont Regolament 86 tar-Regolamenti dwar l-Akkwist Pubbliku, il-membri tar-Review Board jistgħu legittimament jesercitaw il-professjoni privata tagħhom. Fil-kliem verbatim, ir-Regolament jistipula:

“Il-membri tal-Bord ta' Revizjoni ma jkunux prekluzi milleżerċizzju tal-professjoni rispettiva tagħhom, iżda, waqt il-perijodu tal-ħatra, ikunu prekluzi mill-eżerċizzju tal-professjoni tagħhom f'każijiet quddiem il-Bord ta' Revizjoni”

Huwa rreġistrat illi Kenneth Swain ġie maħtur bħala Non-Executive Director fl-1 ta' Jannar 2026, filwaqt li Dr Vincent Micallef ġie maħtur bħala Non-Executive Director fl-2017. Għal skopijiet ta' trasparenza, huwa ċar li la Kenneth Swain u lanqas Dr Vincent Micallef ma kellhom xi forma ta' nvolviment fil-proċess tal-koncessjoni li huwa s-sugġett ta' dan l-appell, fl-istadji kollha ta' dan il-proċess inkluz fl-evalwazzjoni tal-offerti jew fil-fażi ta' deċiżjoni, kemm fil-kapacita tagħhom professjonali kif ukoll dik personali. Konsegwentement, l-ebda wieħed minn dawn il-membri m'għandu xi forma ta' nteress ġuridiku preċedenti jew kontinwu fil-koncessjoni de quo kif deskritt hawn fuq.

Huwa ta' importanza fundamentali li jiġi enfasizzat illi SD Finance plc qatt ma kienet u qatt mhu maħsuba li tkun economic operator fi kwalunkwe proċess ta' tendering jew koncessjoni. Il-kumpanija ġiet stabbilita fl-2017 bħala special purpose vehicle għall-għan speċifiku għall-ħrug ta' bonds, u dan huwa dokumentat u aċċessibbli pubblikament kemm fil-Malta Business Registry (MBR) kif ukoll fuq is-Malta Stock Exchange (MSE).

Jigi ulterjorament iddikjarat li kemm Kenneth Swain kif ukoll Dr Vincent Micallef, m'għandhom ebda involviment dirett jew indirett fi kwalunkwe soċjeta oħra fi hdan id-DB Group of Companies.

In oltre u strettament minghajr ebda pregudizzju l-istess membri mhumiex involuti bl-ebda mod fi kwalunkwe attività operattiva, finanzjarja jew amministrattiva ta' dawn il-kumpaniji tal-grupp. SD Finance plc għandha biss funzjoni esklussivament korporattiva u finanzjarja, u hija l-branka korporattiva intiza għall-bond issues. Konsegwentement huwa ccarat illi l-istess soċjeta SD Finance plc ma għanda ebda nteress ġuridiku kemm attwali kif ukoll potenzjali fil-proċeduri ta' dawn l-appelli.

Qed jiġi nnutat illi, skont il-fatti disponibbli u l-provi rilevanti, s-soċjeta sussidjarja ta' dB Group u cioe Seabank Hotel and Catering Ltd, fil-kwalita tagħha ta' operatur ekonomiku f'din il-koncessjoni, ġiet senjatament eskluża mill-proċess tal-koncessjoni fis-stadju tal-evalwazzjoni, u per di piu' lanqas ma pprezentaw appell quddiem dan il-Bord u lanqas huma ma qieghdin jippartecipaw f'dawn l-proċeduri.

Konsegwentement, m'hemmx interess ġuridiku attwali, dirett jew indirett tad-DB Group jew mis-sussidjarji tiegħu fl-appelli pendenti.

Madanakollu, u nonostante s-suespost, l-Bord qed jitlob lill partijiet kollha sabiex jiddikjaraw jekk kull parti għandix xi oġġezzjoni sabiex dawn l-appelli jinstemaw u jiġu deċiżi bil-kompożizzjoni attwali tal-membri, jiġifieri b'Kenneth Swain bħala Chair u Dr Vincent Micallef bħala wieħed mill-membri attivi, jew jekk, ikunx meħtieġ, fl-interess ta' kull parti, li wieħed jew iż-żewġ membri flimkien jitneħħew mill-proċeduri odjerni.

F’kull każ, il-Bord qed jitlob illi r-rieda u l-pożizzjoni ta’ kull parti tiġi verbalizzata b’mod ċar, u tali dikjarazzjoni tiġi rreġistrata f’verbal li għandu jifforma parti integrali mill-atti uffiċjali ta’ dawn l-appelli, kif meħtieġ mill-prinċipji generali tal-Amministrazzjoni Pubblika u skont il-liġijiet u regolamenti vigenti”.

Dr Adrian Delia, on behalf of European School of English Limited, stated that he was making a legal submission, noting that the decision was not solely his to take. He explained that he needed to discuss the matter with his client regarding the client’s position and the issues he would insist upon, particularly those changes that might not materialise in the composition.

Dr Delia raised two fundamental legal points with which he disagreed. First, he stated that there was no legal interest as to whether the entity involved was Finance Bank or Sea Bank; however, since he did not have the full corporate structure, he was not making any distinction. He explained that once a party commences participation in a procedure, it acquires a legal interest in that procedure, including whether it is cancelled or otherwise. Such interest would remain dormant because, if a party participates, is subsequently excluded, and the entire procedure is later cancelled, that interest would be revived. At this stage, there had been no prejudice. Dr Delia requested time to explain the matter to his client before providing a concrete answer.

Dr Ryan Pace, on behalf of Katari Hospitality JV, stated that he likewise needed to consult his client in order to reflect on the issues raised, and that he was not in a position to take decisions at that moment. Dr Pace agreed with Dr Delia that the process should remain open to all parties.

There were several elements requiring discussion to analyse the position of the co-appellants in their appeal, as well as their status as interested parties in the other appeals. Dr Pace expressed his appreciation to the Board for convening the meeting, so that no issues would arise at the eleventh hour of the proceedings.

Mr Swain noted that his verbal submission had been made at the outset.

Dr Delia reiterated that, with respect to the second point, the principle of justice had to be upheld.

Mr Swain responded that this was precisely why he had requested a verbal confirmation from all parties.

Dr Delia insisted that his statements carried legal weight and were intended to properly express his client’s cause. He remarked that proceedings before the Public Contracts Review Board were scrutinised three times more closely than court proceedings.

Dr Damien Degiorgio, on behalf of European School of English Limited, sought clarification as to whether the scheduled dates would remain unchanged in the event of a recusal.

The Chairman replied that this would depend on the responses of the parties and noted that, from a logistical perspective, it would be far-fetched. Mr Swain indicated that he was prepared to remain present if the parties requested an hour’s adjournment; however, if they proposed Monday, that would be another matter.

Dr Delia requested time to make two telephone calls.

Mr Swain reminded the parties that everyone was aware of the dates relating to the issue of the tender and the evaluation and award processes. He noted that had Dr Degiorgio been present—

though he was excused for health reasons—the decision would have been delivered. He stated that he could not commit to the previously indicated date of 23 January 2026. He then invited comments from Dr Camilleri and Dr Mifsud Bonnici.

Dr Clement Mifsud Bonnici, on behalf of Malta Strategic Partnerships Projects Limited, welcomed the Board’s suggestion that all parties confirm any objections. He emphasised the importance of the project and stated that no objections should arise during the hearing. Legally, he did not perceive any conflict of interest but nevertheless agreed that all parties should proceed “tanto oper.”

He noted that one bidder had been disqualified and had lost all rights, having failed to appeal or participate in the present appeal, despite having submitted the second-cheapest bid. On this basis, any conflict of interest would be purely hypothetical and should not be debated. He stated that he could obtain instructions from his client within the hour and insisted that the timetable should not be stalled. He agreed with Dr Degiorgio regarding the deadline for the submission of documentation.

Dr Joseph Camilleri, on behalf of Valletta Luxury Projects, the recommended bidder, stated that his client had no objection and was amenable to providing a verbal confirmation. He agreed with Dr Mifsud Bonnici that there appeared to be no conflict of interest, while acknowledging the importance of avoiding any doubt. With regard to timing, he noted that considerable time had already elapsed and that all parties were being prejudiced.

Dr Pace anticipated that both the Contracting Authority and the recommended bidder would raise no objections. He added that, should an objection arise from him or the other appellants, the appeals should nonetheless be heard together.

The Chairman suspended the sitting for 20 minutes.

Following the recess, Dr Clement Mifsud Bonnici stated that he had received instructions not to object.

Dr Adrian Delia and Dr Damien Degiorgio, on behalf of the appellant European School of English Limited (ESE), referred to the case-management verbal delivered earlier that morning, specifically the request contained in the final paragraph requiring a verbal confirmation from each party to form an integral part of the acts. They declared that their client had no objection, agreed with the composition of the Board, and consented to the continuation of the proceedings.

Dr Ryan Pace, on behalf of Katari Hospitality JV, confirmed that his client had no objection.

Dr Clement Mifsud Bonnici, on behalf of the Contracting Authority, confirmed that there was no objection.

Dr Joseph Camilleri, on behalf of Valletta Luxury Projects, likewise confirmed that there was no objection.

Dr Camilleri reminded the Board that two witnesses were scheduled to testify during the following week, one of whom—Mr Simon DeCesare—could only attend on that specific day due to travel commitments.

Mr Swain stated that Mr DeCesare would be the first witness to testify and that his testimony would suffice for both appeals.

Dr Camilleri noted that Valletta Luxury Projects did not require Mr DeCesare as their witness, though he might be required by other parties.

Mr Swain informed Dr Delia that the appellants would commence with their appeal.

Dr Degiorgio stated that Mr Ivan Faure would testify on 23 January 2026, as he would thereafter be abroad.

Mr Swain remarked that, should Mr DeCesare be required as a witness for the appellant European School of English, he would be the first witness.

Dr Delia stated that his side had a witness who could explain what had occurred, given his direct involvement, and that it would have been logical to begin with that testimony. He added that he wished to select his witnesses according to the structure of his case. Nonetheless, he confirmed that he would listen to and cross-examine Mr DeCesare, if necessary, though he could not yet confirm whether his testimony would be required.

Dr Camilleri clarified that Mr Simon DeCesare was the principal individual involved in the process. While he would be present the following Friday as a representative, he could not attend other hearings.

Mr Swain asked whether another individual could be made available to respond to the appellants' questions.

Dr Delia replied that Mr DeCesare had not been identified by other parties as a witness, and that only a representative was required, provided that such representative assumed responsibility.

Dr Vincent Micallef asked whether Mr DeCesare could be reached online.

Dr Andre Gera de Petri explained that Mr DeCesare was participating in a charity event involving a climb of Mount Kilimanjaro.

Dr Delia stated that he would verify whether Mr DeCesare's testimony was required and would consider summoning additional witnesses on his side.

Dr Degiorgio confirmed that documents were to be submitted online.

Dr Delia asked whether new documents could be submitted following a witness's testimony, clarifying that he was referring to documents mentioned by a witness and previously unknown to him—for example, where a witness from MBR is asked to provide a list of companies.

Mr Swain confirmed this.

Adjournment.

The Chairman thanked all parties for their participation and formally adjourned the sitting to Friday, 23 January 2026, at 9:00 a.m.

**Fourth Day January 23, 2026.**

**Minutes – 23rd January 2026.**

On January 23rd, 2026, at 09:00 am, the PCRB reconvened, to commence the hearing following the third hearing held on January 16th, 2026.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallek – Member
- Mr Lawrence Ancilleri – Member

**Attendance:**

**Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative.
- Dr Damien Degiorgio – Legal Representative.
- Dr Christian J Farrugia – Legal Representative.
- Mr Sean Legault – Company Representative.

**Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative.
- Dr Kyle Decelis – Legal Representative.
- Dr Andrea Gera de Petri – Legal Representative.
- Mr Simon DeCesare – Company Representative.
- Mr David Vella – Company Representative.
- Mr Ian DeCesare – Company Representative.

**Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative.
- Mr Paul Attard – Company Representative.

**Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.
- Mr Karl Azzopardi – Company Representative.
- Ms Maria Zerafa – Company Representative.
- Mr Robert Falzon – Company Representative.
- Prof. Saviour Formosa – TEC Chairperson.
- Perm. Sec. Matthew Vella – TEC Member.
- Perm. Sec. Charlo Camilleri – TEC Member.
- Dr Matthew Joe Farrugia – TEC Secretary.
- Prof. Philip Von Brockdorff – TEC Consultant

**Opening Statements**

The Chairman welcomed the parties present and stated that the proceedings would begin as agreed in the Case Management Meeting. He identified the parties in attendance: the Appellant, European School of English Limited; Katari Hospitality JV in their capacity as interested party; the recommended

bidder, Valletta Luxury Projects; and the Contracting Authority, Malta Strategic Partnerships Projects Limited.

The Chairman provided a brief summary, explaining that the hearing would commence with the first appeal filed by European School of English Limited (ESE). He noted that it had been agreed that all witness testimony and evidence relevant to the potential second appeal by Katari Hospitality JV would also apply to that appeal when it is eventually addressed.

At this stage, the Chairman invited the appellants to make their initial submissions on behalf of their client. He reminded all parties to identify themselves for recording purposes during their first intervention.

#### **Initial Submissions.**

##### ***Initial Submissions by Dr. Adrian Delia (for the Appellant).***

Dr. Adrian Delia greeted the Board and stated that the appeal is divided into three parts. He explained that he would proceed through the grievances in sequence to facilitate the Board's understanding, as the appeal is detailed and written in a clear sequence. He began with page 3, addressing the disqualification of the Appellant itself.

Dr. Delia indicated that he would not go into full detail at this stage, as the details are written in the appeal, and he preferred that the Board hear the witnesses, particularly the professionals, to understand why the Appellant should never have been disqualified. He noted that what was requested in the tender document, which the Board would have the opportunity to read once, twice, or three times, is replaced in the third paragraph under the first grievance regarding the gearing ratio. He acknowledged that the Chairman, being technical, would understand immediately, and the Board members would understand as they proceed. However, he reserved the right to have the experts speak on this matter. He emphasized that this was the first reason why they should not have been disqualified.

Dr. Delia moved to the second issue concerning the offer of Valletta Luxury Projects. He stated that if the Board had read this section, they would find a situation that he believed was the last of its kind he had encountered, more than ten years ago. He recalled a previous bid before this Board, differently composed, from the time when cardboard boxes were used and things were done more manually but were more visible. He explained that unlike today, where things are on screen and can be moved or altered without clarity, in that previous case there was an allocated space where the price was to be placed. He made reference to this case as he was directly involved in that tender. He recalled that in the reserved space, which was column 4 where the price was to be placed, the price was not placed. Subsequently, there was literature mentioned about it. There was an appeal because the price was

not visible, and there were submissions that could be found elsewhere, but they proceeded and there was a disqualification.

Dr. Delia stated that here something similar occurred, though not identical, but he could not find something where, if you have a price, that price would not suffice, and suddenly, regarding the price, this price was changed or said to be changed because one must see the visibility from their side. However, certainly there was movement in the most sacred thing when you have this type of tender where forty percent of it is a number, and if you touch it, everything will collapse. He stated that this was the second reason why Valletta Luxury Projects should have been disqualified regarding the Financial Buffer.

Dr. Delia moved to the third part, which is related to the proposal and offer of the other tenderer, Katari Hospitality. He noted that originally, they were called Planning Project, then Katari, and now they have changed, but at that time they were called that. He expressed satisfaction that from the beginning it was understood that there would be a change, noting that it makes a difference in the name because here there was a change in the documents. He explained that there was a passage of time, a few days, not many, in which during the period when the tender was closing, on the closing date, if someone had gone to look at their books, their financial books, it would have resulted that they did not qualify. Remarkably, because they are in Malta, there were technical errors and therefore the tender was said to have been postponed, by a few days, once or twice. He stated that they will hear what happened in that short passage of time, and while providence wanted there to be a technical need for the tender to run smoothly, in the same period somewhere else, in another building somewhere else, now they will have witnesses, there was a substantive change in the documentation whereby where before this obligor would have been disqualified, suddenly it was said or came to be compliant, though they also have reservations about this.

Dr. Delia moved to the fourth part, stating respectfully that the scores given to the bidders are not sufficiently motivated and the methodology used does not provide the transparency required in the present process. He stated that he would not go into detail on this because he wished the Board to hear, but noted that this tribunal has stated several times in various judgments that not only must the selection criteria be accurate from the very beginning, but one must have the ability to know that if they are going to place their offer in these different sectors or fields, they would know in advance how the points will be given and how they were given, and they must reflect in a transparent manner that methodology so that they remove as much as possible the subjectiveness of a process which has to be as objective as possible in order to comply with the tenets of transparency required by law.

Dr. Delia concluded by stating that he would not say much more because he preferred to leave it for later, as there will be hearings and obviously witnesses. He stated that this was a summary so that the

Board would be in the context of what they will hear, where they will categorize it, where they will place it in their thoughts and in their notes.

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

Dr. Clement Mifsud Bonnici stated that when dealing with these appeals before the Board, it is perhaps easy to get lost in the details and focus on the grievances, of which there are four. However, he believed it was important not to forget the entire background, the bigger picture. The tender exists for a project that is important for the country. It exists to commercialize a site that he believes everyone is familiar with, a landmark, the Evans Building, and it is a project that the government is prospecting will have both a direct and indirect positive impact on the economy.

Dr. Mifsud Bonnici stated that what should not be tolerated, and what is being done here, said obviously with respect, is an exercise of throwing mud. He explained that they are seeing what can be thrown at the tender and at the evaluation process with the hope of bringing it down. He stated that hidden in the requests is the eighth one, which is what the Appellant truly wants, and that is the cancellation of the tender, because whichever way one looks at it, all the grievances are either inadmissible or have no utility, sometimes even contradictory, which they would arrive at later, but they have no chance of obtaining the contract. The only chance is that they start again from the beginning, and not a re-evaluation, but that it is cancelled and reissued.

Dr. Mifsud Bonnici asked why he was saying this. First of all, where are the Messrs. Arrigo, the Arrigo Group of Hotels? The tender, the offer that was submitted by the Appellant, was not submitted alone; it was submitted with another partner, a partner that the Board should know was compliant with the gearing ratio criterion. They are not here. On this point, both the Contracting Authority and Valletta Luxury Projects raised a fine point and said the appeal is inadmissible due to the integrity of judgment, because the Joint Venture does not have separate legal personality, and they should have included them all at once. However, eventually the Board will decide this together with all the points as they always do, and this is how it needs to be done in this case as well.

Dr. Mifsud Bonnici stated he would now begin to go through the grievances. The first grievance, with all due respect, he believed has now become a purely academic question. Whether they are right or not on the interpretation of the criterion would have no impact on the evaluation. Why is he saying this? As shown in the response, even if they had been compliant, even if they had obtained full marks on the technical scores, they still would not have come first, they would not have obtained the contract, and therefore there is no utility.

In any case, and on the merits of this grievance, the interpretation of the Appellant, and he always says this with respect, is a completely self-serving interpretation, perhaps reverse engineered to see how they could somehow pass the line of the tender requirements. The reality is that the consultants

engaged by the evaluation committee, who he believed are people of a certain caliber, and all the obligors except the Appellant, interpreted it as they are interpreting it. However, this is a point that eventually he believed they will debate at length about how they should interpret this criterion or not, but they maintain that interpretation.

Dr. Mifsud Bonnici moved to the second grievance. Here, he ventured to say, and this he was also addressing to the other appeal, it is somewhat of a narrative or interpretation, a somewhat absurd position that this Board is being invited to consider. They are telling the Board to listen: forget that there was an offer that was forty million higher than mine, almost double what I offered, because of a caveat, a caveat that one should refuse, look the other way, the government loses the opportunity to bring in forty million more over the course of the concession and instead we go for something that is cheaper. He could assure the Board, without going into detail, that the tender evaluation committee followed the tender, followed the law, and absolutely nothing was changed in the offer submitted by Valletta Luxury Projects, but they would go into this in more detail.

Dr. Mifsud Bonnici moved to address the third and fourth grievances, which he would treat together for the simple reason that whichever way one looks at it, they were brought too late. These are matters that should have been raised before submitting the bid and not now. The difference between pre-contractual remedy in the concession contracts regulation compared to the other is that one can raise it even a day before the tender expires. Thus, they could have done it, they did not do it, and therefore they accepted everything in the tender, both the extensions which were absolutely above board, as well as how the BPQR was drafted. Here, he necessarily had to address and say that it is a conspiracy theory of the most creative and even absurd kind that somehow the government was extending the tender to give some advantage to someone or other.

The record will show, because there are detailed emails and they explained in the response that the extensions were only made due to genuine issues because at that time the Web TPT2 was being introduced. Today, obviously, time has passed, they have learned it, and there are no such issues, but there were those issues at that time.

To conclude, Dr. Mifsud Bonnici made an appeal to this Board. Obviously, when one submits appeals, sometimes he himself is sitting at that table, one must treat it seriously, give everyone fair hearing. However, what he would suggest is that from this appeal it will emerge how well this process was done. He stated that sometimes he worries, and he hopes not in this case here, that this country is losing the ability to successfully deliver a complex project of this scope from inception to signature to execution. The government, he submitted, did its part, did the evaluation according to the tender and according to the law, treated everyone equally. Now they need to be careful not to allow someone to

come and throw mud so that through them the tender is cancelled and they get a second bite of the cherry. That was all.

The Chairman thanked Dr. Mifsud Bonnici and stated that they would move to the recommended bidder for initial submissions.

***Initial Submissions by Dr. Joseph Camilleri (for the Recommended Bidder).***

Dr. Joseph Camilleri greeted the Board and stated that many of the points raised by Valletta Luxury Projects as the recommended bidder in their response had already been addressed in some way or another by the able colleague representing the Contracting Authority. Therefore, he did not need to be lengthy, but he would make some points to show the direction that Valletta Luxury Projects will take in these proceedings. He believed there are a few general principles or general observations that should guide this Board in the way it considers the appeal before it.

First of all, he would be reiterating a point raised by the Contracting Authority. There is somewhat of an element, or perhaps not somewhat but rather a significant element in the appeal before this Board of "I didn't succeed, so I will cancel the party for everyone else." Why is this being said? This is being said because the grievances that were raised, the four grievances, if one excludes the first one which is about whether the consortium should have been admitted or not under the selection criteria, are all attacks not so much on the way the offer of the consortium was assessed—not a consortium, he reminded, but the appealing party as a member of a consortium—but rather an attack on the rest, where there is an attack on the offer of the recommended bidder which he would enter into shortly, there is an attack on what happened with Katari, but then there is, and this is perhaps the one he cannot understand the most, the criticism of the fact that the decision of the Contracting Authority is allegedly not supported by clear explanations, clear scoring, etc.

Dr. Camilleri stated that they should not forget that with regard to the consortium of which the appellant company is a member, no scoring was made. That is, what is being said by the appellant that the scoring was not clear, was not transparent, was not clear, this is certainly not speaking about their own offer but as he said, they are trying to cancel the party and attack the process itself with the aim of leading to the cancellation of everything. The problem, as was pointed out by the Contracting Authority, is that these points, which are clearly not referring to the evaluation itself but refer to the scoring as indicated how it would be done in the RFP, these are matters that if truly and genuinely the consortium of which ESE is a member had pre-occupations about this, then they should have raised a remedy before the evaluation continued.

When one sees, and certainly this Board has seen as much if not more than him such situations, when one sees that you have an operator who first participated and accepted the rules of the game but then because he lost does not criticize the match or the referee but the rules of the game themselves, then

there you realize and it is a clear example and indication that he wants to cancel because he did not succeed. He believed that this Board should be very careful of such an approach.

Dr. Camilleri moved to the second point regarding the question of the offer of Valletta Luxury Projects, the recommended bidder. Here again, let us not get lost behind a lot of procedural discourse, let us not get lost behind many academic arguments and lose what is the crux of the matter and the truth of the facts. Here you have an offeror who offered seventy-eight million, seventy-eight million. As the Contracting Authority said, forty million more than the offeror who offered in second place. This nonsense that there was some change in the offer is just a way to try to confuse minds and remove the truth, remove attention from the basic point that here you have an offer of seventy-eight million. They could debate procedural matters and certainly these will arise and they will address them all and will put everyone's mind at rest that the procedure was followed correctly. But again, if one looks at the offer made by the recommended obligor, there should be absolutely no doubt that from the very beginning, from the first day, the offer was always the highest one of seventy-eight million. Now, if they want to take an offer that is valid, an offer that will be of benefit to the country with this amount that he is mentioning and grab it and throw it away because of a procedural doubt being raised by the Appellant, then they will see about that. But he believed and they will show that certainly this should not be the case.

Dr. Camilleri moved to the third and final point and closed on this, also another general observation. They need to also be careful of this attitude of two weights, two measures. He heard nothing in the opening statement of the Appellant that tries to address the procedural point that his friend from the Contracting Authority mentioned about the irregularity or not of the appeal that was lodged. He believed it is a point that even if they debate it later, should have been addressed first to put their minds at rest that procedurally one member of a consortium can and has the interest to lodge this appeal.

However, obviously the Appellant is more interested in throwing mud at the other competitors than addressing the procedural problems that the Appellant itself has. He believed that the Board should also keep these points in mind. It is easy to throw mud at someone else, but first of all address the questions of legal interest that you yourself have, both because of the issue that they just mentioned and also there is the other obstacle that if you yourself did not qualify under the selection criteria, how then do you come and pretend to attack the other obligors who passed to the next round. He would stop here for now, Mr. Chairman.

The Chairman thanked Dr. Camilleri and stated that to close the initial submissions, he asked whether the interested party had any comments to make.

***Initial Submissions by Dr. Ryan Pace (for the Interested Party).***

Dr. Ryan Pace greeted the Chairman and Board members. He stated that obviously he would not repeat what his colleagues had said, and that he agreed with some and at times disagreed with others. However, what he wished to address, first of all, he agreed very much with what the colleague representing the recommended bidder said, that the preliminary point raised both by the Contracting Authority and also referenced by the recommended bidder, although it is a purely legal point, is a point that must be given priority even in the way this appeal is conducted. That is, this Board will surely understand him, one cannot dive into the merits when they also have a question that is still not clear how admissible the appeal is in itself, the same appeal in which other questions are being raised that are related to the merits. That is the first point that he wished to make.

On the grievances raised in this appeal, where the first grievance is concerned, regarding the gearing ratio, obviously that is a matter more between the Appellant and the Contracting Authority. As an interested party, they had no visibility, and the only visibility naturally is that which they could take from the response that was presented particularly by the Contracting Authority. However, obviously he believed the interpretation that was adopted by the Contracting Authority and by his clients as well, and it results that it is the interpretation that was adopted by the complement of offerors except for one offeror which is the Appellant, it seems to him in his understanding that it is the correct interpretation. However, naturally where the detail is concerned, that is something they had no visibility on, so there is a limit to how much he could comment about it.

On the question of the second grievance, he would not say it is an identical grievance but a very similar one regarding the price. He did not agree and could never agree with the colleague representing the Contracting Authority and also the colleague representing the recommended bidder that this is some academic or theoretical exercise. That is, what the Appellant is insisting on in their second grievance in this appeal, and what he is insisting on from beginning to end in his appeal, is not so much an academic or theoretical exercise but is the implementation of the terms and conditions that were stipulated in the tender.

Dr. Pace stated that he was sincerely quite startled by the stretching in the interpretation that the Contracting Authority gave to arrive at the conclusion it reached when it recommended the recommended bidder, because the offer, good or bad, and that which they as other offerors had visibility of, is a totally different offer from that which the Contracting Authority concluded about it vis-à-vis the recommended bidder. To say that this is an academic exercise, he totally disagreed. The wording of the tender is clear, the price is notorious, and it cannot be changed certainly, although they are stating the obvious because the price is the lock of every offer in the public procurement process. Therefore, he could never agree, also because his appeal is based totally on that grievance with the position that the Contracting Authority is taking vis-à-vis the second grievance.

On the third grievance, Dr. Pace stated that he understood why the Appellant brought the third grievance because it is only by conjecture of that type that one can somehow throw doubt on a valid, legitimate, and contrary to the Appellant, conforming offer with the tender vis-à-vis his client. To say that regarding the extensions, and he referred here also to the response that the Contracting Authority made where it gave in its response a complete link of all the facts where regarding the extensions, they were not even requested by his client, much more so was it in his client's interest that the tender be brought forward, is conjecture, there is no other word for it.

This is absolute nonsense. With all due respect, he stated that the words that were used and the absurd but serious allegations that were thrown even in that third grievance, he believed, are censurable by this Board. Obviously, he looked forward to having these witnesses so that it would emerge how much it has absolutely nothing to it, what the Appellant is alleging regarding how the Contracting Authority conducted the procedure vis-à-vis his client, who was treated in the same way that the other offerors were treated. He looked forward to that witness testimony coming up so they would hear precisely the opposite of what is being alleged by the Appellant in this appeal.

On the question of the fourth grievance, in his opinion it is grievance that is also purely legal. He believed, as the representative of the Contracting Authority also said, there are appropriate remedies, those appropriate remedies for a reason that the Appellant knows, were not used, they did not avail themselves of them. Therefore, they cannot come now—this Board teaches us. The Court teaches us—that if you are not going to avail yourself of remedies that the law gives you to attack some part or other of the procedure, then it follows from there that you accepted in its totality the running of the procedure.

Dr. Pace stated that they cannot come here just because they did not succeed in achieving their objective, in being the recommended bidders, to try to cancel the party like children in a sweet shop when they said no, who stamp their feet and do everything to ruin the whole day. He had nothing more to say at this point in time. Naturally, he would wait to see the witnesses and then one regulates themselves from there.

#### **Procedural Matters and Board Directions.**

The Chairman provided direction on the preliminary plea regarding consortium members. The Board would follow the Court of Appeal's teaching according to the Support Services case. All evidence would be heard before a final decision is rendered after witnesses testify and the process concludes, scheduled until the following Thursday, with a decision six weeks thereafter.

Dr. Delia thanked the Chairman and noted that their response to this preliminary issue would be addressed at the end during final submissions, including reference notes demonstrating how integrity

of judgment can occur when one party's interest encompasses that of its partner. The Chairman confirmed this approach and stated they could proceed with witnesses.

Dr. Mifsud Bonnici raised two procedural points. First, the Contracting Authority was merged with Malta Government Investments Limited (C10175) on 9th January 2026. He emphasized recording the company registration number C10175 for future reference, particularly in case of name changes, though this merger does not affect the current appeal. The Chairman acknowledged this would clarify the Contracting Authority's identity.

Dr. Mifsud Bonnici addressed witness availability. Many government personnel were involved in the tender, making full availability difficult. They had communicated schedules to all parties. From the Tender Evaluation Committee, Mr. Matthew Vella would be present only today, not Tuesday or Wednesday. Professor Philip von Brockdorff, consultant to the TEC, would also be available only today. Professor Saviour Formosa, Mr. Sharlo Camilleri, and Mr. Godwin Mifsud would be present through Wednesday. Ms. Marisa Marmara, former CEO of MSPP, would arrive later and be available Tuesday and Wednesday.

Dr. Delia confirmed that if they needed Mr. Matthew Vella's testimony, it must be taken today. He also noted that Dr. Claudette Fenech from the Malta Business Registry was present and suggested calling her first to avoid unnecessary waiting. The Chairman agreed and called Dr. Claudette Fenech.

**Witness:**

***Dr. Claudette Fenech (ID: 53572M) summoned by Dr. Delia.***

Dr. Claudette Fenech stated she was present in place of Dr. Ruth Grima, who was indisposed, and appeared as Registrar of Companies within the Malta Business Registry. She took the oath to tell the truth, the whole truth, and nothing but the truth.

Dr. Delia stated she had been requested to bring copies of the financial accounts filed by Plan Property Holdings Limited, previously known as Katari Hospitality (C number 70860), for the years 2019, 2020, and 2021, and to indicate the dates when these financial documents were entered into the register.

Dr. Fenech confirmed she had brought the accounts for 31st December 2019, 31st December 2020, and 31st December 2021. Based on what was accessible on their public website, there were two submissions of the same set of accounts. This was not a run-of-the-mill case. When the second copy of the same set of accounts was sent, it was accompanied by the signature of director Paul Attard, who signed an explanation for why he was sending a second set of accounts for the same year.

The Chairman asked her to specify whether this occurred for all three years—2019, 2020, and 2021— or for a particular year. Dr. Fenech confirmed it occurred for all three years.

Dr. Delia asked her to proceed chronologically, clarifying whether all three years were initially filed together and then refiled together, or whether the three years were filed at different times initially but then refiled all at once.

Dr. Fenech explained they were not filed all at once. The accounts for 31st December 2019 were first filed on 14th January 2021 and refiled on 18th April 2023. The accounts for 2020 were first filed on 28th September 2021 and refiled on 18th April 2023, the same day as the 2019 accounts. The accounts for 2021 were first filed on 15th February 2022 and refiled on 28th October 2022.

Dr. Delia asked whether they could have been filed again at another time. Dr. Fenech explained that while it was possible they could have been sent for correction, the registry always retains the same dates, so she doubted they had been filed additional times.

Dr. Delia asked Dr. Fenech to note whether, for the particular year 2021, the accounts had been filed again subsequently after the October 2022 filing.

Dr. Delia referred to the explanatory note signed by the director, which she had described as not run-of-the-mill. He asked what the note said. Dr. Fenech stated she would present a physical copy and asked whether it needed to be read in full. When requested, she read: *"To whom it may concern, Katari Holdings Limited owns a plot of land in Naxxar approximately 4,748 square meters. By 2019, Katari Holdings Limited had developed the land into an old people's home consisting of 235 beds spread over 117 rooms, together with a number of miscellaneous facilities over three levels above ground. The building also comprises two basement levels. In 2019, the property was completed and operational and was valued at €18 million, including furniture and fittings. The property valuation was carried out on 30th September 2019 but was only recognized in the financial statements of 2020. In this respect, given the circumstances, it would be proper if the said valuation is also reflected in the 2019 financials. Accordingly, please find enclosed with the letter a new set of financial statements for the year 2019 to replace the financial statements for 2019 already submitted as per document D17."*

Dr. Delia asked which set of accounts this document was annexed to. Dr. Fenech stated it was annexed to the second set of accounts for both years.

Dr. Delia presented Dr. Fenech with a document downloaded from the MBR website showing filing information, including filing year, registration date, and documents submitted. He directed her attention to the third line highlighted in green for the year 2021, which was filed for the third time on 17th April 2023.

Dr. Fenech confirmed she recognized the document as one downloadable from their site. She explained it was a screenshot of documents registered and submitted for registration with the MBR. It showed the document number assigned before registration, the registration date when the

document was entered and scanned and became available to third parties, the type of document (whether accounts or annual returns), and the filing year when it was sent.

Dr. Delia asked about document number 21. Dr. Fenech confirmed document number 21 was accounts for the year ending 2021, registered on 17th April 2023. Comparing this with her earlier testimony, she confirmed this would be the third filing of that set: first on 15 February 2022, second on 28 October 2022, and third on 17th April 2023.

***Cross-Examination - Positions of the Parties.***

The Chairman asked whether there would be cross-examination. Dr. Delia requested that the witness either exhibit those accounts immediately or provide them by email if the other parties required time to prepare cross-examination.

Dr. Mifsud Bonnici, for the Contracting Authority, stated their position was that all this was irrelevant to the evaluation and would be addressed in later submissions. They reserved their position in good faith pending review of any exhibited documents to determine if anything material emerged.

Dr. Camilleri, for the recommended bidder, adopted the same position, reserving his right but not anticipating questions.

Dr. Pace, for the interested party, stated he would reserve his position in good faith but wished to review what would be submitted.

The Chairman confirmed there was no objection to submission by email and directed Dr. Fenech to circulate the documents to the Board by Monday at 11:00 am. He requested all parties to advise by 2:00 pm Monday whether they needed the witness to return for cross-examination on Tuesday or Wednesday. Dr. Fenech noted she had three copies of the accounts if needed. The Chairman confirmed she should remain available for Tuesday's second hearing if required.

***Disclosure by Dr. Pace.***

Dr. Pace informed the Board that he had previously occupied the position of Director of Malta Government Investments but had resigned from that position with effect from 25th September 2025, prior to the merger referenced at the beginning of these proceedings.

The Chairman noted that no objection was raised by any party and therefore the proceedings would continue as planned.

The Chairman invited Dr. Delia to proceed.

**Witness:**

**Mr Matthew Vella (ID.no.239489M). summoned by Dr Delia.**

Dr. Delia greeted Mr. Vella and asked him to describe who he is, what he does, and where he works.

Mr. Vella greeted Dr. Delia and the Board, stating that he currently occupies the position of Permanent

Secretary in the Ministry of Education, Sport, Youth, Research and Innovation. When asked how long he has held this position, Mr. Vella stated he has been in this Ministry for the last four years.

Dr. Delia asked him to explain about the tender they were discussing regarding the Evans Building and how he became involved. Mr. Vella explained that he was approached by the CEO of MSPP, Marisa Marmara, who told him he had been identified to be one of the members of the evaluation board. The appointment arrived on 13th January 2023.

Dr. Delia asked about the first meeting, the brief, and who the board members were. Mr. Vella stated the Chair was Professor Saviour Formosa, the other two members were Sharlo Camilleri and Godwin Mifsud, and the Secretary was Dr. Matthew Farrugia. When asked about voting rights, Mr. Vella explained that voting rights were held by the three members he mentioned, along with the other two members. The Chairman did not have the right to vote, nor did the Secretary.

Dr. Delia asked him to explain how the work began, whether there was a meeting, whether someone explained things to them, whether they were given documents, and whether they discussed responsibilities. Mr. Vella explained that as is standard practice when you have an evaluation board, you meet the first time. In fact, when counting everything, twenty meetings were held. At the beginning, you have access to the ePPS and start by filling in the declaration forms, then you start to vet the necessary documents as everyone knows. You vet the documents by progressing from one stage to another, and when there is need or according to Note 2 or 3, you make clarification or rectification accordingly. When Dr. Delia asked how many companies or entities submitted, Mr. Vella stated seven.

Dr. Delia asked whether there was a preliminary process, whether this tender was price only or most advantageous tender, and what type of tender it was. Mr. Vella stated it was a tender where ultimately the process of the financial bid form was used so that the offer was considered, with obviously the stages before from the administrative aspect. When Dr. Delia stated he did not understand, Mr. Vella explained that you start with the administrative aspect, the selection criteria, then move to the evaluation of the technical.

Dr. Delia asked him to clarify whether this was a price-only tender or another type, noting that surely, he knew what types of tenders exist. Mr. Vella confirmed he did. When pressed to specify what type of tender this was, Mr. Vella stated it was a tender where, after whoever is eligible, the recommended bidder is worked out based on the final price and the aspect of the bid that the bidder submitted. Dr. Delia stated they were not agreeing and asked whether he was answering yes or no regarding whether it was not price-only. Mr. Vella asked if he meant not BPQR, to understand correctly.

The Chairman intervened, asking what the criteria for award was for this concession. Mr. Vella stated the BPQR system. When Dr. Delia asked what this meant, Mr. Vella stated that there is the process,

but apologized because he was not feeling well. The Chairman told him to calm down. Mr. Vella asked if he could go wet his face, explaining that he had arrived late from abroad the previous night and was not feeling well. The Chairman stated they would suspend for a few minutes. Since Mr Vella was unwell, Mr Sharlo Camilleri was called as the next witness.

***Mr. Sharlo Camilleri (ID: 0146076M) summoned by Dr. Delia.***

The Chairman noted that members of the evaluation board according to his list were Mr. Sharlo Camilleri and Mr. Godwin Mifsud, as Mr. Vella was indisposed.

Dr. Delia greeted Mr. Camilleri and asked him to explain what he does, where he works, and what position he occupies. Mr. Camilleri stated that he is currently Permanent Secretary in the Ministry for Agriculture, Fisheries and Animal Rights, a position he has held since 20th January 2020. As Permanent Secretary, he is responsible for the public administration of his Ministry. When asked about his previous employment, Mr. Camilleri stated that between 2011 and 2020, he occupied various positions as director or director general in the civil service, always in the same Ministry and always in the area of agriculture. He confirmed he was not in the Ministry of Tourism and never worked in tourism, except when designing agro-tourism strategies within his Ministry.

Dr. Delia asked how he became involved in this process regarding the Evans Building tender. Mr. Camilleri explained that like every other tender process, he was nominated to the technical evaluation committee. He was asked if he had a problem with this and he accepted, then received the official nomination from MSPP.

#### *Tender Structure and Evaluation Process*

Dr. Delia asked him to explain, since they already knew who the board members were and that they met numerous times, how this tender was divided and what type of tender it was. Mr. Camilleri explained it was BPQR, best price quality ratio, which takes into consideration both the financial offer and the quality of the tender submission and proposal as given by the different offerors. There was a specific section with indicators for the project, and marks were allocated for everything so they could evaluate the project's quality. The Contracting Authority made a list of things that in their opinion indicated the quality of the project.

Dr. Delia asked him to proceed step by step, noting he had divided it into the financial part and the technical part, and whether there was a distribution of percentages between them. Mr. Camilleri stated yes, though he did not remember exactly, believing it was 40% but having doubts. The Chairman gave direction that he had no problem with documents being passed to witnesses to help them respond, provided no suggestions were given. Mr. Camilleri was given a copy of the tender document, reference number MSPP/02/2022, and found Section 6, Criteria for Award, on page 18. He read: *"The work concession will be awarded to the tenderer submitting the offer with the best price quality ratio,*

*BPQR, in accordance with the below: The BPQR is established by weighing technical quality against price on a 60 to 40 basis. This is done by multiplying the technical score awarded to the offer of 0.6 and the financial score awarded to offer 0.4.*" Mr. Camilleri confirmed that was 60% on quality and 40% on financial. He clarified that when he mentioned they did not enter into the weighting, he referred to the fact that the ratio between the quality bid score and the percentage from the offer was worked out automatically by the system.

Dr. Delia asked how many tenderers or entities submitted offers. Mr. Camilleri checked and confirmed there were 8 offers from 7 different companies, with one company, Sea bank Hotel and Catering Limited, making two offers. When asked if there was a preliminary process whereby some did not remain in the race, Mr. Camilleri explained the evaluation process is divided into three stages: the administrative part, then technical, then financial. Bidders could fall out during any of these stages. The Chairman clarified that as long as they remained in the process, they evaluated all the bids that came before them. Mr. Camilleri confirmed that when the result came out, they no longer had 8 but 2 offers remaining. Ultimately, 2 offers were ranked: first was Valletta Luxury Project and second was Katari Hospitality. Those two reached the end of the process. Mr. Camilleri confirmed that if bidders fell in the administrative stage, the technical would not be seen, and if they fell in the technical stage, the price would not be seen or considered.

#### *ESE Limited's Disqualification*

Dr. Delia asked about the tender of European School of English, ESE Limited, and at which stage it fell. Mr. Camilleri stated it fell in the first phase, the administrative stage, and the technical part regarding their capacity was never weighed. When asked for the reason, Mr. Camilleri stated it fell because it did not meet or exceeded the gearing ratio. Dr. Delia asked where in the tender this gearing ratio requirement was stipulated. Mr. Camilleri referred to page 8, Economic and Financial Standing, Point 4: *"A gearing ratio of not more than 3, this is to apply as an average of a consecutive 3 year period between years 2018-2021, both years included and in the case of tenderers submitting the proposal as a joint venture/consortium/association/group of economic operators, this ratio is to be satisfied by each economic operator member of the same."*

Dr. Delia asked how the evaluation was done and specifically by whom, asking if Mr. Camilleri had professional technical experience in finance. Mr. Camilleri stated no. When asked which of his fellow voting members guided them on this particular point, Mr. Camilleri stated his colleague Godwin Mifsud. Dr. Delia asked him to explain what he understood this clause to mean and who made him understand that ESE's bid administratively did not meet the requirements. Mr. Camilleri stated the judgment was his as well, after they informed and explained to him. Mr. Mifsud explained to them what it is, what it means, and why it is there to indicate the financial standing of the company and to

enable comparison with other companies if chosen by the Contracting Authority. This ratio indicates the financial standing of the company year by year. The gearing ratio is calculated as debt over equity, and the ratio between them is determined. It is worked according to how it was requested in the tender to calculate the gearing ratio for each year and take the average of 3 years.

Dr. Delia interrupted to establish that this was not a comparative requirement but rather a threshold—either you have it or you don't. Mr. Camilleri confirmed that was correct. If you exceed it, you become non-compliant. If you are under 3, being 1 does not give you an advantage over someone who is 2 or 2.5 or 3. Mr. Camilleri added that although Mr. Mifsud was part of the technical evaluation committee and explained to them, the committee did not rely on him alone but took two technical opinions.

#### *Expert Consultations and Clarifications*

Dr. Delia asked at which stage they obtained these opinions besides Mr. Mifsud. Mr. Camilleri stated they obtained them while they were working on the evaluation, after a request for clarification was received. When asked what request for clarification, Mr. Camilleri explained that the committee asked and gave the chance under Note 2 for the figure to be rectified, but the offeror wrote back that they were calculating it in a different way and in their opinion, that was the correct way it should be calculated. At that point they requested the opinion again to be certain.

Dr. Delia asked if there was a clarification requested before the tender closed on this issue. Mr. Camilleri confirmed yes and referred to a document from Malta Strategic Partnerships Projects dated 27th January 2023. The question was: *"There is a reference in the request for proposal document page 8. A gearing ratio of not more than 3, how is this being calculated exactly given that usually it is presented as a percentage?"* The response was: *"The gearing ratio is calculated as follows: Total debt divided by total equity. The result can be expressed either as a ratio example 3 or as a percentage 300%."* When asked if there were other clarifications made by other interested parties before the tender closed related to the same gearing ratio, Mr. Camilleri checked the document containing all pre-closure clarifications and confirmed there were no other clarifications referring to gearing ratio.

Dr. Delia asked from whom they requested consultation. Mr. Camilleri stated from E-Cubed Consultancy and from Professor Philip von Brockdorff. When Dr. Delia asked about E-Cubed being a company of Gordon Cordina and whether there was any relevance regarding conflict of interest, Mr. Camilleri confirmed E-Cubed Consultancy but stated he did not know what other positions Gordon Cordina held apart from the company and chose not to respond to the conflict-of-interest question. The Chairman directed them to continue with good order.

Dr. Delia asked when they engaged these experts, who chose them, and whether they verified if these experts had any conflict of interest. Mr. Camilleri explained that the technical evaluation committee asked the Contracting Authority to provide them with the experts. They had no say in whom they

chose as expert. The Contracting Authority chose both experts. When asked why they requested experts, Mr. Camilleri stated they asked for experts during the evaluation process to help guide them and ensure they were correct in what they were doing. They requested the expertise again after the technical evaluation committee made the request for rectification to the bidder on the gearing ratio, to take advice, and in fact they took a second opinion to be certain.

Dr. Delia asked which came first. Mr. Camilleri stated E-Cubed came first. E-Cubed Consultancy were engaged to help them during the evaluation process from the very beginning, not just for the Iconic Nobu bid but they helped in the whole process. When the response from Iconic Nobu entered explaining the methodology they used, they again consulted with E-Cubed because they were the consultants on the tender. After E-Cubed Consultancy gave them the response and explained how they calculated it, which obviously was not in agreement with what the bidders were saying, they sought a second opinion to be more certain of what they were doing, and if he was not mistaken, they did this also on legal advice to obtain a second opinion.

Dr. Delia asked if on the financial part they relied on consultation given by E-Cubed company. Mr. Camilleri confirmed that on the assessment of financial standing, they obviously had Godwin who guided them, but then they had the technical help of E-Cubed Consultancy. Dr. Delia asked him to identify the documents and confirm they were the ones he was referring to when saying they helped. Mr. Camilleri confirmed Exhibit CA-4.1 was the first one chronologically, dated 8th August 2023. Exhibit CA-4.2 was dated 27th December 2023. The first was during the evaluation, the second was after the request for rectification and after the response entered from Iconic Nobu. After that came the opinion of Professor von Brockdorff which was on 9th January 2024.

Dr. Delia asked whether they contacted Professor von Brockdorff directly or the Contracting Authority contacted him. Mr. Camilleri stated it was through the Contracting Authority. Professor von Brockdorff was given terms of reference on how to prepare the opinion and provided them with a written opinion. When asked what they requested and what they gave to von Brockdorff, Mr. Camilleri stated he was informed it was for a second opinion and he knew it was a second opinion. Dr. Delia asked if they gave him the first opinion. Mr. Camilleri stated he was not certain, but he had the terms of reference given to Professor von Brockdorff. He read from the letter sent by the Chairman of the EAC Professor Formosa: *"After the bidders sent responses related to the standard five working day limit associated with the rectification request, the bidder finally submitted a response to the request addressing EAC's concerns. The attached document is the signed bidder response. Guidance on this matter submitted by E-Cubed consultants is also attached. The RFP document, which contains the above caption provision is further attached. The EAC is therefore requesting your guidance and expertise as a means to garner a second opinion on the matter in relation to the specific technical*

*issues at play in his response.*" Dr. Delia asked him to confirm the report, showing him Exhibit CA5 dated 9 January 2024, which Mr. Camilleri confirmed was that report. When asked whether they had any sessions with these people, with Professor von Brockdorff or with Mr. Gordon Cordina, to explain matters to them, Mr. Camilleri stated he did not remember.

#### *Scoring Methodology and Documentation*

Dr. Delia moved to the scoring methodology and asked what documents they had before them when reviewing the technical, substantive, qualitative part. Mr. Camilleri explained there was a lot of documentation submitted by different bidders. There were very thick documents with plans, designs, information on how they would save water, how they would handle electrical systems, what they would use, and how they would manage operations. When asked if there was a document showing this volume of documentation, Mr. Camilleri stated from what he remembered there was a main document they looked at, but each company attached different documents, not all the same. When asked about Katari and how many documents they submitted, Mr. Camilleri stated he would need to request the documentation as he did not remember exactly.

Dr. Delia stated this was related to their fourth grievance regarding the scoring, and attempted to ask about the volume of submissions. The Chairman explained that scanning can produce different megabyte sizes for the same page depending on format. Dr. Delia pressed that he needed information to establish as fact that one had a document in one way and another had it differently. Dr. Mifsud Bonnici made a formal objection that this question was completely irrelevant to the appeal. Dr. Delia stated it was completely relevant to grievance number 4 because he needed to build context about how points were awarded. The Chairman stated that the Board had spoken many times on BPQR and that volume per se does not necessarily dictate quality. He did not see that the number of megabytes was relevant even to establish volume in paper format. Dr. Delia accepted this and moved to discuss the question of Valletta Luxury Project regarding the price.

#### *Financial Bid Process*

Dr. Delia asked how the financial bids were done. Mr. Camilleri stated they were submitted in the system. There was the financial bid form where bidders fill in the details of the offer, and then there was the xml format where they enter the amount. Dr. Delia asked to see these as they were important to explain this grievance, and Mr. Camilleri confirmed the financial offer and showed the xml format. Dr. Delia asked to establish the xml format showing the bid of Valletta Luxury Project and how it was done, which Mr. Camilleri confirmed. When asked about the xml format—who submits it, at which stage, and until what time—Mr. Camilleri explained it is submitted by the bidder on the system when they submit the bid, at the moment they submit it. When asked if it can be removed afterwards, Mr.

Camilleri stated no. When they enter the price and press the button, that price gets locked in the system and becomes visible to the public.

Dr. Delia asked what showed on the xml for the appellant. Mr. Camilleri stated for the opening report, for Iconic, it was 39,333,385. For Plan Property Holdings (Katari) it was 40,707,030. For Valletta Luxury Projects it was 1.2 million. Dr. Delia asked if the tenderer who submitted that price is paired with a specific number, an ID number, so that price has a name and also has a specific ID. Mr. Camilleri confirmed yes, the offer ID was 000191554. That price, that number, is unique to that bidder only. Nobody else can use it. Nobody can access the system to change any information pertinent to that number. That is the offer ID.

Mr. Camilleri clarified that for Katari there were other offer IDs with different figures, for example with 1 Euro, but as was explained to him, those are used to upload documents and initiate technical processes. The Chairman clarified that the offer of 40 million was mentioned because that was the bid, the offer that they ultimately evaluated when they reached the financial offer stage.

Dr. Delia requested to suspend this witness as he had another witness with time constraints. The Chairman accepted this, noting it was not ideal but acceptable.

***Mr. Alan Craig (ID: 290070M) summoned by Dr. Delia.***

*Background and Engagement*

Dr. Delia asked Mr. Craig to explain who he is, what he does, who he works with, and what his function is. Mr. Craig stated he is Alan Craig, a certified public accountant qualified and graduated for more than 30 years. He has been working for approximately 20 years as a partner in the company Forvis Mazars, where he is responsible for the business advisory section. Forvis Mazars is an international firm, and they are the local variant. It is a firm of auditors, tax advisors, and business advisors in Malta, present for more than 25 years and employing more than 100 people.

Dr. Delia asked if there was a time when he was contacted by companies regarding this tender for the Evans Building, and if yes, when and for what purpose. He made reference to two documents submitted, one called ESE002 and the other ESE001. Mr. Craig confirmed they were approached by European School of English Limited on 26th February 2024. They were requested to analyze the financial statements filed by the company that at that time was called Katari Holding Limited, which today is called Plan Property Holding Limited. They analysed the financial statements from 2018 to 2021, including the filing and the manner in which these financial statements were filed, and the reasons arising from those financial statements as to why they were resubmitted and restated in this period.

Dr. Delia asked about the dates of the reports he prepared. Mr. Craig stated the date of the first report he made was 27th March 2024, which is ESE001. Three people worked on this report: he took

responsibility for it and engaged the head who is also a partner of Forvis Mazars of the audit department who leads the audit department, whose name is Tino Riolo, and was also assisted by Rebecca Barther, a forensic accountant who works in the forensic and investigation department of Forvis Mazars. Regarding the other report, ESE002, the same people were involved. This was a lighter report, a letter. They were requested by ESE Holdings to comment on the method of how the current ratio and the gearing ratio are calculated, especially in the context of the definition of how these ratios are worked out that was in the RFP.

#### *Analysis of Ratio Requirements - Report ESE002*

Dr. Delia started with report 002 as it was shorter. In the first page of the second report, the RFP laid down minimum requirements, and Mr. Craig reported in the last paragraph of that first page: "A current ratio of not less than 0.75" and "A gearing ratio of not more than 3." When asked where he obtained these clauses, Mr. Craig stated these were the clauses in the RFP and confirmed they were the requirements of the tender.

Dr. Delia asked him to explain what they mean so the Board could understand what these ratios are. Mr. Craig explained that the current ratio is a standard basic accounting ratio that gives an indication of the liquidity or the strength of liquidity that a company has. It is a ratio where you take the current assets of a company and divide them by the current liabilities. The tender document specified that this current ratio when worked out over a 3-year period should not be less than 0.75.

The gearing ratio is also a basic accounting ratio that is used and quoted to indicate and give an indication of the health and stability of a company. The gearing ratio takes the total amount of debt, normally interest-bearing debt that the company has, and expresses it divided by the total equity shareholder's funds of that company. The tender document requested that over a period of 3 years, the average of these gearing ratios should not be more than 3. The ratio between total debt and shareholder's equity should not be more than 3 over an average period of 3 years. The tender document also gave a reference range between 2018 and 2021, which are 4 years, and tenderers could choose which reference range they needed or wanted to use for their purposes.

Dr. Delia referred to the second page of the report where it stated: "*In the absence of any detailed guidance or methodology from the MSPP on the prescribed method on how to calculate the average over the three-year period and in the absence of a universally prescribed standard, in our opinion, tenderers may have applied two main methods.*" Mr. Craig confirmed this. When referring to MSPP, he was referring to the Contracting Authority. When saying "*in the absence of a universally prescribed standard,*" he explained there is no definition of average gearing ratio and how an average gearing ratio is worked out. If one looks at the books that exist, there is no prescribed universal method of how to calculate the average gearing ratio. Even the gearing ratio has different interpretations of how

it is worked out, though the Contracting Authority had issued a clarification on exactly what the components should be when working out this gearing ratio.

Dr. Delia asked him to explain the two methods he described. Mr. Craig explained they called them Method 1 and Method 2 because there is no method in their opinion that is absolute. Method 1, which speaks about average gearing ratio of a 3-year period, they defined as a method that takes the 3-year period, takes the total debt of the 3-year period, takes the total shareholder funds equity of the 3-year period, and comes out with a ratio. That would be the average gearing ratio over a 3-year period. Method 2, which could also fall within that definition, works it out differently by calculating the gearing ratio of each year for each period—2018, 2019, whatever years have been selected—working out that gearing ratio for each year, and then making an average of the gearing ratios.

Dr. Delia asked if he would be incorrect to describe Method 2 as an average of averages. Mr. Craig stated no, it is not an average of averages but an average of gearing ratios. In their opinion, they felt there could be Method 1 and Method 2 because the tender document did not specify how it should be worked out. If the tender document or whoever wrote it was referring to a specific method, for example Method 2, it would have been written differently. Under Method 2, if they wanted to specify exactly Method 2, they would speak of an average gearing ratio or a gearing ratio calculated as an average of the three gearing ratios for those years. Therefore, in their opinion, both Method 1 and Method 2 are definitions of calculating gearing under the methodology prescribed in the tender document. When asked for confirmation which method European School of English Limited used, Mr. Craig stated he could not say because he was not involved in that. When asked if he could say whether these two methods are both compliant with what the document requested, Mr. Craig stated that in his opinion, according to how it was requested by the tender document, both Method 1 and Method 2 fall within those definitions.

#### *Analysis of Financial Statement Filings - Report ESE001*

Dr. Delia moved to the second report, marked ESE001, called Review of the Financial Statements of Plan Property Holdings Limited. He asked if Mr. Craig investigated the chronology of when these accounts entered the MBR. Mr. Craig confirmed yes, it was part of their assignment to see when these audit accounts entered the MBR. He directed attention to page 28, which showed a timeline. The upper part of the timeline related to the RFP and the tender, and the lower part showed the filings they saw from the MBR site, which were publicly available, of Katari Holdings, which today is called Plan Property Holdings Limited.

The timeline showed that on 31st October 2020, the accounts, the audited financial statements of 2019, were approved. It also indicated that on this same date, the amended or resubmitted financial statements that were submitted later in 2023 also had this date of approval. Dr. Delia asked if he

understood correctly that the date of approval of accounts was the same in what was submitted in 2021 and what was submitted subsequently in 2023. Mr. Craig confirmed yes, even the auditor's report had the same date. On 14th January 2021, these were submitted to the MBR.

Mr. Craig continued that on 18th August 2021, the audited financial statements of 2020, which were issued a total of 3 times, on this date the original, the first amendment, and the second amendment were all approved by the Director, and the auditor's report indicated this date, although the first amendment and second amendment were submitted at a later date. The first amendment was submitted on 15th February 2022, and the second amendment was submitted on 20th March 2023. However, they all had the same approval date of 18th August 2021.

On 28th September 2021, the original first set of audited financial statements of 2020 were filed. On 28th January 2022, a correction letter dated that day, signed by the Director of Plan Property Holdings Limited, was written revising and resubmitting those audited financial statements, the first amendment, and these were uploaded by the MBR on 15th February 2022. On 14th September 2022, the audited financial statements of 2021 were approved, and the auditor signed the audit report. According to the MBR, the 2021 accounts were submitted to the MBR on 28th October 2022 but were not published. The final submission, when they were published and updated, was at a later point, on 27th February 2023. From their interpretation, it appeared the accounts sent to the MBR on 28th October 2022 might not have been the same accounts published on 27th February 2023.

Meanwhile, after the initial submission to the MBR of the 2021 accounts, the RFP was published on 27th November 2022. On 1st February 2023, there was the first notice for extension period, and the initial deadline was 3rd March 2023. The first extension extended that date to 19th April 2023. On 27th February 2023, the MBR published the audited financial statements of Katari Holding Limited for the year 2021. On 20th March 2023, an amended correction letter to the financial statements of both 2019 and 2020 was dated, and those accounts were published to the MBR on 18th April 2023, both of them. So a new set or resubmitted set of financial statements of 2019 were published by the MBR on 18th April 2023 as well as 2020, with 2020 being revised for the third time. Meanwhile, on 17th April 2023, the notification came out on the second extension, which extended to 21st April 2023. On the 18th, as mentioned before, those 2019 and 2020 audit financial statements were resubmitted. There were further extensions in the deadline, and finally the final deadline was on 28th April 2023.

Dr. Delia confirmed that the initial deadline for submission for the tender was 3rd March 2023, and the deadline for submission after the third extension, the last one, was 28th April 2023. The documents that entered from Plan Property Holdings by virtue of the fact that the time of the tender was extended, if the initial deadline of 3rd March had not been extended, could have entered but would not have had an effect on the tender. Mr. Craig confirmed this was correct. Dr. Delia stated that

these documents that entered—in summary, the second time the accounts of 2019, the second time the accounts of 2020, and the second and third time the accounts of 2021—were significant. Mr. Craig confirmed this.

#### *Accounting Standards and Restatement Issues*

Dr. Delia stated that what was different in these re-entered accounts from how it was reported in the MBR documentation before they entered was then detailed in his report. Mr. Craig stated that before speaking about this, with their permission, he wished to say that these accounts filed by Katari Holdings Limited were drawn up under accounting standards, and the accounts must follow certain accounting standards. In the case of Katari Limited, the accounting standard was GAPSME, which is a local standard published by the Ministry of Finance targeted to small and medium businesses. Katari Holding qualified to use that standard, but the standard prescribes what can be done and what must be done when there is an error in the financial statements, and it is very prescriptive.

He referred to page 32 of his report, Chapter 5: Omissions from and misstatements in an entity's technical guidance. He quoted Section 5.14 of GAPSME, which provides the principles to be followed when an entity identifies the need to correct prior period errors. These principles state that entities shall correct material period errors retrospectively in the first set of financial statements authorized after its discovery. If the error was in the previous year, you correct the comparative. If the error occurred in an earlier period, not of the comparative before, by restating the opening balance of assets, liabilities, and equity for the earliest period presented.

The guidance or principles of GAPSME is that if there is an error in the accounts, omission error, or misstatement, you do not reissue those accounts again. You correct that error in the accounts that will come out. If he published the 2021 accounts and those are the last accounts published, if he realized there was an error in 2021, he corrects that error in the accounts that will come out for 2022. If there is an error in 2019 after he issued the accounts of 2021, he does not reissue accounts of 2019, but in 2022 he corrects, shows, and corrects the opening balance shown in the accounts of 2022. This is the prescribed rule that companies making accounts under GAPSME must follow when they realize there was an error in the accounts.

Dr. Delia asked if this happened in this case. Mr. Craig stated no, in this case it did not happen because, as they saw from the timeline, the accounts of 2019 were resubmitted, redrafted, and withdrawn once, and the accounts of 2020 were resubmitted and redrawn three times. Dr. Delia confirmed that accounts submitted on different dates over the years, culminating in that month of 2023, report the same date of when they were signed, as if on one date different accounts were signed that were presented at different times. Mr. Craig confirmed this was correct. There exist different accounts of a particular year that have different versions and they are not distinguishable, signed on the same day.

### *Material Changes in Financial Statements*

Dr. Delia asked about the materiality, the total effect of the picture that the accounts showed that entered in April 2023 versus the picture that the same company was giving with the accounts submitted over time, particularly in the context of the gearing ratio or anything else requested according to the tender. Mr. Craig stated he would take a step back and respond to the first question before this: what were the differences between the original accounts and the resubmitted accounts. He referred to page 30, which showed a table with the difference between the original 2019 accounts and resubmitted 2019 accounts resubmitted in April 2023. In the original accounts, the adjustment was essentially a revaluation of the property plant and equipment. The property plant and equipment that had a carrying value in the original accounts of 9.8 million was revalued by approximately 6 million. The value of that property plant and equipment increased, and in the restated financial statements of 2019, that carrying value of the property plant and equipment was now 15.9 million, an increase of 6 million. The difference between the original 2019 and the revised or resubmitted 2019 in April was essentially this.

Dr. Delia asked if this was a small thing, a pertinent thing, a big thing, or a substantive change. Mr. Craig stated it was a substantive change of 6 million. The word is material. Over an initial carrying value of 9.8 million to take that up to almost 16 million is a material increase. Dr. Delia asked how this impacted the assessment, the requirement that companies submitting for this tender had, whether before they would not be compliant and with this method or change, they became compliant. Mr. Craig stated they saw and studied the effect of the changes and amendments in the audited financial statements based on the current ratio as well as the gearing ratio. He referred to Chapter 6, Page 36.

### *Current Ratio Analysis*

They analysed the impact on the current ratio based on these restated financial statements. They saw the original and saw the restated and used both Method 1 and Method 2. To remind the Board, the RFP requirement wanted the current ratio over an average of 3 years to not be less than 0.75. At page 38, there were two tables. When they examined the original financial statements submitted to the MBR using as reference period 2019, 2020, and 2021—because they concluded that if Katari had used 2018 they certainly would not meet these requirements—when they saw the original financial statements and the resubmitted financial statements, under both scenarios, under both Method 1 and Method 2, in the original and resubmitted, Katari or Property Plan satisfied the criteria in the RFP. The current ratio under both was above 0.75, so it satisfied the requirement of 0.75.

However, when they analysed further and entered more into detail, they saw that certain things reported or how they were reported in the audited financial statements of 2021 were material for Katari Project Plan Limited to be able to reach this threshold where it satisfied the current ratio

minimum requirement. With their permission, he wished to enter and explain what these things were that in 2021 happened that affected and helped Katari Holding reach these current ratios.

#### *Reclassification Issues*

He referred to page 39: Analysis of the reclassification of non-current assets to current assets. Here they were speaking about reclassification of what they had under plant property and equipment which were non-current assets that do not affect the current ratio, and there was a reclassification of part of them, a total amount of 2.9 million, almost 3 million, from non-current assets to current assets. They wanted to see what these non-current assets were that were reclassified to current assets, and according to the accounts of 2021, they understood these were furniture and fittings originally shown under property plant and equipment in 2019 and 2020, which now were reclassified to current assets. GAPSME in Articles 23.7 to Articles 23.14 gives guidance to the preparer of the accounts on what must be done when there are these reclassifications and when they can be made. GAPSME gives specific instructions and guidance on what is to be done and what can be done. GAPSME says this reclassification, and in Article 6.33, a reclassification from a non-current asset plant property and equipment to a current asset can only be done if certain conditions are met. These conditions are: The asset is available for immediate sale in its present condition subject only to terms usually customary for sales of such assets; the sale must be highly probable so there is a high probability the sale will happen; and the entity must expect to complete the sale within one year from the date of classification as held for resale. The classification date was 31st December 2021, so this standard is saying that within 12 months from 31st December 2021, the asset must be sold. Those are the three conditions that the accounting standard requires for making that reclassification. If you don't meet those standards or requirements, you need to keep showing that as a non-current asset.

However, if they looked at the accounts of Katari, of Plan Project Holdings Limited, and looked at the audited financial statements published of 2022 and also the audited financial statements of Plan Property Holdings Limited of 2023, it is still carrying, the audited accounts show they are still carrying those assets as a current asset on its balance sheet, which means the company Plan Property Holdings Limited did not sell those assets within the prescribed period of 12 months, not even 24 months. On that basis, it did not satisfy the requirements of GAPSME to reclassify that non-current asset to a current asset.

If they looked at the audited financial statements of Plan Property Holdings Limited of 2024, they saw the reverse. They saw that not only was that inventory, those furniture and fittings, not sold, but there was a reclassification in the opposite direction. They removed them from current asset and recapitalized them to property plant and equipment. So, in 2021 they removed them from property plant and equipment and made them current assets; 3 years later in 2024, they reversed everything

and entered them there again. He reminded them that the GAPSME standard says the sale must be highly probable, the entity must expect to complete that sale within one year.

Dr. Delia confirmed that in the last line he said that in the accounts of 2024, which were not required for the tender, they went back or the company went back to the position quo ante that was before the change that would bring them compliant in April 2023. That is, they had a position, they changed it for the purposes of this tender, and subsequently in the accounts after, they went back again to how they were before. Mr. Craig confirmed this was correct. The motive behind it he did not know, but it raised certain questions.

Dr. Delia requested that in view of what this witness just said, they requested Dr. Fenech from the MBR to submit accounts for 2019, 2020, and 2021, but obviously he did not know this would emerge, so he requested that she also submit the accounts just mentioned so they would have completeness. The Chairman stated he saw no objection, to corroborate this reversal of this reclassification. Dr. Mifsud Bonnici stated he would be practical and if the other side downloaded it from the MBR, he would not contest the authenticity of it. Mr. Craig stated he had copies there if they wanted, and the Chairman confirmed these were extra copies. Mr. Craig stated he provided them downloads from the MBR of the audited financial statements of Plan Property Holdings Limited for 2022, 2023, and 2024.

#### *Liability Reclassification Analysis*

Mr. Craig continued to page 41. Apart from there being a reclassification from plant property and equipment non-current asset to current asset, there was another reclassification that caught their attention: analysis of reclassification of current liability to non-current liability. In the audited financial statements of 2021, there were amounts due to related undertakings that in the accounts of 2020 and 2019 were being classified under current liability, which now started to be classified under 2021 as a non-current liability.

Article 14.4.18 of the accounting standard GAPSME gives guidance and direction of what an entity should show as a current liability. On page 42, GAPSME says a liability should be shown as a current liability if it expects to settle the liability in the entity's normal operating cycle, or if it holds the liability primarily for the purpose of trading, or if the liability is due to be settled within 12 months after the end of the reporting period, or the entity does not have a non-conditional right to defer settlement of the liability for at least 12 months after the reporting period. Those are the four conditions that if met, then that liability must be shown as a current liability. All other liabilities by definition then should be shown as non-current liability.

They tried to see if the reclassification of these amounts due to related undertakings fell within this definition or direction that GAPSME gives. In the accounts they saw, in the audit accounts of 2019 and 2020, which had current liabilities under current amounts due to related undertakings of 2.2 million

for 2020 and 2.2 million for 2019, Note 7 to the 2019 and 2020 audited financial statements said that these amounts due to undertakings are unsecured, interest-free, and repayable on demand. Due to the fact that they are repayable on demand, it does not satisfy the requirement that the entity can pay this after a 12-month period and correctly showed those as a current liability.

However, they also saw in the 2021 audited financial statements that the amount or the description of the terms changed immediately, and the note was updated to say that the amounts due to related undertakings are unsecured, interest-free, and have no fixed dates of repayment. On that basis, or after that change, in the audited financial statements of 2021, a reclassification was made from current liabilities to non-current liabilities. Apart from there being a reclassification in 2021, the audited financial statements of 2021 reclassified the balance that was in 2020 from current to non-current as well, although the terms were repayable on demand.

In their opinion, the company did not satisfy the requirement to show that as a non-current liability. Having no fixed date of repayment does not mean that it is not repayable within a period of 12 months. That clause in GAPSME, which is an obligation that the company does not have an unconditional right to defer the settlement of the liability for at least 12 months, if this undertaking had no fixed date of repayment it could have been repaid within this 12-month period, and as a result, its proper classification should have been as a current liability in the balance sheet of 2021 and 2020.

So much so that when they saw the audited financial statements of 2022, the description of that liability changed again to satisfy this requirement of the unconditional right to defer liability to a 12-month period. In 2022, the director or the company that issued those accounts realized that the terms of that loan cannot be classified as non-current, and as a result there was a change in the description of the repayment terms in the audited financial statements to now be able to satisfy the requirements of GAPSME and continue to show that as a non-current liability.

#### *Impact on Compliance*

The impact of all this, on page 44, if they removed, if they assumed that those reclassifications in 2021—and here he was speaking about the reclassification from property plant and equipment to current asset as well as the reclassification from current liability to non-current liability—if they removed the effect of those and worked out the current ratio, both under Method 1 and under Method 2, Plan Property Holdings Limited does not satisfy the tender requirement of a minimum of 0.75 current ratio.

#### *Scheduling and Continuation*

Dr. Delia proceeded to Chapter 7, page 45, addressing the gearing ratio. The Chairman remarked on his intention to approach the matter pragmatically and anticipated a conclusion similar to that reached with the current ratio. He inquired if Mr. Craig was only available that day. Mr. Craig

responded that ideally yes, but he would not be traveling regardless. Dr. Delia suggested dedicating a few minutes to finalizing remarks on the gearing ratio, noting its frequent reference. He proposed releasing Mr. Craig, considering it unlikely that cross-examination could be completed that day.

Dr. Mifsud Bonnici indicated his readiness to proceed. The Chairman sought clarification of the schedule. Dr. Delia requested two minutes to conclude discussion on the gearing ratio and asked whether there were additional witnesses available solely for that day. The Chairman confirmed that proceedings could continue until 12:40 pm. It was decided that Mr. Craig would complete his testimony, with cross-examination deferred to Tuesday. Mr. Craig would be required to attend again, allowing for examination of another witness. Dr. Delia queried whether Mr. Craig's report on the current ratio also applied to the gearing ratio, as he had another witness prepared.

Mr. Craig stated his intention to be as succinct as possible while ensuring necessary explanations were provided. Dr. Delia deferred further questions until the next session. The Chairman noted this as a suspension initiated by Dr. Delia and confirmed that Mr. Craig would need to return on Tuesday for the continuation of the examination and subsequent cross-examination.

**Witness:**

**Mr. Ivan Faure (ID: 339167M) summoned by Dr. Delia.**

*Background and Role*

Mr. Faure stated he is Ivan Faure, Director with European School of English, ID Card number 339167M. He took the oath to tell the truth, the whole truth, and nothing but the truth.

Dr. Delia asked if he is Director only with European School of English or also has other material functions or work with the company, and if yes, what. Mr. Faure stated he is a qualified accountant (CPAA), auditor, works as Group Operations Officer and Director, i.e., senior management, and assists with other companies in the group.

Dr. Delia asked how long he has been with the company. Mr. Faure stated since 1st September 2005, i.e., 20 years. When asked what he did before, Mr. Faure stated he worked with Farsons as Group Financial Controller and Group Executive Board Member of Farsons Cisk PLC for ten years, and also for ten years with Diamantino Manfre as auditor.

*Involvement in the Tender*

Dr. Delia directed him to the tender, asking if he was involved in its preparation, planning, work, or submission, and if yes, in what way and what his involvement was. Mr. Faure stated that basically he usually takes care of this type of work, i.e., tenders, but this was the first time with the government. The board decided to use Deloitte and Touche to help them submit their tender application and prepare for it. It took many months, involving many people. He worked closely with Andre Fenech, Senior Manager in Financial Advisory at Deloitte and Touche; Michael Zarb, Partner at Deloitte and

Touche; and Raphael Aloisio, specialist and Partner at Deloitte and Touche. During the preparation months, there were engineers like Perit Chris Briffa, Marielouise Caruana Galea, and Renzo Curmi, all involved as they progressed, and obviously with Director Sean Legault. They were always active on preparation and compilation.

#### *ESE Disqualification and Gearing Ratio*

Dr. Delia asked about the disqualification they are appealing from, what he knew about it, how they reacted, what they did, whether they were requested for information before it happened, and if yes, how and what response they gave. Mr. Faure stated that as an accountant, he always looks at the criteria, because if they did not meet them, they would not spend the hundreds of thousands they spent to bid. The criteria were simple: current ratio and gearing ratio, plus the usual non-criminal checks. His first role was to see if they met them. They took necessary professional advice from Deloitte and Touche, consulting with Raphael and others to see if with their financial statements they could qualify. The RFP wording was very clear, "an average of the 3 years."

Dr. Delia showed the clause for accuracy: "A gearing ratio of not more than 3, this is to apply as an average of a consecutive 3-year period between years 2018-2021, both years included..." Mr. Faure confirmed they were referring to that clause. He noted there was also a clarification before tender closure specifically on gearing ratio. Dr. Delia asked if they requested that clarification. Mr. Faure stated no, they did not request it. When asked who did, Mr. Faure stated no one knows. Dr. Delia asked what they knew about the response given by the Authority. Mr. Faure stated the response was clear, the same wording as the RFP, "average of the three years," very simple. The first time he heard the calculation must be the average of the ratios of the 3 years was in December 2023, 8 months after tender closure, when they changed the definition of that clause—the criteria changed. When saying "the average of the 3 years," it is not "average of the ratios of 3 years." The English is clear, no room for confusion.

Dr. Delia asked when the wording changed, after tender closure. Mr. Faure confirmed obviously in December 2023 when they were notified the board was making them change their calculation based on new wording. Dr. Delia asked what "board" meant—the evaluation board. Mr. Faure confirmed. He explained it was published on the electronic platform, telling them they were not following the RFP, which clearly says gearing must be the average of the ratios for 3 years—wording never seen before—and they had to resubmit their calculation of the gearing for those 3 years based on the average of the ratios within a period of time. They were given 5 days. Dr. Delia asked what they did. Mr. Faure stated they wrote back, took legal counsel, and rejected it, stating they had worked correctly according to the RFP and would not change anything.

Dr. Delia asked if they stood their ground with their original offer. Mr. Faure confirmed yes. Dr. Delia asked if after the board requested change, they took advice from consultants, auditors, financial advisors, lawyers, etc., and if any gave contrary advice. Mr. Faure stated always the same thing: it is an open interpretation, very clear that it was vague, "average of 3 years" can be read as you want, but interpretation was clear, average of 3 years does not mean average of the ratios of 3 years. The English is clear. Dr. Delia thanked him, no further questions.

**Cross-Examination by Dr. Mifsud Bonnici (Contracting Authority)**

Dr. Mifsud Bonnici confirmed the Deloitte team: Raphael Aloisio, Michael Zarb, and Andre Fenech. He noted Matthew Xuereb was not part of the team but joined after Mr. Aloisio withdrew from Deloitte. Mr. Faure confirmed Matthew Xuereb was already a partner there but not included in their team, though they originally consulted with him.

Dr. Mifsud Bonnici asked when Dr. Delia asked if anyone gave advice before bidding that the gearing ratio could be interpreted differently, Mr. Faure said *"it was clear that it was vague, it was open to interpretation"*—his words. Mr. Faure clarified he never used the word *"vague."* The Chairman noted he had just said it. Mr. Faure stated it was in context. Dr. Mifsud Bonnici confirmed Mr. Faure said *"it was clear that it was vague and open to interpretation,"* so when bidding, for him the criterion was open to interpretation, vague at best. Mr. Faure clarified: no, he never had doubt on the calculation of the gearing ratio up to December 2023. The only complexity came then. Up to December 2023, it never entered his mind to do the average of the ratios.

Dr. Mifsud Bonnici confirmed on oath that until they bid, they had no doubts on the interpretation of this criterion. Mr. Faure confirmed yes. He had direct involvement in the bid. When entering figures for gearing ratio and current ratio in the ESPD, he entered them. When calculating, he produced the method first, presented to everyone; Deloitte agreed, said nothing. They did not request clarification on gearing ratio before bidding. No further questions.

**Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri confirmed Mr. Faure said the gearing ratio requirement was clear to him and his bidder, with no room for confusion. He agreed they engaged Forvis Mazars to prepare reports including on how to calculate the gearing ratio. In that report, Mazars indicated two alternative methods for calculating the gearing ratio. Mr. Faure agreed. Dr. Camilleri stated that even Mazars agrees with a method aligning with the Contracting Authority's approach. Mr. Faure disagreed. Dr. Camilleri referred to the RFP: *"A gearing ratio of not more than 3. This is to apply as an average of a consecutive three-year period."* He asked what "this" refers to. Mr. Faure stated exclusively one ratio, the cumulative ratio. No further questions.

**Cross-Examination by Dr. Ryan Pace (Interested Party)**

Dr. Pace asked a straightforward question: from tender publication until before this appeal, as a company, they neither requested clarification nor took any legal steps vis-à-vis this tender. Mr. Faure confirmed no.

Conclusion of Testimony

#### **Conclusion of the Fourth Hearing.**

The Chairman thanked Mr. Faure for his time and all parties present and adjourned the hearing for Tuesday 27th January 2026 at 9.00hrs.

#### **Fifth Day January 27, 2026.**

#### **Minutes – 27th January 2026.**

On January 27th, 2026, at 09:00 am, the PCRB reconvened, to commence the hearing following the fourth hearing held on January 23<sup>rd</sup>, 2026.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallek – Member
- Mr Lawrence Ancilleri – Member

#### **Attendance:**

#### **Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative.
- Dr Damien Degiorgio – Legal Representative.
- Dr Christian J Farrugia – Legal Representative.
- Mr Sean Legault – Company Representative.

#### **Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative.
- Dr Kyle Decelis – Legal Representative.
- Dr Andrea Gera de Petri – Legal Representative.
- Mr Simon DeCesare – Company Representative.
- Mr David Vella – Company Representative.
- Mr Ian DeCesare – Company Representative.

#### **Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative.
- Mr Paul Attard – Company Representative.

#### **Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.
- Mr Karl Azzopardi – Company Representative.
- Ms Maria Zerafa – Company Representative.
- Ms Marisa Marmara – Company Representative.
- Mr Robert Falzon – Company Representative.
- Perm. Sec. Charlo Camilleri – TEC member.
- Perm. Sec. Godwin Mifsud – TEC member.
- Dr Matthew Joe Farrugia – TEC Secretary.

#### **Department of Contracts.**

- Dr Audrey Marlene Buttigieg Vella – Legal Representative.
- Ms. Marisa Gauci – DOC

#### **Chairman Opening**

The Chairman opened the second session of Case Number 2131 with greetings to all present. He confirmed that the session would continue with the testimony of Mr. Alan Craig, which had been suspended from the previous hearing to allow for completion of his evidence and subsequent cross-examination.

#### **Continuation of Witness Testimonies**

*Mr. Alan Craig (ID: 290070M) summoned by Dr. Delia*

#### **Resumption of Testimony**

The Chairman invited Dr. Delia to proceed. Dr. Delia welcomed Mr. Craig back and proposed to continue where they had left off at the previous session. He provided a summary to bring everyone up to date. At the last session, Mr. Craig had begun by explaining the grid and timeline extending over a period of time regarding the filings of Katari. He had then explained in detail his report, beginning with the standard of accounts and omissions as outlined in one of the chapters. They had then moved to the methods or methodologies of how the ratios are calculated, divided into current ratio and gearing ratio, and had stopped somewhere between the two. Dr. Delia asked Mr. Craig to confirm where he had reached in order to continue his explanation without prompting from counsel.

The Chairman clarified they had reached the gearing ratio section, as the current ratio had already been explained. Dr. Delia confirmed the last question had been about the gearing ratio and they had been about to start that discussion when time ran out. The Chairman agreed this was correct.

#### **Gearing Ratio Analysis**

Mr. Craig confirmed they had reached the gearing ratio section. Before that, they had explained the current ratio and seen from their analysis that the current ratio was satisfied after certain reclassifications were made in the 2021 accounts. The gearing ratio gives some indication of the financial health of a company. It is the relationship between debt, typically interest-bearing debt, and shareholders' equity. The ratio is the amount of interest-bearing debt the company has divided by the number of shareholders' funds or equity. In this case, the tender document or RFP had a requirement that tenderers must have a gearing ratio of not more than 3, which is to be calculated as an average of a consecutive three-year period.

The Chairman interjected to correct that it was 3, not 10. Mr. Craig apologized and corrected himself, stating tenderers must have a gearing ratio of not more than 3, which is to be calculated as an average of a consecutive three-year period. He directed attention to page 46 of their report, specifically Figure 6, the table shown there. When they calculated the gearing ratio of Katari Holdings Limited, now called Plan Property Holdings Limited, they used both Method 1 and Method 2 as previously mentioned. They saw that when they calculated the gearing ratios on the financial statements that were originally submitted, not those resubmitted in 2023, but the originally submitted statements, Katari Holdings Limited satisfied the tender requirement under Method 1. However, when they calculated the gearing ratio under Method 2, which is the average of the gearing ratios of each year, it did not satisfy the criteria. Looking at that table, the reason it did not satisfy the criteria was caused by the year 2019, where there was a negative equity resulting in a negative gearing ratio.

After the 2019 accounts were resubmitted and restated, which were filed at the MBR on 18th April 2023, referring to page 47, they saw that after those amendments and after that resubmission of the audited financial statements, Katari Holdings Limited or Plan Property Holdings Limited now satisfied the gearing ratio under both Method 1 and Method 2. Looking at the first column for 2019 amended financial statements, they saw that the company now had not a negative equity but equity of 6 million plus Euros.

### **Analysis of 2019 Restatement and Property Valuation Issues**

Mr. Craig stated they examined what the changes were in 2019 when the accounts were resubmitted. Looking at the 2019 accounts that were resubmitted, the accounts were submitted with a covering letter from the director of the company. The covering letter was dated 20th March 2023. To quote the covering letter, the director wrote: "Katari Holdings Limited owns a plot of land in Naxxar of approximately 4,748 square meters. By 2019, Katari Holdings had developed this land into an old people's home, consisting of 235 beds, spread over 117 rooms, together with a number of

miscellaneous facilities over three levels above ground. The building also comprises two basement levels. In 2019, the property was complete and operational and was valued at 18 million, including furniture and fittings. A property valuation was carried out on 30th September 2019 but only recognised in the financial statements of 2020. In this respect, given the circumstances, it would be proper if the said valuation is also reflected in the 2019 financials. Accordingly, kindly find enclosed with this letter a new set of financial statements for 2019 to replace the financials for 2019 already submitted as per document 17." That was the covering letter with which the revised financial statements of 2019 were resubmitted.

What caught their attention was that when they were looking at the financial statements of 2020, they saw there was more capital expenditure. The capital expenditure in 2020 comprised about 2 million. This caught their attention because in the letter the director sent, he wrote that the property was complete and operational. Therefore, they were not expecting to see an increase of 2 million, another 2 million in capital expenditure, if it was complete and operational. In fact, they also saw that in the 2019 audited financial statements, the revaluation of the property plant and equipment was not done at 18 million, so the property was not revalued to 18 million, but was revalued to 16 million, specifically 15.947 million. The difference between them is 2 million, which at prima facie could be that those 2 million are 2 million of capital expenditure that was made in 2020.

The audited financial statements of 2019 did not make disclosures about who the valuer was, when it was done, and the methodology by which they were valued. However, when they saw the fact that according to the declaration or letter of the Director, the property was complete and operational, when they saw that even after 2019, in 2020, that capital expenditure of 2 million was made, and also saw that after the 2020 capital expenditure of 2 million, the property would have in the accounts a value of 18 million, so the 18 million was not achieved in 2019 but in 2020, this prima facie created certain doubts as to whether the statement made by the director was factual, whether the valuation was done in 2019 or whether it was done in 2020, because if it was done in 2019, how could it anticipate expenditure that still had to be made. This caused an element of doubt prima facie regarding this declaration as well as the actual financials that were submitted.

#### **Further Revaluation Issues in 2021 and Timing Concerns**

They also noted that in the audited financial statements of 2021, there was another increase, another revaluation, in the property plant and equipment. The revaluation was an increase of 1.5 million, which was an additional revaluation in land and buildings according to the 2021 accounts. The 2021 accounts did not give any information about the valuation or the date of the valuation. However, when

the audited financial statements of 2022 were published after they presented this report, referring to Note 5 on page 21 at the very bottom, there was an explanation stating: "Land and buildings have been valued on 7th October 2022 at 12,965,362 by architect Colin Zammit on the basis of an open market valuation." This referred to 2022, but this note was not referring to the revaluation in 2022 but to the revaluation that was made in 2021, which was the 1.5 million they had been discussing earlier.

What caught their attention was that the 2021 accounts were signed by the director, so the audited financial statements of 2021 were signed by the director on 14th September 2022. They noted the date when the audited financial statements of 2021, which contained that revaluation of 1.5 million, was before, prior to, the date when the valuation carried out by Colin Zammit was made. The audited accounts were signed on 14th September 2022, but the valuation by Perit Colin Zammit was made later on 7th October 2022. Again, prima facie these are things that are like red flags, indicating that things are not as they appear or should be.

They also saw that these changes made in the 2019 and 2021 accounts meant that by virtue of them, obviously the company could qualify or satisfy the gearing ratio under both Method 1 and Method 2 that were in the contract. They also saw, as mentioned before regarding disclosures, that the accounts are drawn up in line with a standard, that standard being GAPSME. GAPSME requires certain disclosures to be made. They noted again, referring to pages 48 and 49 of their report, that certain disclosures that should have been made on revaluations, as seen in sections 7.23 and 7.28 on the next page, showed that certain disclosures were not being made. They also noted that when there is a revaluation of property, there must be a calculation of deferred taxation, the implication of deferred taxation. Again, in the restated financial statements of 2019, they did not see this recalculation, this calculation of deferred taxation, as it should have been done. They noted also that even if they had done that recalculation of deferred taxation, it would not have had any impact on the gearing ratio.

### **Concluding Remarks and Summary of Findings**

Mr. Craig stated he would summarize and close on this point. Referring to page 13 of his report, paragraph 1.3.23 contained the concluding remarks. With permission, he would read them to summarize and conclude. Their analysis indicated that a sequence of events and salient issues merit further understanding and analysis. In summary, these include: The 2019 financial statements of Plan Property Holdings Limited were reissued once and those for 2020 were reissued twice, with updated versions submitted to the MBR very close to the tender closing date. Despite the restatements submitted to the MBR in April 2023, the financial statements for 2019 and 2020 bear original approval

dates, leading to multiple versions of financial statements for the same period with the same approval date and auditor report, which is not in line with the prescribed procedures as set forth in the GAPSME and ISA standards.

GAPSME mandates disclosure requirements for corrections to a set of financial statements which have already been published. The reissued financial statements for 2019 and 2020 did not include such disclosures. Despite ISA 560 necessitating a new audited report for amended financial statements which includes an emphasis of matter on the reasons for the amendment, the accompanying audited report for the reissued 2019 and 2020 financial statements lacked the required disclosures and was backdated to the same date as the original set of financial statements.

In their opinion, the RFP lacked the required clarity for the prescribed method for calculating the average ratios of a three-year consecutive period, necessitating the application of two methods to determine the average. It was only after the closing date and resubmission of bids that MSPP on 6th December 2023 clarified that the gearing ratio was to be calculated as the average of the three ratios for each year. The average current ratio requirement for 2019 to 2021 was satisfied in both the original and the reissued financial statements, but only achieved after two material reclassifications were made in the 2021 financial statements, notably a 2.9 million shift of furniture and fittings to inventory held for resale. Additionally, a related party loan amounting to 1.6 million was reclassified from current to non-current liabilities in 2021, following a reported change in the repayment terms from on demand to no fixed date of repayment, with no indication being made that the entity has an unconditional right to defer the settlement of the liability for at least 12 months after the end of the reporting period.

Initially, Plan Property Holdings Limited did not satisfy the average gearing ratio using Method 2 based on the original financial statements, but only achieved it after the restatement of the 2019 financial statements to reflect a revaluation of PPE. A clarification letter submitted by the Director accompanying the 2019 revised financial statements stated that the revaluation was carried out in September 2019 and that the property was complete and operational. In spite of this, the 2020 audited financial statements continued to show further additions to property plant and equipment of 2 million.

Their report highlighted that prima facie and subject to limitations highlighted in Paragraph 2.6, Plan Property Holdings Limited did not follow the prescribed accounting standards and policies in the recognition and disclosure of specific adjustments as well as in the restatement of the financial

statements. These restatements appear from their timing to have had the effect of enabling the company to satisfy certain financial requirements in the RFP.

### **Conclusion of Direct Examination**

The Chairman asked Dr. Delia if there was anything else from this witness before they proceeded. Dr. Delia stated that from their side there was nothing further. The Chairman stated they would proceed to the contracting authority's cross-examination.

### **Cross-Examination by Dr. Mifsud Bonnici (Contracting Authority)**

#### **Relationship with European School of English and Independence**

Dr. Mifsud Bonnici, counsel for the Contracting Authority, commenced his cross-examination by inquiring about Mazars' relationship with European School of English beyond the preparation of the report. Mr. Craig confirmed that his firm has a relationship with European School of English and stated this relationship was declared in their report. He indicated that Mazars had been appointed as auditors of the Claret Group, which owns ESE, approximately a couple of months prior to the report. The Chairman requested the specific page reference, and Mr. Craig directed attention to page 18, section 2.71 titled "Preexisting relationships."

When asked if there were any other engagements or consultancies ongoing apart from what was disclosed in the report, Mr. Craig stated that up to that point, the only engagement they had been given apart from the group audits was this particular matter. He clarified that for audit purposes, he was not involved and was not the audit partner on that client. Dr. Mifsud Bonnici confirmed this was clear. When asked whether they had spoken with Arrigo Group of Hotels Limited about this tender or the report, Mr. Craig stated he was not familiar with them and to the best of his knowledge, they had never spoken with them.

Dr. Mifsud Bonnici sought to confirm that Mazars had no involvement in the preparation of the bid itself and were engaged ex post facto after the appeal was lodged. Mr. Craig agreed, stating that in the bid made by ESE or any other bidder, they had nothing to do with it and had not even seen ESE's bid. When Dr. Mifsud Bonnici expressed surprise that he had not seen ESE's bid, Mr. Craig confirmed he had no reason to see it.

#### **Discussion on Method 1 and Method 2 for Gearing Ratio Calculation**

Dr. Mifsud Bonnici established that for purposes of the cross-examination, he would refer to the two calculation methods as Method 1 and Method 2, though he believed there was only one method. He

asked whether Mr. Craig agreed that Method 2 was in principle a valid application of the criterion in the tender. Mr. Craig clarified that Method 2 was not wrong, but their comment was that as the requirement was written in the tender document, it was not precise and allowed for interpretation. Both Method 2 and Method 1 were valid methods, and they were not saying Method 2 was wrong.

Dr. Mifsud Bonnici indicated he was not attempting to catch Mr. Craig with his questions and requested that when possible, responses be given as yes or no with explanations only if truly necessary. The Chairman noted this approach was in the spirit of the time available, and Mr. Craig agreed. Dr. Mifsud Bonnici confirmed Mr. Craig was appearing before the board as an expert witness, bringing his expertise for the board to rely upon. Mr. Craig agreed this was correct.

### **Expert Opinion on Instinctive Application of Methods**

Dr. Mifsud Bonnici then asked Mr. Craig for his genuine, honest expert opinion: if someone had given him this tender, instinctively which method would he apply to calculate the average of gearing ratios. Mr. Craig responded honestly that he would apply either method, because both give different indications and both have advantages and disadvantages. However, when he saw the wording, his first interpretation was for Method 1 because that was how he understood the tender document required it. His first reaction was to go for Method 1. He emphasized he was not saying Method 2 was bad or that Method 1 alone was good, but that was his interpretation. Dr. Mifsud Bonnici confirmed this was exactly the genuine, honest opinion he wanted.

Dr. Mifsud Bonnici then referred to the second report, ESE 002 dated 3rd April, where Mr. Craig made two remarks on Method 1 and Method 2. He read from the report that Method 1 sums the components, numerators and denominators, separately to arrive at the average period ratio, and this methodology smooths any yearly fluctuations in the individual annual ratios. Method 2 takes the average of the annual ratios for the period and is linear, where each individual ratio contributes equally to the overall average result, implying no single year's ratio has more weight or significance over another when computing the average. Dr. Mifsud Bonnici acknowledged this was technical language and asked Mr. Craig, given that he instinctively went for Method 1, whether he felt Method 1 had more advantages than Method 2.

Mr. Craig responded that he could not comment in that way, as he did not know what the person who wrote the tender document needed. His opinion on Method 2 was that if a company had a year, especially an earlier year, that was not good, but towards the end and in the final year had a strong financial position having corrected that position, Method 2 would penalize them. Although at that current point in time the company was financially strong, Method 2 would penalize them. As they saw

before when discussing Plan Property Holdings Limited, under Method 1 it passed but under Method 2 it did not pass because it had a 2019 gearing ratio that was adverse and impacted the whole average ratio. He was not saying Method 2 was wrong or that Method 1 was necessarily good, but Method 1 seemed to smooth out big fluctuations and seemed to carry some form of balance and weight between the years. In the case of Plan Property Holdings Limited, although under Method 2 it did not meet the tender requirement, under Method 1 it satisfied that requirement because the effect of the negative impact of 2019 was diluted and weighted out through subsequent years that were positive. Dr. Mifsud Bonnici confirmed Mr. Craig had answered his question.

### **Knowledge of Other Bidders' Calculations**

Dr. Mifsud Bonnici asked whether Mr. Craig knew that of all the bidders who submitted bids, only the appellant calculated the average of gearing ratio using Method 1. Mr. Craig stated he did not know and had not examined that matter, as their terms of brief and terms of reference were extremely restricted and they had not conducted any investigation or analysis on that point. When informed there were five others who did not use Method 1, Mr. Craig reiterated he did not know. Dr. Mifsud Bonnici confirmed that Mazars had not given advice on this tender to any other bidders. Mr. Craig confirmed not to his knowledge.

### **Analysis of Method 2 Steps**

Dr. Mifsud Bonnici directed attention to the second report, ESE 002, and began reading from paragraph B on page 2 describing Method 2. The description stated that Method 2, as applicable, calculates the gearing ratio for Year 1, Year 2, and Year 3 individually, sums the resultant gearing ratios together for Year 1, Year 2, and Year 3, and divides the result by 3. Dr. Mifsud Bonnici broke down the process into five steps and asked Mr. Craig to confirm each step. First, one takes and makes a division of debt over equity for the first year. Mr. Craig confirmed this was correct. Second, the same process is done for the second year. Mr. Craig confirmed. Third, the same is done for the third year. Fourth, one arrives at the ratios and takes the ratios of each year from Steps 1, 2, and 3 and makes a sum total, counting them all together. Mr. Craig confirmed yes. Fifth, after having the sum total, one makes a division by 3 to get the average. Mr. Craig confirmed yes.

### **Analysis of Method 1 Steps and Average Calculation**

Dr. Mifsud Bonnici then moved to Method 1 as described by Mr. Craig. The description stated that Method 1, as applicable, totals debt for Year 1 to Year 3 and divides by total equity for Year 1 to Year 3. Dr. Mifsud Bonnici counted three steps and went through them together. First, all the numerators

are added up. Second, all the denominators are added up. Third, a ratio is made by dividing the first sum by the second sum. Mr. Craig agreed this was correct, confirming it was total debt divided by total equity for those years. Dr. Mifsud Bonnici noted that while not good at mathematics in school, in these three steps nowhere was there an average calculated, and he asked Mr. Craig to correct him if wrong.

Mr. Craig responded that in his interpretation, one was getting a direct average because one was taking the debt of Year 1, Year 2, Year 3, adding them together and dividing that by the debt of Year 1, Year 2, Year 3, and implicitly producing an average. Dr. Mifsud Bonnici emphasized the word "implicitly" and noted this was important because Mr. Craig was an expert witness who had given his genuine opinion. He confirmed that implicitly one gets the average with Method 1. Mr. Craig confirmed one gets the average, stating in his opinion it was a different way of calculating the average. In his opinion, Method 2 was the average of the gearing ratios of a three-year consecutive period, and he was not saying it was bad.

Dr. Mifsud Bonnici asked for agreement that in Method 1, in none of the steps they went through together was there a requirement for calculation of an average, as average means if one has three figures, count them together and divide by 3 as Method 2 requires. He asked whether it was correct to say that in Method 1, in none of the steps was there a calculation of average, at least as he understood it, and requested a yes or no answer. Mr. Craig stated he did not agree in the sense that he needed to qualify. If the assertion was that each step does not calculate an average, then yes that was correct, each step was not calculating the average. However, Method 1 calculated the average in itself, so the result of Method 1 was the average gearing of that particular period.

### **Plan Property Financial Health and Method Application**

Dr. Mifsud Bonnici turned to the other report on Plan Property and began with section 1.3.17, located in the executive summary on page 12. The paragraph stated that with respect to the gearing ratio, Plan Property did not initially satisfy, on the basis of the original financial statements, the average gearing ratio criteria when calculated on the basis of the annual gearing ratios. Dr. Mifsud Bonnici confirmed that when referring to average of the annual gearing ratios, Mr. Craig was referring to Method 2. Mr. Craig confirmed yes.

Dr. Mifsud Bonnici then noted that Mr. Craig had stated previously that instinctively he would have gone for Method 1, not Method 2. Mr. Craig confirmed yes, instinctively he went for Method 1, but emphasized he was not saying Method 1 alone was good or that Method 2 was not good, but instinctively that was his first reaction. Dr. Mifsud Bonnici confirmed that if Method 1 had been applied, which Mr. Craig would have instinctively gone for, Plan Property would have satisfied the

gearing ratios based on the original financial statements. Mr. Craig confirmed this was correct. Dr. Mifsud Bonnici added that with Method 2 there would have been a problem. Mr. Craig confirmed yes, in the originally submitted statements.

Dr. Mifsud Bonnici recalled that at the beginning, Mr. Craig had stated the gearing ratio was an indication of the financial health of a company. Mr. Craig confirmed it was used for that purpose. Dr. Mifsud Bonnici then moved to Figure 6, which Mr. Craig had shown earlier, located in section 7.1 on page 46. Dr. Mifsud Bonnici stated the actual figures were somewhat irrelevant to him but he would use them as an example for his line of questioning. In the first year of 2019, when there was in Mr. Craig's words negative equity of negative 21,000, Dr. Mifsud Bonnici asked whether this was a great year for the company and whether the financial health of the company was good in that year. Mr. Craig responded that according to the gearing ratio it was not good because there was a negative gearing ratio, which indicated that at that point in time and in that position, the financial risk was high.

Dr. Mifsud Bonnici noted that Mr. Craig had earlier used the word that the company would be penalized if Method 2 was applied with the average of gearing ratios, but questioned whether it was correct to say that in truth, Method 2 captured the fact that the company over that three-year period was not financially healthy. Mr. Craig acknowledged this was correctly stated but wished to clarify what he tried to explain. The company was not good in 2019, but in 2021 the indication was that it was strong, so it was that contrast he tried to explain and express.

#### **Limitation of Liability and Reliance on Report**

As a final point, Dr. Mifsud Bonnici read from clause 2.3.3 of the report on page 16, where it stated the report had been prepared solely for the use of ESE and Mazars accepted no responsibility to third parties in relation to the matters in the report and for any breaches of this obligation. Dr. Mifsud Bonnici asked for clarity, acknowledging this might be boilerplate language that appeared in the report, but asking whether the PCRB and he personally could rely on the report. Mr. Craig clarified that in the engagement letter, which he agreed contained boilerplate language, they were aware this report would be part of the appeal that ESE would make and would be used for that purpose, and they authorized it to be used for that purpose.

Dr. Mifsud Bonnici concluded his cross-examination, thanking the witness.

#### **Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

## **Scope of Engagement and Focus of Reports**

Dr. Camilleri, counsel for the recommended bidder, conducted a brief cross-examination beginning with questions about the engagement Mazars received from European School of English to prepare the two reports. Mr. Craig was asked to confirm or explain what context ESE gave them for this assignment, specifically whether they explained their offer and its context, or whether the remit was specifically for the points covered in the report. Mr. Craig clarified that ESE never gave them and they never requested ESE's submission, as it was not part of their scope. Their scope was exactly as written in the report. He referred to section 2.3.1, which stated that ESE appointed Mazars to conduct a review to assess the filing of the financial statements for the years ending 2018 to 2021 by Property Plan Holdings Limited, including the timings of their filings and the reasons for restatement.

Dr. Camilleri confirmed that in that report, Mazars looked purely at the offer or rather the financial statements of Katari. Mr. Craig confirmed yes, and after giving that report, they were asked to produce a subsequent report, which was the letter dated 30th April, to comment specifically on Method 1 and Method 2. Dr. Camilleri confirmed that in the gearing ratio report about how the gearing ratio should be calculated or interpreted, the same approach was taken, not with reference to what was done by any particular bidder but purely the question that was asked of them for the report preparation. Mr. Craig stated the question was asked specifically for the report preparation, but they were aware and were informed by ESE that this method of calculation of the gearing ratio was important to them, especially after they received the clarification from the contracting authority on how the gearing ratio should be calculated based on the ratio of the 3 years, which came out after the closing bid was closed. ESE had asked them for this, and therefore they produced this letter, their opinion on the interpretation of the original tender document.

## **Basis of Gearing Ratio Report Conclusions**

Dr. Camilleri sought agreement that their report on the interpretation of the gearing ratio was based, without entering into their conclusions, on their interpretation of what the RFP stated. Mr. Craig, asking which report was being discussed, was directed to the second report, ESE 002. The Chairman clarified this was ESE 002. Mr. Craig confirmed their interpretation was how they read the RFP and their interpretation of how the RFP was written. Dr. Camilleri confirmed this was not in relation to any form of standard about how the gearing ratio is calculated, but was an interpretation of the language of the RFP. Mr. Craig clarified that how the gearing ratio per se is calculated, there are standards for that and different interpretations, but the issue was how to calculate the average gearing ratio for a consecutive period. There was no standard for how to calculate the average gearing ratio for a

consecutive period, and that was the basis of the interpretation. Dr. Camilleri confirmed they went to the RFP, to the language of the RFP. Mr. Craig confirmed yes. Dr. Camilleri stated he had no further questions.

The Chairman asked if the interested party had any questions in cross-examination.

### **Cross-Examination by Dr. Ryan Pace (Interested Party)**

#### **Engagement Details and Documentation Provided**

Dr. Pace, counsel for the interested party, stated he would be asking questions mainly focused on the report the appellants marked as ESE 001, which was the analysis of the financial statements of Katari, now Plan. He acknowledged colleagues had already asked some questions but needed clarification. He directed attention to page 13 or 14 of the report where there was a signature, and confirmed with Mr. Craig that this was his signature. In the report signed by Mr. Craig, section 2.3.2 made reference to an engagement dated 26th February. Mr. Craig asked which section, and Dr. Pace clarified section 2.3.2 on page 16, referring to their engagement letter. Dr. Pace then referred to section 2.7.1 on preexisting relationships, where it stated the board of directors of Claret Group Limited resolved to appoint Mazars Malta as the statutory auditor of Claret Group Limited in February 2024, and asked if this referred to the same engagement. Mr. Craig clarified no, in section 2.3.2 he was referring to the engagement specifically to do this report, whereas the purpose of section 2.7.1 was to state they had a preexisting relationship with Claret Group.

Dr. Pace sought clarification that they were given a one-off engagement by ESE on 26th February 2024. Mr. Craig asked if he was referring to this report, and Dr. Pace confirmed he imagined he was referring to this report and asked if they were given the engagement by ESE. Mr. Craig explained the sequence of events was that they were appointed before as auditors of the Claret Group, so that was the first sequence of events. Dr. Pace asked for patience and permission to ask his questions, confirming they were appointed auditors of Claret Group before they were given the engagement by ESE for this report. Mr. Craig confirmed yes. Dr. Pace confirmed they still occupied the role of auditors of Claret Group today. Mr. Craig confirmed yes. Dr. Pace confirmed the engagement was given to them by ESE. Mr. Craig confirmed yes, for this report it came from ESE.

#### **Brief and Information Received**

Dr. Pace asked how the brief was given directly to Mr. Craig, whether someone came to the office, and how it happened. Mr. Craig recalled he received an email or phone call, he was not certain, directly

from ESE, and did not know if it was from Sean LeGault or Ivan Faure. Dr. Pace confirmed Mr. Craig received the brief. Mr. Craig confirmed yes. When asked what exactly the brief was, Mr. Craig stated it was what was written in the report, to do a review of the filing of the financial statements for the years 2018 to 2021 by Property Plan Holdings Limited, including the timings of their filings and the reasons for their restatement. Dr. Pace confirmed this brief was made because ESE realized when they did their checks that certain filings were made close to the date of the closing of the tender, and they asked a professional firm of auditors to do an investigation and produce this report.

Dr. Pace asked what information or documentation was passed to Mr. Craig when he was given this brief. Mr. Craig stated he believed they were given various documentation including the accounts that were filed by Katari, so they would not have to search for and obtain them themselves. He believed somewhere in his report he mentioned the information they were given. Dr. Pace noted there was a table in the report that included the tender, and asked if apart from that list or catalogue of documentation mentioned in the report, he was not given any other information or documentation. Mr. Craig stated to the best of his knowledge this was correct because as a procedure, the information they used to base their findings and this report was declared, and he believed it was declared in Appendix 1.

Dr. Pace noted that in the execution of the brief, Mr. Craig had mentioned Tino Riolo and Rebekah Barthet, and asked what discussions they had and with whom. Mr. Craig stated they had discussions among themselves because they were working together. Dr. Pace asked specifically among whom. Mr. Craig clarified between himself, Mr. Tino Riolo, and Ms. Rebekah Barthet, and they spoke mostly with Ivan Faure from ESE. Dr. Pace sought to confirm his understanding that they were given a set of accounts by ESE. Mr. Craig stated he believed, if he remembered correctly, the accounts were passed to them by ESE. Dr. Pace asked if they confirmed these were the same version as at the MBR, whether there was a procedure they followed. Mr. Craig believed they confirmed this because they downloaded them and they were the same, and they had the MBR stamps.

### **Desktop Exercise and Scope of Analysis**

Dr. Pace confirmed that they were given this set of documentation which were financial statements, and then those financial statements were discussed only among the three of them, Rebekah Barthet, Tino Riolo, and Mr. Craig, from their office. Mr. Craig confirmed yes, from their office. Dr. Pace asked for permission to use a phrase for clarity, whether this analysis they did was a desktop exercise or whether they spoke with other people, noting that in the previous session Mr. Craig had stated Rebekah Barthet was a forensic accountant. Mr. Craig confirmed yes. Dr. Pace asked if they arrived at

the analysis and this report from this desktop exercise they did among the three of them. Mr. Craig confirmed their findings were based on the analysis of the financial statements that were submitted to the MBR as well as the requirements of the accounting standards and auditing standards that exist, so it was based on that.

Dr. Pace sought confirmation that essentially the brief they were given was to look at the financial statements of those years Mr. Craig mentioned and see what changed from year to year. Mr. Craig confirmed yes, and they tried to understand what changed and why it changed also based on the financial statements and the information in the financial statements. Dr. Pace clarified that when Mr. Craig said they tried to understand what changed and what did not change, beyond discussions between himself, Tino Riolo, and Rebekah Barthet, there was nothing else. Mr. Craig stated apart from the discussions they had with their client. Dr. Pace clarified with ESE. Mr. Craig confirmed correct.

### **Focus on Form vs. Substance and True and Fair View**

Dr. Pace asked if the analysis they did essentially did not enter into whether the numbers reported were good or bad. Mr. Craig asked in what sense. Dr. Pace stated that in Mr. Craig's report, which was an extensive report, he made various observations that were, to make them simpler, questions of form more than substance, the mode of reporting, mentioning GAPSME and so forth. Mr. Craig confirmed regarding reporting. Dr. Pace asked if his question was correct to say that essentially in this analysis done by Mr. Craig, Rebekah Barthet, and Tino Riolo together, they did not enter into whether the numbers reported in the financial statements they reviewed were good or bad.

Mr. Craig stated they did not do an audit of Katari Holdings Limited. They based their report and analysis on the financial statements that existed and were published, and what they saw, as declared in their report, was prima facie, what they looked like to the reader of the financial statements and their interpretation. They did not speak with the director of Katari Holdings and were not authorized to do so. Dr. Pace agreed. Mr. Craig added they had no reason to speak with him and did not speak with the auditors either, if that was where the question was heading. Dr. Pace stated not exactly, and began a new line of questioning.

Dr. Pace noted that as a general principle, which Mr. Craig would teach him in this profession, it was correct to say that every director of a company has an obligation to present a true and fair view of their assets. Mr. Craig stated the Companies Act said this applied to the company. Dr. Pace asked if the answer was yes. Mr. Craig confirmed yes. Dr. Pace stated that he had begun asking a previous question and perhaps was not clear on his part, and asked if it was correct to say that they as a team, Mr. Craig, Tino Riolo, and Rebekah Barthet, did not enter into, analyze, or review whether the numbers

reported in the financial statements they had access to represented a true and fair view of the assets of the company whose financial statements they were viewing, yes or no.

Mr. Craig stated yes and no, he would not respond with one answer because it had to be qualified. They looked at the figures there, saw them prima facie, and there were certain indications that raised certain questions, and their report was about those. Dr. Pace asked what those indications were. Mr. Craig stated these indications were the changes in timing, the disclosures that were there, the reclassifications in 2021, for example of certain things that were being reported in previous periods that were being reported differently in 2021. They also mentioned the 2019 revaluation, and again these prima facie raised certain questions about the accounts that were presented.

Dr. Pace noted Mr. Craig was repeating each time "prima facie." Mr. Craig stated necessarily. Dr. Pace stated he was asking whether among themselves their discussion did not enter into whether the numbers reported in the financial statements they were reviewing represented a true and fair view of Katari's assets, and stated this was a yes or no question. Mr. Craig stated no, he did not agree, because prima facie if certain reclassifications were made and in their opinion... Dr. Pace stated that was not what he was asking. Mr. Craig asked for permission to continue. Dr. Pace stated he should respond to the question asked, not to a question not asked. The Chairman intervened, stating the witness was under cross-examination, would be asked the question, and if the board allowed him, would respond to it, and if necessary the question could be repeated, but he should respond to the question asked.

Mr. Craig asked for the question to be repeated. Dr. Pace stated he had asked, because Mr. Craig had said and in his testimony last time began to say they raised certain questions, and now kept saying prima facie repeatedly, but that was not what he was asking. He was asking essentially what verifications they did, if they did any, to confirm whether these numbers that formed part of the financial statements and about which they were given a brief, represented a true and fair view of Katari's assets. Mr. Craig stated the analysis they did was based on the information in the financial statements, which were public documents, and there were indications, especially about reclassifications that were made based on the information in the financial statements, that indicated the information might not be a true and fair view.

Dr. Pace stated Mr. Craig was adding a piece he had not mentioned before with all due respect, saying there could be things that showed they were not a true and fair view. He asked if that was what Mr. Craig was saying. Mr. Craig stated he was saying this because certain... Dr. Pace asked first if that was what he was saying. Mr. Craig confirmed yes, that was what he was saying. Dr. Pace, noting Mr. Craig was now saying this, asked what verifications they made on their part to see whether or not they were

a true and fair view of Katari's assets. Mr. Craig stated the verifications they made and on which he based this statement were information that was in the audited financial statements. Dr. Pace asked if beyond that they made no other verifications. Mr. Craig stated beyond the audited financial statements, the accounting standards and auditing standards, and the timings at the MBR, they made no further verification.

Dr. Pace asked if they made no verification, how were they now telling the board they did not represent a true and fair view of the company's assets. Mr. Craig stated as he explained in his report, there were certain classifications where they were reclassifying... Dr. Pace stated he was asking about numbers. Mr. Craig stated it was not a question of numbers, because true and fair view was not just numbers, true and fair view was the position of the company's balance sheet as it was presented and how it was being presented. If something was property plant and equipment but was not being shown as property plant and equipment but was being shown as inventory, if there were doubts about that classification, yes, the point of true and fair view was raised, especially... Dr. Pace began to speak but Mr. Craig asked for permission to finish, stating especially if the amounts were material.

#### **Analysis Focused on Form Rather Than Substance**

Dr. Pace stated he would return to what he asked before, whether it was correct to say, and he had also seen in the conclusions of the report on pages 13 and 14, that their analysis was more focused, even from the conclusions, on form rather than substance. Mr. Craig stated he did not agree. Dr. Pace asked why. Mr. Craig stated he did not agree because it was not a simple issue of form. There was substance in the audited financial statements as they were presented, how they were drawn up, what was included, what was not included. There was not form only, in his opinion there was a certain element of substance.

#### **Care Home Revaluation Analysis**

Dr. Pace stated that in Mr. Craig's testimony and also in the report, something that was of substance and appeared to have weighed heavily on the outcome of their report by the three of them was the revaluation of the care home. Mr. Craig confirmed it was one of the points they mentioned. Dr. Pace stated but it was the biggest point, because it was some 6 million as Mr. Craig had told them. Mr. Craig stated the amount was, he needed to verify, but whatever the amount was. Yes, it was some 6 million. Dr. Pace stated 6 million, and Mr. Craig last time described it, to use his words, as a material change. Mr. Craig confirmed in 2019, yes.

Dr. Pace sought to confirm, making reference again because Mr. Craig had already referenced it, whether it was correct to say that the care home was built. Mr. Craig stated according to the director's declaration, it was built, completed, and operational. Dr. Pace asked if Mr. Craig did not know if it was built or not. Mr. Craig stated personally he did not verify. Dr. Pace stated that did not matter. Mr. Craig stated that state of fact, he was not contesting it. Dr. Pace clarified Mr. Craig did not personally know, he was just relying on the declaration of the director, Paul Attard. Mr. Craig confirmed yes. Dr. Pace stated he anticipated Mr. Craig also relied on Mr. Paul Attard's declaration regarding the operation, that in 2019 it was operating. Mr. Craig stated that was what he said in his declaration.

Dr. Pace asked if it was correct to say that a building, naturally built not empty and operating, raised the value, meaning it positively affected the valuation of the care home. Mr. Craig stated he assumed yes but he was not a valuer, not a perit, and needed to be careful how... Dr. Pace stated fair enough. Mr. Craig added logically he could say... Dr. Pace stated but from the experience in his work, he thought it followed that the operation would raise the value. Mr. Craig stated he thought a completed building and in operation would have a certain value, but again he was not a valuer.

Dr. Pace noted Mr. Craig was not a valuer, and asked, permitting him to ask, if Mr. Craig himself was saying he was not a valuer, how did he arrive at the conclusion that because the valuation of the care home rose by 6 million, that was a material raise and raised questions, to use the words Mr. Craig used. Mr. Craig stated it did not raise questions based on the value, they were not saying the value was X and not Y, they were not saying that. They were speaking about the timing of when these revaluations were made. Dr. Pace asked for a moment, because in their report they were also saying because it rose by 6 million, not just a question of timing, the timing was understood, that was the position they took, but on the question of the figure, he was now asking Mr. Craig how, as a witness in the last session, Mr. Craig described the increase of 6 million euro in the valuation of the care home as a material change. Today Mr. Craig was saying he was not a valuer, which Dr. Pace understood, but then what was the reason Mr. Craig arrived to conclude, he and his colleagues arrived to conclude, that it was a material change and arrived at their assumptions.

Mr. Craig stated it was a material change because of the amount. Dr. Pace confirmed because of the amount. Mr. Craig stated because 6 million euro based on the carrying value the asset had was material, on that basis they were saying material change. Dr. Pace stated so... Mr. Craig stated their analysis was more... Dr. Pace asked if they were not saying whether or not it reflected the increase in value. Mr. Craig stated he was not contesting or in any way doubting the value of that property. Dr. Pace stated very good. Mr. Craig stated he did not do any analysis. The only thing he mentioned and said was that although the valuation according to the director was made in 2019, their comment was

this: the director said the valuation was made in 2019 and the value of the property according to the valuation the director mentioned, he did not see the valuation and did not know who did the evaluation, was 18 million. Their comment was that at that point in time, the director also declared that when that valuation was made in 2019, September 2019, the property was complete and operational. What they saw in 2020, although it was complete and operational, was more expenditure of 2 million. They also saw that in 2019 the carrying revalued value of the plant property and equipment was not raised to 18 million but was raised to 6 million. Dr. Pace interjected. Mr. Craig continued that the value of the property became 18 million after the expenditure in 2020. They were questioning and raising certain red flags, to call them red flags, regarding the timing of things. Dr. Pace asked not about the value. Mr. Craig stated no, he was not raising doubt over the value.

### **No Expert Opinion or Additional Verifications Obtained**

Dr. Pace asked for completeness more than anything, whether he understood correctly that in their exercise they did not resort to any expert opinion of a perit. Mr. Craig stated no, it was not in their assignment to do that. Dr. Pace confirmed they did not see management accounts. Mr. Craig stated they did not have access to management accounts, only public documents. Dr. Pace stated he understood, for completeness more than anything, and confirmed they did not speak with Katari's auditors. Mr. Craig confirmed they agreed, he did not speak with them.

### **Financial Statements Verification and MBR Communications**

Dr. Pace confirmed that at the beginning Mr. Craig had confirmed he was given the financial statements obviously with the MBR stamp, given to him by the client ESE. Mr. Craig confirmed yes. Dr. Pace asked if they made any form of communication with the MBR. Mr. Craig stated yes, they had communication with the MBR to try to understand or to understand and be certain what the components of their stamps meant, so they stamp a document when it is filed electronically or manually, and they checked with the MBR to be certain they understood each date and each position, what it meant exactly. Dr. Pace confirmed factually, meaning as dates. Mr. Craig confirmed factually yes.

Dr. Pace sought agreement that the MBR had the authority, call it what one will, to send financial statements back, not accept them. Mr. Craig stated sometimes he thought they saw cases where financial statements were sent back by the MBR for correction. Dr. Pace asked if in these discussions they had, Mr. Craig or one of his colleagues with the MBR, they checked whether these particular financial statements were ever sent back. Mr. Craig stated no, they did not check if they were ever sent back with the MBR directly, speaking about the 2021 financial statements. Dr. Pace clarified all

the financial statements in truth, any of them. Mr. Craig stated no, the financial statements of 2018, 2019, and 2020 as far as they knew and from what they read, were never sent back, they were resubmitted. Dr. Pace clarified he was saying sent back by the MBR, not resubmitted. Mr. Craig stated but from their interpretation of the stamp on the electronic filing of 2021, it appeared that the 2021 accounts were presented and submitted to the MBR. Their interpretation was they did not know exactly what was there because they could not speak with the MBR and the MBR could not speak with them about any particular person obviously. Their interpretation of the dates on the 2021 stamp was that they were submitted in 2022 at an early date, and they knew another set of accounts was resubmitted at a later date. What changed in those accounts between what was originally submitted and what was submitted at a later date, they had no visibility of.

Dr. Pace stated but returning somewhat to his question, they gave no interpretation that in some way the MBR sent back these financial statements. They were resubmitted, Mr. Craig was saying, but Dr. Pace was not asking about resubmission but sent back. Mr. Craig stated they did not know they were sent back. Dr. Pace confirmed they did not know they were sent back.

#### **No Challenge to Absolute Values**

Dr. Pace asked, when Mr. Craig was telling them about the changes, because earlier Mr. Craig said he did not enter into questions of value, rightly so because the assignment was more to look at the financial statements and what was reported, not whether the value was correct or not, but when they arrived at the conclusion that with the changes that were made, they would not pass and qualify, were they presupposing the values were bad. Mr. Craig stated no, they never doubted or questioned, let him not use the word doubted, they never questioned or challenged the absolute amount as a figure in the financial statements. They classified or questioned their timing and their classification, but as an absolute number, they never challenged, nor could they because they had no basis to try to challenge those figures. In their report they were not making any doubt or expressing any doubt about absolute value. Dr. Pace stated clear and thanked the witness.

#### **Conclusion of Testimony**

The Chairman thanked Mr. Craig for his time and asked whom they would call as the second witness of the day.

**Witness Testimony - Mr. Raphael Aloisio (ID: 43064M)**

***Mr. Raphael Aloisio (ID: 43064M) summoned by Dr. Delia***

### **Professional Background and Role**

Dr. Delia welcomed Mr. Aloisio and requested information about his professional background, work, profession, and experience. Mr. Aloisio stated he was supposedly retired. He had been a partner at Deloitte from 1990 to 2023. In that capacity, he was an advisory partner and audit partner, working across the entire sector. When asked if he had any particular specialization within certain sectors, as professionals in the field may have experience in care homes, aviation, or other areas, Mr. Aloisio stated his main specialization was in the tourism sector.

### **Relationship with ESE and Involvement in Tender**

Dr. Delia asked about Mr. Aloisio's relationship with the company called ESE, what it was, when it began, and whether at any time he had involvement with the tender referred to as the Evans Building tender. Mr. Aloisio stated he had a relationship with ESE over a number of years on various projects in which they were involved. In the case of the tender for the Evans Building, although there were different people from the office directly involved in certain services, he was a bouncing board on certain higher-level and technical matters. Dr. Delia confirmed that based on what Mr. Aloisio knew, Deloitte were assisting ESE in this tender. Mr. Aloisio confirmed yes, Deloitte were assisting, but his role was not actively involved in that capacity. There were some consultations during the process while they were working on their bid.

### **Consultation on Gearing Ratio**

Dr. Delia moved to the first issue or matter that had been raised and was being discussed, which was one of the reasons for the current proceedings, something called the gearing ratio. He asked whether Mr. Aloisio was consulted either by his colleagues at Deloitte or by ESE directly in his capacity as consultant, both during the tender as well as after the tender or at any time, and requested Mr. Aloisio explain without prompting on that question, if he was involved, when, and how. Mr. Aloisio stated there were actually several instances he thought were relevant. At the beginning of the process when they were considering submitting their bid, there were meetings where obviously they were tackling the question of structure, with which entities, and the tender requirements. They prepared their workings to see if they were compliant with the tender requirements. This was the first process in which they were involved, where basically they asked for his input on the structure they were looking at and basically their workings of compliance vis-à-vis the gearing ratio. He would be honest that the things they worked out appeared in line with the tender. When after adjudication the opinion came out that they were not compliant, they again asked for his opinion on that situation, where he personally did not agree at all with the conclusion. He gave them his professional opinions on why he

thought he did not agree with the conclusions reached that they were not compliant on that piece of work regarding the gearing ratio.

### **Explanation of Gearing Ratio and Interpretation of RFP Requirement**

Dr. Delia asked Mr. Aloisio to be patient as he would ask some technical questions and requested explanations in the simplest possible way. He asked Mr. Aloisio to begin by explaining what a gearing ratio was and then stated he would read a passage that Mr. Aloisio had likely read in his advice, but for good measure would read so they were making reference to it. The passage read: "A gearing ratio of not more than 3. This is to apply as an average of a consecutive three-year period between years 2018-2021, both years included. And in the case of tenderers submitting the proposal as a joint venture consortium association group of economic operators, this ratio is to be satisfied by each economic operator member of the same." The information had to be included in a specified location. Dr. Delia asked Mr. Aloisio to begin by explaining what a gearing ratio was, then with reference to what had just been read, to explain in more detail what he consulted on.

Mr. Aloisio explained that a gearing ratio is a KPI, a key performance indicator, used extensively to assess the financial stability of an entity or entities. Its importance lies in seeing if the company has the financial strength to enter into certain investments and commitments. A gearing ratio is the relativity of how much debt one has compared to how much shareholders' funds one has. The more debt there is, the more the financial stability is affected. The lower it is, the stronger one is. The higher it is, obviously one has burdens of interest and repayments. A gearing ratio is calculated by taking the debt and dividing it by the shareholders' funds, producing a number. When preparing a document like an RFP and asking for a gearing ratio, they can ask for a gearing ratio at a point in time or take it over a period of time. When taking it over a period of time, the logic is to eliminate the possibilities of distortions or one-off variations that might not reflect something fundamental or engrained but rather a spike or one-off occurrence. When viewing the period over a longer time, one eliminates deviations and variations. When someone says gearing ratio, the intention is to see financial stability. If doing it over a period of time, one does it to take a broader perspective and eliminate the possibilities that the number or figures being looked at are somehow distorted.

Mr. Aloisio then addressed the second part concerning the requirement that tenderers were asked to apply, "this is to apply as an average of a consecutive three-year period between 2018-2021, both years included." He explained what this meant, how he expressed himself about it, how he understood it, and what advice he gave. He noted there were reports and things that came out with which he did not necessarily disagree with certain stated things, but he would explain himself. Starting from the

beginning, the exact wording was "the ratio should be an average of a consecutive three-year period." The wording was "an average of a consecutive three-year period." The position he thought ESE adopted in the bid was one he thought was intended to show the overall gearing position of the company over the period, those three-year periods. They took the total debt of Year 1, Year 2, and Year 3, took their total, took the gearing or shareholders' funds of the same period, and arrived at what was the overall gearing ratio, the average gearing ratio for the three-year period. For him, this reflected the financial stability, the overall gearing position of the company over the three-year period.

In documentation and reports that existed, there was a situation where there were other interpretations, where basically it was being said that the gearing ratio should be calculated as the average of the three-years' gearing ratios. Approach 1 was to work out the gearing ratio for the period, which was total debt over the period by total equity for the period, producing a figure. The second approach being indicated was that one had to calculate by taking the gearing ratios of each year and calculating the average, and there was a statement that the only interpretation was that it should be computed as the average of averages. He did not agree with this at all because if someone had... Dr. Delia interrupted, asking for patience and clarification, as suddenly Mr. Aloisio was making reference to some report, and if yes, he needed to state which report he was referring to.

Mr. Aloisio stated there was the E-Cubed document that was basically presented. Dr. Mifsud Bonnici objected, stating he would object that this witness, a witness of fact, was making observations on another report. If necessary, the appellant should bring that witness and ask him questions. Dr. Delia stated absolutely not, this was a document presented and they were making reference to this document, questioning how he could not make reference to presented documents. The Chairman asked if they were referring to CA 4.1. Dr. Delia stated either CA 4.1 or CA 4.2, there were two, questioning how he could not make reference by a technical person to this document. Dr. Mifsud Bonnici stated he thought what Mr. Aloisio had said up to that point... Dr. Delia interrupted that this was not what he thought, stating if he had a presented document, how could he not ask about it. The Chairman asked for the objection to be made so he could decide.

Dr. Mifsud Bonnici stated Mr. Raphael Aloisio was present to testify principally about facts as he experienced them and what he gave as advice and services during the engagement period that Deloitte had, and thus could not give his expert opinion on another report that existed. He was objecting to testimony about those reports. Dr. Delia responded that the Chairman would decide on what Mr. Aloisio would testify about. Mr. Aloisio would testify about what he was asked. What he would be asked was to make reference to the reports before the board that were part of the process,

which was clearly within procedure and practice regarding what he was entitled to be asked about. The Chairman stated at that stage he would accept that the witness respond to that question.

### **Analysis of E-Cubed Report and Alternative Calculation Methods**

Mr. Aloisio stated that whether or not he referred to the report, the piece of work lay in an interpretation that was the basis of where he thought ESE were considered non-compliant, which was that average of averages had to be used as opposed to the average over the three-year period. He was convinced that although technically both were methods that could be used, he was convinced that if the tender wanted it to be average of averages, the wording in the tender would have been specific and would have said that the average, the gearing ratio must be calculated and computed as an average of the three-year averages and not with the wording that was in the tender, which specified that the wording should be "an average of a consecutive three-year period." The fact that one was saying average over a three-year period indicated one should look at the period holistically. There was no indication in the workings or in the RFP that the ratio should be calculated as average of averages. The word was singular, "average of a consecutive three-year period." If the RFP wanted to use the method of average of averages, he thought the wording would have been specific and would say the gearing ratio over the three-year period should be calculated as an average of the three-year gearing ratios and not in that manner. In fact, if they used the wording they used, sometimes the unequivocal method could be used saying to use methodology. Since there was no methodology and this piece of work existed, both in the process beforehand when the company was making their decisions and afterwards, the position was always interpreted, and he thought correctly, that the method should be the average over the three-year period and not average of averages.

Dr. Delia, with the tribunal's permission, made reference to document exhibit CA 4.2, which was a document prepared by E-Cubed Consultants dated 27th December 2023, the first paragraph. The first paragraph stated: "The RFP clearly states that the criterion of the gearing ratio is to be computed as an average of a consecutive three-year period. The only rational interpretation of this requirement is to compute an average of three consecutive gearing ratios. It does not encompass an approach whereby one ratio is obtained from the sums of the numerators and denominators over the three years." Dr. Delia asked if this was what Mr. Aloisio was referring to earlier, and if yes, what he had just explained now and what specifically contradicted this paragraph.

Mr. Aloisio stated he was referring to that paragraph and said categorically he did not agree with the word "the only rational interpretation of this requirement." He did not agree in any way, and there were a million cases one could see where the method ESE adopted was used because it had

advantages that gave more importance and was more watertight when dealing with fluctuations or weighting or materiality of numbers. He certainly did not agree with the conclusion that "the only rational interpretation" was correct. He was not saying the other method of average of averages did not exist, could not be calculated, or was not acceptable, but what he was saying, based on the RFP, was that one certainly could not arrive at the conclusion that the only acceptable method or the only correct method was what was called professionally, he believed the average of the three years, meaning the total, was much more effective than average of averages because there were many cases, and he could give an example.

### **Illustrative Example of Method Differences**

Mr. Aloisio provided an example. Imagine having a company that in its first year had not yet started operating and had a situation where it had, say, an element of debt of 500,000 and had 100,000 equities because it had just started. The gearing ratio would be 500 divided by 1, which came to 5. Then the operation started, they began generating money, the debt rose to 4.5 million, the equity to 1.5 million, producing a ratio of 3. Continuing to advance, the debt fell from 4.5 to 3.5 with the money collected, leaving more money in the company and the equity rose to 2 million. So, there was a company that in the first year had a gearing ratio of 5, in the second year had a gearing ratio of 3, and in the third year a gearing ratio of 1.75. This was a company whose financial position was certainly strengthening and certainly for RFP purposes was coming into a position that definitely one would look at favourably. If calculating using the method ESE used, taking the total debt over the three years and the total gearing over the three years, one would get a figure of 2.36. If taking it simply as average of averages, because the first year, where the numbers were immaterial, produced 5, one would get 3.25. Technically, if someone said Method A was the only way, when he was saying Method B actually, if he were assessing financial stability, he would say the second one was giving the figure or the good conclusions, he certainly could not accept the comment that the only rational interpretation was average of averages. One, because the wording did not say it. Two, because in the results and numeric examples, he had three numeric examples and would not take up their time with them, but each time he could show simply that the method ESE adopted was much more profound than average of averages because average of averages was easily distorted.

### **Standards and Methodology in Professional Practice**

Dr. Delia asked a final question. In Mr. Aloisio's practice, in his profession, in what was requested and in what he was explaining, was there any standard or any way things were supposed to be done, meaning he did not even need to explain because that was how it was supposed to be, when using

that word, how ESE went against what was supposed to be done. Mr. Aloisio stated no. When it emerged, when the non-compliant result came out, he went into more research and confirmed that there did not exist standards saying this was good or this was bad. Some preferred one and some preferred the other, and therefore the importance of specific guidance or detailed or accurate wording was crucial for him.

The Chairman stated they would proceed to cross-examination by the contracting authority.

### **Cross-Examination by Dr. Clement Mifsud Bonnici (Contracting Authority)**

#### **Role with Deloitte Team and Bidders**

Dr. Mifsud Bonnici, counsel for the contracting authority, stated he would ask some brief questions. He understood that during the time the English School of Language and Arrigo Group of Hotels were preparing their bid, Mr. Aloisio was leading a team that was consulting them on their bid. Mr. Aloisio clarified no, he was not leading a team. Because there were various, and as the lawyer said at the beginning, his involvement in the tourism sector was very active and he had various clients, various clients who were also interested in this process. He decided he did not want to involve himself in detailed matters as part of the team and leading a team, and there were different teams doing that work. The only thing he did was involve himself on technical queries and experiences, so he was not leading the team. Dr. Mifsud Bonnici asked if he was part of the team or not. Mr. Aloisio stated he attended meetings but was not part of the team doing the work, so they were consultations with the team with him, yes.

Dr. Mifsud Bonnici stated his question was simple, whether Mr. Aloisio was part of the Deloitte team that was giving advice to those two bidders on the bid, a very simple question, not to go around the bush and give a response. Was he part of the team or not, in the sense of what he thought was in his mind was irrelevant, what he was, was he part of the team or not, was he giving them advice. Mr. Aloisio stated he gave advice yes. As for being part of the team, there were roles, to tell him, he would not tell him he had to say, he would tell the facts. He was not actively involved from beginning to end. He came in on an as-needed basis, yes he did provide advice, yes. Dr. Mifsud Bonnici asked who else was on the team from Deloitte giving advice on this bid. Mr. Aloisio stated there was Michael Zarb. Dr. Mifsud Bonnici noted Andre Fenech was also mentioned. Mr. Aloisio confirmed Andre Fenech exactly, and Michael Zarb.

#### **Calculation Verification and Meetings**

Dr. Mifsud Bonnici noted that Mr. Faure, who was the CFO of the English School of Language, told them he calculated the average of the gearing ratios, whether average of averages or not, he calculated it and passed it to the Deloitte team. He asked if Mr. Aloisio checked those figures. Mr. Aloisio stated there were several stages. When Ivan Faure and the team submitted their workings before they finalized them, they passed them to the team, and at that point he was not involved in the process. He was involved at the very beginning when they were taking decisions to enter the bid, when they were making the companies and were assessing. Ivan Faure was doing the workings based on the numbers because these were already there to see if they were compliant. At that point he was consulted where Faure had the workings, not the final bid but at the very beginning when he had the workings and had the things to see if obviously before entering a bid that would cost a substantial amount of money, they wanted to see that things were compliant. At that point yes, they consulted with him to see if he agreed with the position they were taking.

Dr. Mifsud Bonnici asked if for this meeting both the English School of Language and the Arrigo Group of Hotels were present. Mr. Aloisio stated he thought... Dr. Mifsud Bonnici confirmed they had an engagement with Arrigo Group of Hotels about this bid, yes, they did. Mr. Aloisio confirmed yes. Dr. Mifsud Bonnici asked if for this meeting they were not present. Mr. Aloisio asked which one, the first or the last. Dr. Mifsud Bonnici stated the last he could not say anything about because Mr. Aloisio was not involved, about the first one. Mr. Aloisio stated the first one was at the beginning of the engagement, before they decided whether to enter the bid or not, sort of pre-process. Dr. Mifsud Bonnici asked if the Arrigo Group of Hotels was not present for that meeting. Mr. Aloisio stated the main contact point was Ivan Faure, who was basically the Financial Controller and the person leading the process.

Dr. Mifsud Bonnici asked how Mr. Faure passed these figures to him, whether by paper in a meeting on Wednesday. Mr. Aloisio stated no. Dr. Mifsud Bonnici asked if by email and he went in to check. Mr. Aloisio stated no, he had prepared them and they had a meeting where they went over the figures at one of the hotels, he did not remember if it was the Coastline or the Salini or the George, but there was an in-person meeting with him where they went over the things he had prepared, where he had copies of the accounts, had the structures, had worked numbers.

### **Review of Workings and Compliance Assessment**

Dr. Mifsud Bonnici noted Mr. Aloisio had told them earlier that they prepared the workings, which he had now confirmed, and his words were that they appeared to be in line with the tender. He asked what exactly Mr. Aloisio saw whether he saw the final ratio as calculated by Mr. Faure or whether he

did the workings step by step and recalculated them himself. Mr. Aloisio stated Faure had the workings done, had the detail of the workings and had the results that came from those workings. He did not do a recompilation of the workings, but he looked at his workings, they had the RFP there, and they saw the piece of work regarding whether they were compliant. The conclusion was yes, and there was no doubt that this piece of work on the gearing ratio could be done another way did not even cross their minds because they believed it was good.

Dr. Mifsud Bonnici confirmed that as Mr. Aloisio just told him, he did not redo a recalculation of the workings, he looked at them and as he told them, they appeared at face value to be in line with the tender. He asked if Mr. Aloisio was a partner at Deloitte. Mr. Aloisio confirmed yes. Dr. Mifsud Bonnici asked if he could say whether Deloitte were giving advice to other bidders in this tender. Mr. Aloisio stated as he had told him, there was another team working with another tender, yes. Dr. Mifsud Bonnici asked which tender that was. Mr. Aloisio stated for Eden, with Eden and another company. Dr. Mifsud Bonnici stated Valletta Luxury Projects. Mr. Aloisio confirmed yes. Dr. Mifsud Bonnici stated they won the tender. Mr. Aloisio asked what. Dr. Mifsud Bonnici clarified they won the tender, were recommended to win the tender, and asked if Mr. Aloisio knew that team gave advice on the bid that was recommended for award. Mr. Aloisio stated yes, he knew, but if he was being told exactly what the conclusion was, to be honest, he did not know exactly.

Dr. Mifsud Bonnici asked if he was consulted on it as well. Mr. Aloisio stated yes, which was why he was saying with both parties, his level was consultative and not involved in the bid itself. Dr. Mifsud Bonnici asked if he knew whether Valletta Luxury Projects passed the gearing ratio criterion by applying the method he called average of averages. Mr. Aloisio stated for him, to be honest, he was not involved in any way and did not think it was relevant because his position... Dr. Delia interrupted, asking for a moment and stating for completeness, the witness did not testify about this, meaning there could not be cross-examination about something not testified to.

### **Objection and Resolution on Credibility Challenge**

Dr. Mifsud Bonnici stated he could do it because he was challenging the credibility, with all due respect to Mr. Aloisio. Dr. Delia stated it could not be done. Dr. Mifsud Bonnici asked Dr. Delia to have patience, stating he knew what he was doing. Dr. Delia stated because he knew what he was doing, when he objected, he objected. Dr. Mifsud Bonnici stated because he was right. Dr. Delia stated no he was not right. The Chairman asked them not to speak at once. Dr. Delia stated not at all, not even in memory, in mathematics he was not good. The Chairman addressed Dr. Delia. Dr. Delia stated not Dr.

Delia, and when he was making an objection to the Chairman, he was making the objection, not to opposing counsel, and opposing counsel should not tell him how to do his work.

The Chairman addressed Dr. Delia. Dr. Delia stated not Dr. Delia. The Chairman stated surely, he would call him Dr. Delia. Dr. Delia stated the Chairman needed to decide. The Chairman stated as far as he knew, he always decided. Dr. Delia stated yes, he was not saying to the Chairman, and the Chairman knew. The Chairman stated if he pleased, since he decided, they should address him and not speak among themselves. Dr. Delia stated he was making the point as an objection, Mr. Chairman, to the Chairman. The Chairman stated yes. Dr. Delia stated there could not be cross-examination where there was no examination. The Chairman stated he knew he would listen to him and knew he would take a decision, always proceeding that way, but... Dr. Delia stated but he should not be prevented from making the objection. The Chairman stated that never happened. Dr. Delia stated not from the tribunal's side, he referred to his colleague. The Chairman stated and it never would happen; he could rest assured it never would. At this stage the witness would respond to the question.

#### **Calculation Methods and "Average of Averages" Terminology**

Dr. Mifsud Bonnici returned to questioning Mr. Aloisio. He stated they would enter more into averages. As the colleague rightly observed, he was not so good at mathematics, but he would give this example to see if he was understanding correctly how average was calculated. Using the board as an example, they had Dr. Micallef who was two meters tall, Mr. Swain who was one meter tall, and Mr. Camilleri who was one and a half meters tall. To calculate the average, one would count the two meters, the meter, and the meter and a half, arrive at the total, then divide by 3. He asked if Mr. Aloisio agreed this was how average was calculated. Mr. Aloisio confirmed yes.

Dr. Mifsud Bonnici stated that when Mr. Aloisio earlier began explaining how he interpreted this criterion, he mentioned three steps and asked if he was correct that first one counted the numerator, which was the debt of 3 years, counted it and arrived at the total. Mr. Aloisio confirmed yes. Dr. Mifsud Bonnici stated then one counted the denominator, which was the equity of the 3 years, and arrived at the total. They agreed. Then one divided the first total with the one below it. They agreed. Mr. Aloisio acknowledged. Dr. Mifsud Bonnici asked if one agreed one arrived at a figure. Mr. Aloisio asked him to continue. Dr. Mifsud Bonnici stated this was how he explained it and asked for yes or no. Mr. Aloisio confirmed yes.

Dr. Mifsud Bonnici asked Mr. Aloisio to tell him where the average was in that method as he explained it. They agreed how to calculate average, they agreed how Mr. Aloisio explained the method. He asked where in the method Mr. Aloisio just explained was the average calculated. He would tell him that in

the method as Mr. Aloisio interpreted this criterion, nowhere was average calculated. Mr. Aloisio stated with all due respect, he did not agree at all. If one had a situation of what was one's average gearing ratio over a three-year period, one's average gearing ratio of a total period was one's total debt over the three-year period divided by total gearing over the three-year period. That was the average gearing ratio. If asked whether, if one had to calculate it by simply getting the three averages and working out the average, was it an average over there, he would not say no. He was not saying and this was the question, he was not saying the method ESE adopted was the only way and the only rational and the only way for the ratio. There were two ways it could be computed. His opinion was clear that he believed the method ESE adopted was more robust than the other. One was simpler and many times simple did not mean more effective. When using the example of people of different heights, if trying to see over there, an important element was eliminated. Three people were taken and their position today was taken. Over there, there was only one way to work an average. Here there was a situation over a period of time. When saying over a period of time, one was trying to produce a ratio that was most reflective of the financial stability of the company over a period of time.

Mr. Aloisio returned to the piece of work. Was the method of average of averages incorrect? No. Was the method ESE adopted the only way that could be used? He was not saying that either. He was saying there were several methods that both were used, and he was saying the wording of the RFP, both at the beginning and today, he maintained was intended to see over a period of time. That was what he was saying.

### **Implicit Average and Source of "Average of Averages" Term**

Dr. Mifsud Bonnici stated Mr. Aloisio had every right to agree or disagree with him, but despite taking his time to explain to himself, he still had not explained where in his method, the three-step approach, average was used to calculate the final sum. Perhaps, if he was understanding him correctly, Mr. Aloisio was saying that with his method, which Dr. Mifsud Bonnici was saying had no average in it at all, one arrived at some average implicitly. Was that what he was saying. Mr. Aloisio stated he had responded. The method where the height of three people was taken and average was made was correct, he was not saying it was not correct, he was saying it was correct, certainly it was correct. But here they were not speaking about one variable which was height. They had a relativity of debt to gearing and they had this over a period of time. If he were to throw it the other way, if he were assessing without an RFP, so to speak, if he were assessing the gearing ratio of a company, he needed to take trend, needed to take weighting, needed to take the average...

Dr. Mifsud Bonnici stated sorry, but his question was very simple, it was a matter of yes or no. Mr. Aloisio asked him to tell him. Dr. Mifsud Bonnici stated but he could not get a yes or no from him. Mr. Aloisio had explained at length again but still had not identified which of the three steps used the method of calculation of an average. He was saying there was none, but Mr. Aloisio was saying there was, it did not matter. But if he was understanding correctly, this was a yes or no question, Mr. Aloisio was saying that with his method one arrived at some average implicitly. Was that what he was saying, yes or no. Mr. Aloisio stated one produced an average, yes.

Dr. Mifsud Bonnici asked, since many times Mr. Aloisio said he did not agree with this word "average of averages," who came out with "average of averages," where did he get this term "average of averages" from, where did he read it. Mr. Aloisio asked for patience. He stated first of all he did not tell him he did not agree with average of averages. He said that when he responded to the word "the only rational interpretation," when one had the words "is an average of a consecutive three-year period" and the conclusion was the only way to calculate that was average of averages, he was saying he did not agree. Not that average of average was not a solution, but that it was not the only rational... The Chairman stated he understood.

Dr. Mifsud Bonnici asked to make it clear, meaning Mr. Cordina in his report nowhere wrote "average of averages." This was Mr. Aloisio's own word that he was adding to explain to them today. Mr. Aloisio stated he was explaining. Dr. Mifsud Bonnici asked yes, or no. Mr. Aloisio confirmed yes. Dr. Mifsud Bonnici stated that was all, thanking the witness.

### **Conclusion of Testimony**

The Chairman asked if the recommended bidder had any cross-examination of this witness. Dr. Camilleri stated no. The Chairman thanked Mr. Aloisio and noted that according to what was agreed last time, the next witness would be Dr. Jason Grech. Dr. Delia confirmed yes.

### **Witness Testimony**

***Mr. Jason Grech (ID: 185071M) summoned by Dr. Delia***

### **Professional Role and System Responsibilities**

Dr. Delia welcomed Mr. Grech and requested information about where he worked, what he did, his function, and with whom. Mr. Grech stated he worked with the Department of Contracts as an assistant director, taking care of the procurement system. When asked about his function and job description, what he took care of, whether documents, electronics, data, or procedures, Mr. Grech

clarified he took care of the system, meaning the system fulfilled its purpose. Dr. Delia asked what system he was referring to. Mr. Grech stated the procurement system. Dr. Delia asked if he was referring to the digital system. Mr. Grech confirmed the digital procurement system. Dr. Delia asked if only the digital system was used today. Mr. Grech confirmed yes.

### **Tender Reference and System Operation**

Dr. Delia made reference to tender number 2 from 2022, MSPP. Mr. Grech confirmed 2022. Dr. Delia stated they agreed, noting they were calling it the Evans Building tender. He asked if Mr. Grech was also taking care of that one. Mr. Grech clarified no, he took care of the system, not individual tenders. Dr. Delia clarified that the system that was operated in this tender fell under his responsibility. Mr. Grech explained that every public procurement over 5,000 was done through the system, and he took care of that system. Each procurement was the responsibility of the contracting authority to take care of the process.

Dr. Delia asked for an explanation of how the system worked, particularly interested in when the tenderer was downloading, uploading, using the technical term, or applying, at which point in time they could change it or lock it, and requested an explanation of how it worked. Mr. Grech explained that normally the contracting authority, if they wanted to procure some service or works or supplies or make a tender through the system, there were many procedures, and he was trying to simplify things. They used the system and published. The economic operator then, whoever was interested, first could receive a notification if they set up notifications in the system, if there was a tender that might interest them. If this tender interested them, they could enter the system, download the documents, and if interested...

Dr. Delia interrupted, asking not about when they gathered information, but when they gave information. Mr. Grech continued that if it interested them and they saw it suited them, they launched that tool, the tool called WebTPT, the tender preparation tool, filled it in, and submitted the offer.

### **Tender Classification and File Size Limitations**

Dr. Delia noted that in this case, this was a particular tender, tenders were all different, and some were classified as price only, some as BPQR, some with totally different systems that would be studied particularly, and they would not enter there because it would open old wounds. He asked what quality of tender this particular tender was. Mr. Grech asked for clarification, stating he needed to look at these because he was notified about this a few days ago, in the sense to attend this, and was instructed to give certain information, but nobody told him to examine this part or that part. Dr. Delia stated he

would not take him into detail. Mr. Grech stated he understood, but to be able to give the information being asked, he needed to enter and see the particular tender.

Dr. Delia stated that in the summons, they requested a list of each bidder detailing the number of uploads and the total amount of each upload in Megabytes for each bidder. Mr. Grech stated on paper it seemed simple, simple information. Dr. Delia confirmed yes, which was why he was building up gradually. Mr. Grech stated the list of bidders was available to the public through the open tender detail's information. The hardest thing was that they wanted the file size of the offer.

Dr. Delia stated in fact that was why he was going to ask what happened when they uploaded, whether there was a limit to the information package, but Mr. Grech needed to explain. Mr. Grech stated regarding what was requested, he could explain why he had not yet brought it, because it was a longer procedure than expected. But for perhaps the other question of whether there was a limit, yes there was always a limit on how much could be uploaded. Usually, normally it was 100 Megabytes. Dr. Delia asked him to repeat. Mr. Grech stated normally, if one looked at the majority of tenders, as standard it was 100 Megabytes. Obviously if they had requests, they raised it more, according to the particular tender, it was raised more.

### **Challenges in Retrieving File Size Information**

Dr. Delia asked if from the upload, if he had to go search from outside, would the volumes that each tenderer submitted result. Mr. Grech asked as volumes, as size. Dr. Delia stated he was trying to establish. Mr. Grech stated the size, from outside would not, the system would not tell the public the size because it was not something that interested them, what interested them was who submitted the offer and the price. That was shown to the public. Dr. Delia stated that was why they needed his help, to tell them, because he would ask, the size of Katari's bid was, giving an example, 1200 Megabytes, and asking him to confirm yes or no, was it like that or less. The size of ESE's bid was 800 Megabytes, could he give this information.

Mr. Grech stated he could give this information but could not give it today. The reason, he could give the reason but... Dr. Delia stated he would not ask about all of them, he would ask about these three to make his life easier. Mr. Grech explained that to gather this information, one basically had to download the whole export, basically speaking about 152 files of 150 Megabytes that had to be downloaded into the government network, which due to security and such was a bit slow, plus they needed to extract, speaking about Gigabytes.

Dr. Delia asked for a moment, not to get involved. Mr. Grech stated he was trying to explain from the technical side why. Dr. Delia stated perhaps he was not understanding because he was not technical. He did not want the detail of what was submitted, meaning he was not asking him to download them. Mr. Grech stated this was to tell him the file size of the offers. The Chairman asked if he had to download it to know its size. Mr. Grech confirmed yes.

Dr. Delia stated that in some way or another, this documentation was given, passed, seen by, viewed by an evaluation committee already, no. Mr. Grech stated but the evaluation committee saw it file by file. Dr. Delia confirmed yes, but to see it they downloaded it. This exercise was already done. Mr. Grech clarified he would look at the offer, the package, if they wanted the size, if they wanted the information... Dr. Mifsud Bonnici stated he would make an observation because he was accused of not having such a good memory, but he had raised an objection about the size and how relevant it was, and this board had accepted it.

### **Physical vs. Digital Documentation Volume**

Dr. Delia stated what he was asking was this. If these were physical documents, perhaps he was not understanding, all he was asking was that their offer was like this, to satisfy the court they would say by folders, under several folders and half files, the other brought four boxes, the other came with trolleys so much documentation they had, between one and another. If physically at least he would ask. The Chairman stated he would try to be practical. If he understood correctly, interested in the three bids present here, speaking here. Dr. Delia stated mostly, if it was that difficult. The Chairman asked if Mr. Grech needed... Dr. Delia stated meaning to say that was the bid, two volumes of this one, this was the bid of the other, and the other was of that one.

The Chairman asked Mr. Grech if he would be in a position to compile this data. They were speaking about the bids of European School of English Limited, Katari, and Valletta Luxury Group, would he be in a position. Dr. Delia stated he engaged two people to download these and go over them because they were speaking about Gigabytes, meaning he would do his homework. The Chairman stated there were other things, so he would suspend and come tomorrow, trying to be practical.

Dr. Delia stated because the information he was given was that this was pretty much not only available but visible. Mr. Grech stated this was not visible, no. Dr. Delia stated because one could see somewhere the volume of what was submitted, meaning... Mr. Grech stated no. Dr. Delia stated six packages, each package how much would be in it, he was calling them volumes, meaning he knew one had six packages and the other had one. What he was trying to understand, Mr. Grech would tell him

these six packages were of one page each and that one was of a thousand pages, that he did not have and was asking, thinking it was going to be very easy. Mr. Grech stated it was not.

Dr. Camilleri asked on what was this alleged information based, because they did not have information about other offerors, what they submitted and the volume they submitted. Dr. Delia stated from what he knew, from the system, not speaking about this particular case, from what he knew from other tenders, sometimes he saw indicated the volume of what was uploaded. The Chairman stated this was news to him. Dr. Delia stated if he could pass it to them later, let him pass it. Mr. Grech confirmed exactly, as the Chairman was here, he had other questions for this witness so he would know what to do.

### **Tender Extension and Closing Date**

Dr. Delia asked if in this particular tender there any extension of the closing date was, and if yes, how many times it was done, if yes by how many days it was extended, and if yes why it was extended. Mr. Grech stated he could tell him, he would search for him because as he told him, by memory, he dealt with thousands of tenders, meaning he could check when the extensions were made, by how much the extensions were made. Why the extensions were made he would have to ask the contracting authority. Dr. Delia asked if he did not have it in mind like that if there was an extension. Mr. Grech stated no.

Dr. Delia asked when there was an extension, for what reason could it be, because someone requested it or because the authority, the department, decided. Mr. Grech stated they were made for many reasons. He would give an example. If something happened, nothing to do with understanding, for example the contracting authority had a deadline to respond to clarification, six days before closure and responded three days before closure, they always encouraged the tender to be extended three days to be as if they responded six days.

Dr. Delia asked when there were cases that were not, let him call them like this, administrative, but were technical, was it flagged upwards, meaning did it reach him, because Mr. Grech told him... Mr. Grech confirmed yes, if there was hope there was an issue in the system. Dr. Delia stated he would give an example so he would understand where he wanted to get to. Not speaking about this case, there was a question about the emergency department of Mater Dei Hospital that was also connected with the tender to do the mental health wards, and there was publicly, and he also mentioned publicly, that there was a bidder who tried to enter the documents and did not succeed. He asked if that reminded him of something, if he knew about this. Mr. Grech stated no.

Dr. Delia asked if in this instance, he remembered if there was something that referred to, this happened something, the camera was caught so they would have to extend, he did not remember anything about this. Mr. Grech stated he would say this depended entirely on each case, because if by chance, and truly there could be by chance a bidder, he would not mention anything from the cases, there could be a bidder by chance finding difficulty in submitting, to upload or whatever. They generally contacted them first, then it depended how much time was left.

### **System Issues and Extension Protocol**

Dr. Delia asked but when something did not go well, for a moment, then if it resulted that in this case it was like this, they would tell them. For a moment he was asking if the question of extension was not administrative, meaning not requested by any of the bidders and not because as he said they did not manage but because of something technical, meaning the system he was taking care of had a problem, they did not come to tell him. Mr. Grech stated they would say as the Department of Contracts they always took the route of caution, meaning, as much as possible seeing what the problem was because this could be someone doing it maliciously, meaning it could be someone to make them renew, but if they suspected there was an issue, the route was always of caution, because otherwise...

Dr. Delia asked what "of caution" was. Mr. Grech stated to renew, until they were certain what it was, if there was a problem, if it was a problem with the system or not. Dr. Delia asked if this was done often, meaning he was understanding correctly. Was it done once a year that it happened there was an extension, once a month, or once a week. Mr. Grech stated it was not done as often as mentioned but it did happen yes, it happened.

Dr. Delia stated he would ask them to verify, he thought. They made reference to their letter of objection dated 12th February 2024; on the last page there was a document that perhaps they would show him. Dr. Mifsud Bonnici suggested it should be one of the documents to exhibit so he would not have difficulty. Dr. Delia stated he would show him. The Chairman stated so he would know what to confirm. Mr. Grech stated that was public, that document meaning there was nothing to confirm, it confirmed itself because it was public. Dr. Delia stated if it were not, he would have come again and told him to confirm that, now either confirm that. Dr. Mifsud Bonnici stated there was no objection on the authenticity of that document.

Dr. Delia stated on those two only. If there was an extension of the closing date, if yes, how many times, from which date to which date, and the reason why it was extended. The Chairman added then the list. Mr. Grech stated the reason the contracting authority would have to tell them. Dr. Delia stated he was assuming it was something related. Mr. Grech stated but they did not renew, they were IT. Dr.

Delia asked if the electricity went, everything cut and the system stopped for him, would not... Mr. Grech stated if the system fell, they could not renew because the system fell. Dr. Delia asked what they would do then.

### **Authority and Decision-Making on Extensions**

The Chairman asked to wait, meaning the request came to him from the contracting authority then. Mr. Grech asked what. The Chairman clarified the request for extension came to him from the contracting authority. Mr. Grech stated no, as the Department of Contracts they could suggest, they never forced, they would say listen the case seemed genuine. Dr. Delia stated at noon minus twenty-five minutes and a particular tender closed today, the system fell for some reason, the system fell. Mr. Grech confirmed things that happened. Dr. Delia asked who should renew. Mr. Grech stated at that time it was not renewed and the tender could close. In fact, that was why they had, and this was as stated in the terms of use to advise economic operators, if they were thinking of submitting an offer, think beforehand because something could happen in the system. The same principle as the traditional mode where for example if one left it to the last to take the offer in a box, there could have been a traffic accident.

Dr. Delia stated sometimes there was a case where at noon and five a tender of 250 million arrived. But he was asking if it resulted, in this case interested him, in this case there were difficulties, he was asking if the decision was taken that it be extended and for what reason because from the information, they had it was extended. The Chairman stated at this stage he thought to suspend his testimony, bring all the information, and tomorrow come again with all the information.

### **Proposed Information Delivery Method**

Dr. Mifsud Bonnici stated he could suggest something, because he thought this component was easier to bring about the extension. Mr. Grech confirmed the extension yes, but he would bring. Dr. Mifsud Bonnici asked if there would be an objection to the information entering by email. What did he think? In his hands, he did not want to force him, he was being... The Chairman stated if by email, then to make submissions about them if, meaning if subject to questions he could be present.

Dr. Delia stated it could be that the information given as the colleague was suggesting was enough, meaning... The Chairman stated Mr. Grech at this stage would be suspending his testimony, bring the information, if available he had it today, circulate it with his office, and they would circulate it with all the parties. Whatever happened but this way it would be ready tomorrow morning. He should still please come back here so they could close his testimony with the cross-examination that would be

needed, thanking him. According to the list he had, Mr. Camilleri. Dr. Delia confirmed yes. The Chairman stated they would continue the testimony of Mr. Sharlo Camilleri.

### **Witness Testimony**

***Mr. Sharlo Camilleri (ID: 146076M) summoned by Dr. Delia - Continuation***

### **Financial Bid Requirements and Price Compliance**

Dr. Delia welcomed the witness back and stated he would try to continue with the sequence from where they left off last time. Among other things, regarding the part the witness was explaining, they agreed this was a BPQR type of tender, and they agreed the division between the financial bid and technical bid was 40-60 in that order. What he wanted to ask was whether this tender, as the witness had also stated, had three stages: the administrative, the technical, and the financial. The witness had also made reference to a particular document that was the price submitted by what subsequently became the recommended bidder, and they had the document that was submitted with a price of 1.2. Dr. Delia did not know if the witness had been following, but they had extensive discussion about ratios, gearing, averages, etc. Regarding what had to do with the price, they agreed the tender requirements were very clear and requested an absolute number, a number. Mr. Camilleri confirmed yes.

Dr. Delia stated there were no formulas and ratios and averages, an absolute number was required. Mr. Camilleri stated he thought saying there were no formulas was incorrect because there was the financial bid form that was detailed requiring the annual and the final. Dr. Delia clarified not a form, methodology, not form, calculations, an absolute number yes. There was the form and an absolute number had to be quoted. When there was the price, was there a requirement in the tender saying the price had to be above a certain amount, meaning just as the gearing ratio could not be more than 3 and the other had to be .75, that one had an amount, and if yes what was it. Mr. Camilleri stated yes, but to be correct, he would look at the documents please.

Mr. Camilleri stated he would quote from the tender on page 16, Section 6, B financial offer. The Chairman asked for the page number. Mr. Camilleri repeated page 16, Section 6, B financial offer. Dr. Delia asked for a second. Mr. Camilleri read: "A concession fee paid annually in advance by the concessionaire to the contracting authority, the amount of which shall be not less than €302,000. The concession fee shall be due and payable for the first year on the signing of the concession agreement and on such date each year." This established 302,000 concession fee payable every year, so that was the minimum.

Dr. Delia asked for how many years the concession would be given. Mr. Camilleri stated page 4, section 1.3, last paragraph. Dr. Delia asked for a second. Mr. Camilleri read: "Subject to the term of this RFP and the respective contracts, the term of execution of the concession shall be of 65 years from the date of signing of the respective contract." Dr. Delia stated 65 years, and going back, that 65 years with the other section 1.3 and the other requesting in 6B 1 €302,000, what was the minimum the offer had to be. Mr. Camilleri stated if he was not mistaken, it came to 19 million, 19 million. Dr. Delia stated going to the government, 19,630,000. Mr. Camilleri confirmed.

Dr. Delia asked what would happen if there was some tenderer who offered less than 19,630,000. Mr. Camilleri stated it would become non-compliant. Dr. Delia asked it would become what. Mr. Camilleri stated non-compliant. Dr. Delia stated meaning they would be eliminated. Mr. Camilleri confirmed yes. Dr. Delia asked at which stage this would happen. There was a day the tender closed for submissions, this was done electronically and everyone submitted all the information at once, they agreed. So exactly after this was done, what would have happened and at which stage would they have visibility of the price so they could eliminate those who gave less than 19,630,000.

Mr. Camilleri stated he was in doubt, he did not know according to the system where it was, whether it was in the first part or the last part, he did not remember, he was sorry. Dr. Delia asked if he could find it in the tender and would help him by saying he had mentioned there was the administrative part, the technical part, and the price part. He could search because he could not suggest as he was doing examination not cross-examination. He would help him another piece. That document they were calling the tender evaluation page about which he testified last time, where it resulted the price of Valletta Luxury Projects with the particular ID was 1.2 million, when would they have seen that. Mr. Camilleri stated at the end, one moment. Dr. Delia stated if he needed time, take the time, he was not trying to catch him on something. Mr. Camilleri stated he knew. Dr. Delia stated this was the practice and he was only asking the normal practice, then the board would judge what happened and did not happen. Mr. Camilleri stated financial because, at financial stage, it was part of the financial.

### **Evaluation Process and Compliance Stages**

Dr. Delia clarified meaning first they saw if there was administrative compliance. Mr. Camilleri confirmed yes. Dr. Delia stated they had what was mandatory, and what could pass or be corrected. Mr. Camilleri confirmed yes. Dr. Delia stated then they had the substantive, technical part, call it what one will, and the same way, they had requirements that were mandatory and perhaps others that could be corrected. This clause in the financial now, section 6B 1, that gave the 302 but if calculated came to 19.6, could it be changed. Mr. Camilleri stated no. Dr. Delia asked if the bidder could change

it again, tell them listen he submitted a price, whatever it was, he would raise it a bit, could he do that. Mr. Camilleri stated no, only correct mistakes could be made. Dr. Delia asked if they could ask him to do that. Mr. Camilleri stated change no, they could not ask him.

Dr. Delia stated meaning this was a mandatory clause. Mr. Camilleri confirmed yes. Dr. Delia stated section 6B 1. In the appellant ESE's bid, had they arrived at a price. Mr. Camilleri asked him to clarify what he wanted to say. The Chairman asked if they arrived at a financial evaluation of the appellant. Mr. Camilleri asked about which one they were speaking because now... The Chairman stated European School of English. Dr. Delia stated or Iconic. Mr. Camilleri stated not that one fell in the first phase. The Chairman stated in the first phase, the administrative. Mr. Camilleri confirmed yes because he was getting confused because there were... Dr. Delia stated it did not matter. Mr. Camilleri stated not that one fell in the first part so they would not have arrived there. Dr. Delia asked so what. Mr. Camilleri stated they would not have arrived at the financial part.

Dr. Delia stated but their price came out. Mr. Camilleri stated at the opening bid but then they did not consider it, they did not reach there. Dr. Delia stated but everyone would know the price. Mr. Camilleri confirmed yes. Dr. Delia stated it was not opened later then. Mr. Camilleri stated no because the open bid. Dr. Delia stated first stage, second stage, then it opened. Mr. Camilleri stated in the opening report, which he thought was part of the acts, it was noted how the offers appeared, how the offers came out. Dr. Delia stated from the very beginning. Mr. Camilleri stated he did not remember how much Iconic's was. Dr. Delia asked if they were not asked to make some clarification or something about the price. Mr. Camilleri stated at that stage no. Dr. Delia stated Iconic. Mr. Camilleri stated they could not even, he thought.

### **Katari Bid and Price Submission**

Dr. Delia stated exactly. There was someone else being discussed who was also an appellant, the company was called, or the company was called or the bid was called Katari, the company was called Plan Property Limited, he remembered this other tenderer. Mr. Camilleri confirmed yes. Dr. Delia stated this one also submitted a price and last time he told them what it was. Mr. Camilleri confirmed. Dr. Delia stated they agreed, as far as he remembered. Mr. Camilleri stated 1.2 million as far as he remembered. Dr. Delia stated no, Katari, 39 as far as he remembered the witness had told them. Mr. Camilleri stated he would check because he did not remember. Dr. Delia asked if they changed the price or gave them another price. Mr. Camilleri stated no one could change. Dr. Delia stated no one could change.

### **Consultants Engaged for Evaluation**

At the beginning of his testimony, the witness had told them that for the appellant, Iconic, where there was ESE, they had asked some consultant to assist them about the question of the gearing ratio, he had mentioned two. Mr. Camilleri confirmed yes, correct. Dr. Delia stated they agreed. Mr. Camilleri confirmed yes. Dr. Delia stated one did two reports. Mr. Camilleri confirmed yes. Dr. Delia stated E-Cubed and the other, Prof. von Brockdorff, gave them one report, yes. Mr. Camilleri confirmed correct. Dr. Delia asked regarding Iconic's bid, regarding Katari's bid, excuse him, if they requested any help from any consultant, particularly about their gearing, about their accounts, about their administrative submission related to the change that was made in their accounts. Mr. Camilleri confirmed yes. Dr. Delia asked of whom they requested. Mr. Camilleri stated of E-Cubed in the first report.

### **E-Cubed Report on Katari Compliance**

Dr. Delia asked of E-Cubed in the first report, correct, and was there a particular part he could refer to. They were speaking about the report, there were two reports, 4.2 and 4.1. He asked which one was being referred to, one dated to help him, 27th December 2023 which they had the opportunity to see already, and the other if he was not mistaken, he could not find the date. The Chairman stated 8th August. Mr. Camilleri stated 8th August. The Chairman stated 4.1, exhibit, they were referring to exhibit CA 4.1. Dr. Delia apologized, he had the report in his hands to make reference to it, he was trying to find it. Dr. Mifsud Bonnici stated because it was not the last page because there was an appendix, two pages. Dr. Delia stated 8th August 2023, he found it too.

Dr. Delia asked which of these reports was being referred to, that of 8th August or that of December. Mr. Camilleri stated of 2nd August. Dr. Delia stated OK, which part please, so now they were speaking about 4.1, before they were speaking about 4.2, now they were speaking about 4.1, which piece please. Mr. Camilleri stated section 4, about Katari he was being asked. Dr. Delia confirmed yes. Mr. Camilleri stated section 4, he thought it came to page 6, the report had no page numbers. Dr. Delia confirmed it had no page numbers; he was right. Where it was written GCL, KDL and KHL, he was imagining those were the components of the consortium. Mr. Camilleri stated they were explained above, Golden Care, Katari Developments and Katari Holdings.

### **Analysis of Cumulative Annual Turnover Compliance**

Dr. Delia stated when one had for example point number 1, one had compliant, compliant, compliant, result compliant. Mr. Camilleri confirmed yes. Dr. Delia stated point 2 had compliant, non-compliant, non-compliant but the result came compliant, what had happened there. Mr. Camilleri stated he remembered the question, "the cumulative annual turnover for the same 3-year period." Dr. Delia

stated, "is not less than 7.5 million." Mr. Camilleri confirmed, so here it was asking cumulative annual turnover for the same 3-year period. Dr. Delia asked what happened there exactly. Mr. Camilleri stated he needed to see what was being asked in the tender. Dr. Delia confirmed yes.

Mr. Camilleri stated he did not remember offhand. Dr. Delia stated so, meaning of the 3 companies there was Golden Care Limited which was compliant and therefore had cumulative annual turnover for the 3-year period of more than 7.5 million, the other two companies did not have it. If he continued, more than 7.5, the first one had 8.6, the others had 5.9 and the third one, Katari Holdings had only 2.9, meaning less than half of what was requested. Mr. Camilleri stated he would read, in the report itself there was a footnote. Dr. Delia stated correct on the same page. Mr. Camilleri stated yes on the same page. Dr. Delia stated "it is noted that" correct. Mr. Camilleri stated yes, correct, it referred that the threshold should be reached between the three in cumulative salt, meaning not referring they should reach it individually but the bidder in total, meaning if the three were counted in total, they should exceed that amount and in this case they exceeded.

Dr. Delia asked him to say how it was calculated, the three in total how they exceeded. He would make a suggestion Mr. Camilleri needed. They took of each year, he would borrow the 3 steps of colleague Mifsud Bonnici, counted them together, and divided them by 3. Mr. Camilleri stated no, they were not making average. Dr. Delia asked what they did to exceed the threshold. Mr. Camilleri stated here they were asking total. Dr. Delia stated no, please only the witness should answer. The Chairman asked for silence please, the witness should respond. Dr. Delia stated because there was one compliant and two non-compliant. The Chairman asked to give his interpretation. Dr. Delia asked to explain how one compliant and two non-compliant became compliant.

Mr. Camilleri stated because one had to see the final interpretation. Dr. Delia confirmed yes. Mr. Camilleri stated the tender document on page 8, Section A, A.2, spoke about cumulative annual turnover. Dr. Delia asked what that meant. Mr. Camilleri stated during, but here different from what was being asked in... Dr. Delia stated no, talk about this. Mr. Camilleri stated here it was asking a cumulative annual turnover, obviously of the bidder included. Dr. Delia stated he would try to help him a bit, he could not suggest. Cumulative did not mean because one kept bringing from year to year or if not, what did cumulative mean. Mr. Camilleri stated yes but here it was not making a distinction between the bidder and its components, meaning it had those three. Now here the analysis, the expert did them one after another, because if one did not reach it one of them could reach it for all of them and he wrote it in this manner, did not mean because he wrote non-compliant the bid would fall.

Dr. Delia stated correct, he thought non-compliant meant that. Mr. Camilleri stated in the end the bid was compliant according to the tender specifications. Dr. Delia stated he would understand this, there was one company of them compliant and two non-compliant, he should understand a bit how with a result of two non-compliant, he did not want to do the average of averages thing here, it was not like that, whether he was not taking them year by year or together, in the numerical terms at the top, how did it become compliant here. Mr. Camilleri stated here they were assessing Katari Holdings. Dr. Delia stated yes, about that they were saying. Mr. Camilleri stated now if in the report it was written, whether they were within that range its components, of whom Katari Holdings was composed, did not mean it was not compliant in terms of eligibility criteria.

### **Distinction Between Report Details and Overall Compliance**

Dr. Delia asked what it meant, so why did they go and get people and pay them to see if it was non-compliant so that if it was non-compliant, it did not mean it was non-compliant. Mr. Camilleri stated but that was their part not his part what they wrote in the report, these things. Dr. Delia stated correct, he would remind him they were in the realm of transparency of procedure because it was public procurement not private. Mr. Camilleri stated it was before them; one could see it. Dr. Delia stated they would see what his part was not. The Chairman asked to make the question Dr. Delia.

Dr. Delia stated the question was this: They engaged an expert and at the beginning of his testimony he told him they relied on this expert. This expert in line to under point 4 in report CA 4.1 was telling them the components of Katari Holdings were 3. Two of them on this were non-compliant. But the overall position was compliant. He was asking him to explain how, by which mechanism, interpretation, clause of the tender document gave the opportunity that from being non-compliant to call it compliant. Mr. Camilleri asked the Chair if he could request guidance where in the RFP document it referred to these things they wanted to see please. Dr. Delia asked guidance to whom. Mr. Camilleri stated because he to respond. The Chairman stated he needed to have the tender document before him. Mr. Camilleri stated he followed the overall opinion on the requirements with the tender document.

Dr. Delia asked no questions asked. Mr. Camilleri stated alright. Dr. Delia asked no questions asked. Dr. Mifsud Bonnici stated direct question, he objected to it. Mr. Camilleri stated obviously they had the numbers in their hands. The Chairman stated a tender document could not be given particularly where this clause was, in this report if he was not mistaken on page 6 of exhibit 4.1, it was attached with the tender document, there was a particular clause it seemed. Dr. Delia stated if the board wanted to make precise reference to it, it made no difference to him, he was trying to establish fact.

The Chairman stated if he went to page 8. Dr. Delia stated the better someone else did not give the opinion. Mr. Camilleri stated A2 exactly.

### **Tender Document Interpretation of Cumulative Turnover**

The Chairman stated the witness should have it so he would know what to confirm. Mr. Camilleri stated "The cumulative annual turnover during a consecutive three-year period which period may range from 2018-2021, both years included, shall not be less than 7.5 million, 7,500,000 euros over a three-year period. This information shall be included in the eSPD question reference number." There was nowhere that this had to be reached for each year. Now if the consultant pleased to note in the report more information, his analysis, more than they needed, they in the end saw the overall opinion. Now in this case it gave them an idea and guided them and everything, they also knew how to do 1 + 1.

Dr. Delia stated so since he knew how to do 1 + 1, he would take him a bit lower on the same page where... Mr. Camilleri asked of the report please. Dr. Delia stated what he had before him. Mr. Camilleri thanked. Dr. Delia stated of the 4 of E-Cubed, meaning CA 4.1 where there was the notation in numerical detail now of 2. So, 2 they had the requirement on the left, on the left, and it told them it should be cumulative 7.4, there were 3 columns compliant, non-compliant, non-compliant then there were the precise numbers below 8.6, 5.9, 2.9. He first told him because two of them did not have enough, did not mean they eliminated the tenderer because they did well with the other, to make the average of those 3 numbers.

Mr. Camilleri stated here they were not asking average. Dr. Mifsud Bonnici asked why average was relevant. Dr. Delia stated because he said so. He said if these two did not have... Mr. Camilleri stated he did not say that. Dr. Delia stated so if he did not say that he should explain. Mr. Camilleri stated not true, he never mentioned. The Chairman stated first the witness read in a complete manner the tender document page 8 roman numeral 2, nowhere did he hear the word average. Mr. Camilleri confirmed certain.

Dr. Delia stated so, they went back, they would listen to what he said and what he said would be so. When he told him listen there was one compliant and two non-compliant, he told him because if these two were not, the other could be compliant, it would be enough. Mr. Camilleri stated no that it compensated for them but not average. Dr. Delia stated alright, it compensated for them. The Chairman asked, he would clarify, did he have anything to add. Mr. Camilleri stated he mentioned average in truth, but he told him it was not like the gearing ratio, he made a distinction. Dr. Delia

stated he was not suggesting to him. Mr. Camilleri stated he would not take average here. Dr. Delia stated it compensated for the other.

### **Objections on Relevance to Appeal Grounds**

Dr. Mifsud Bonnici stated he would make another observation. This line of questions was completely irrelevant to the appeal, there was no grievance in this sense, up to now he remained quiet and silent, if he thought he did not notice, he noticed from the first, but this was all irrelevant and he would object to this line of questions. The Chairman asked to explain the relevance please. Dr. Delia stated if one took the cumulative Mr. Chairman under footnote 2, in the explanation, there was how much the number was over 7.5 of the first column of GCL it was 8.6, the second one 5.9, the third one 2.9. Now he was asking the obvious, if here it was written non-compliant because obviously 5.9 was less than 7.5, obviously 2.9 was less than 7.5, he was telling him but the 8.6 made good for them, how did it make good for them.

Dr. Mifsud Bonnici stated it was good explanation, but he thought they understood what his argument was from the questions that he did not explain to the board how it was relevant to the grievance. Dr. Delia stated not relevant, the relevance was this. The Chairman stated he wanted to understand with which grievance it was. Dr. Delia stated the relevance was this, the board was showing him that regarding the technical financial assessment, the evaluation board was speaking, relied on the reports made by E-Cubed. Now, he needed to show that point, he needed to prove how and when even when the report, because then it would affect his, when in the report it told him he understood wrong, even where the report itself was going against what was in the tender, they still relied on it, that was how he was trying.

Dr. Mifsud Bonnici stated he still had not heard with which grievance. Dr. Delia stated this was not something small Mr. Chairman, that one had a requirement over 7.5 and this one was telling him it was 2.9, make the average and they still remained below. Dr. C Pace stated Mr. Chairman one, not to repeat what Dr. Clement said but irrelevance with the grievances raised by the appellant in this appeal one. And two he thought the appellants were focusing so much on Katari to try to eliminate them, if he turned the page before, he would see that of his clients, the appellants that Dr. Delia was patronizing were non-compliant too.

Dr. Delia stated they were making a deal. Dr. Pace stated no they were not making a deal, he already did it now whether he understood or did not understand was another story, but he did it. The Chairman stated at this stage, he would say he had the appeal letter before him here. The third grievance named he would read to be completely correct, "Corrections and amendments to Katari

Hospitality's Financial Statements during extensions to the deadline"; the issues raised in that grievance, he was not seeing any point. Dr. Delia stated the Chairman was right. The point he was making now was this, for relevance purposes, if the evaluation board relied, relied on this E-Cubed document to make his evaluation, of Katari, of others, and he was showing where its report was faulted, if he succeeded in proving it but if he succeeded that was why it was relevant, it was fundamental, they could never allow someone to rely on this when this was flawed from the start.

Dr. Pace stated if it was so flawed, the appellant's offer would also be eliminated. The Chairman stated one by one, he would listen to the contracting authority, then Katari, thank you. Dr. Mifsud Bonnici stated he would not address the graduate declarations being made by the appellant about this report. In Maltese they were going around the bush, but they were not telling where the bush was, he did not say how it was relevant, the board made an observation where it was relevant to the third and Dr. Delia had just told them you were right, so the objection should be accepted on its own because it was not relevant.

Dr. Pace stated Mr. Chair if it did not matter. The Chairman stated he would listen to everyone. Dr. Pace stated he was trying to raise a new grievance that absolutely should not be raised, suddenly they were saying the report was not good, he would say again, if Dr. Delia wished that measure to be used, with all due respect he was shooting himself in the foot because in Nobu's it was also Not Compliant, meaning he could not understand, it was so clear. Dr. Delia stated now they would get to it, but everything in its time.

### **Chairman's Ruling on Relevance**

The Chairman stated Dr. Delia, please one by one, did he have anything to add Dr. Pace. Now he would speak. He at this stage was not seeing relevance with grievance number 3, since that was not raised in the grievance, he was not seeing relevance to it, even if, he thought the witness who had to say said it, now then the board could make its interpretation, meaning the board knew with which page in the tender document the criterion was linked and obviously this board could make its analysis. Meaning he would be accepting this objection and was not seeing its relevance. Any further questions.

### **Receipt and Verification of Expert Reports**

Dr. Delia stated he was relieved the board would enter into it itself. When they received these reports, the first one, the second one, then subsequently that of Brockdorff, did they make any discussion, any inquiry, any verification on the reports, he already mentioned to him in the first testimony or did they rely on these reports. Mr. Camilleri stated if he remembered correctly, apart from the submission of

the report, in one of the meetings, the representative of E-Cubed was present and also explained to them how his own report should be interpreted, which probably he did not know if he was called as a witness, he could explain in more detail himself too.

Dr. Delia stated now... Mr. Camilleri stated but he, if he was not mistaken, he did not know if it was noted in the minutes that he explained to them the report and obviously they had the figures in their hands and could verify what he was saying. Dr. Delia stated now after this August report, they requested in December a report from E-Cubed itself signed on a technical guidance note, they mentioned it on Nobu, so this was an export report as requested by the evaluation and then adjudication, meaning in a way to cover everyone. Mr. Camilleri confirmed yes. Dr. Delia stated of August, of December they requested technical guidance on Nobu. Mr. Camilleri stated on the reply he gave. Dr. Delia stated correct.

### **Technical Guidance Requests for Different Bidders**

Regarding what he just mentioned about Katari, did they request any other report, any technical guidance. Mr. Camilleri asked if they were speaking about the gearing ratio. Dr. Delia stated on whatever, on Katari's bid they requested after, so they had a report on all of them, August, by December they requested a technical guidance report on Nobu only, he was asking if they did not request any technical guidance on Katari. Mr. Camilleri stated that technical guidance they requested in December from E-Cubed related to the gearing ratio was specifically linked to the reply Nobu gave after the request for rectification came out if he was not mistaken.

Dr. Delia stated of Valletta Luxury Properties, note 2, now he took him to the page not of 4, not of 5, it was 6, correct. Of Valletta Luxury Properties, note 2, or not even a column, row 2 also had a situation where there was compliant, Eden Leisure, and non-compliant Benny Holdings, overall opinion compliant. He would follow the board's direction and would not enter into how it was calculated and not calculated etc., but he would ask, nor for these did they request to have technical guidance. Mr. Camilleri asked to clarify on which criterion he was speaking because he was getting confused. The Chairman stated exhibit CA 4.1. Mr. Camilleri stated because their request was. The Chairman stated page number he did not know, but it came to section 6 of the report.

Dr. Delia stated before they were looking at 4 and now they were looking at 6, on the same row, this time instead of three columns because there were three consortium members, there were two, one called Eden Leisure and the other called Benny Holdings. One compliant of the 7.5 million and the other non-compliant. Mr. Camilleri stated they were speaking to be clear. Dr. Delia asked if they requested technical guidance. Mr. Camilleri stated on section 6 of Valletta Luxury Projects. Dr. Delia

confirmed yes, row 2, the cumulative 7.5. Mr. Camilleri confirmed yes. Dr. Delia asked now because there was one compliant and the other non-compliant and result compliant, did they request technical guidance.

Mr. Camilleri stated this was technical guidance, the difference between the technical guidance that came out. Dr. Delia stated apart from the August report. Mr. Camilleri stated the difference between this technical guidance and technical guidance requested in December were two different things. Here they were speaking about the evaluation of the bid in general, the technical guidance requested in December was after they issued the request for rectification on something different, it had nothing to do with this, where the overall opinion of the gearing ratio was non-compliant. Here the overall opinion although there was written non-compliant under Benny Holdings, the overall was compliant, there was no reason why. Dr. Delia stated so no because there was no reason why. Mr. Camilleri thanked him.

#### **Numerical Comparison Across Three Bidders**

Dr. Delia stated he would read now the numerical explanation below, so to compare the three at once now at a go, of appellant Iconic in 2 it was compliant for the two, and the cumulative it had 23 and 22 million years after year correct, meaning more than 7.5 below. In 4 there were those he mentioned before, 8.6, 5.9 and 2.9. In this, in Valletta Luxury they agreed there was not even a number. Mr. Camilleri confirmed yes. Dr. Delia stated empty. Mr. Camilleri confirmed correct. Dr. Delia stated nothing more please.

The Chairman stated very good. They could proceed to cross-examination of Mr. Sharlo Camilleri.

#### **Cross-Examination by Dr. Clement Mifsud Bonnici (Contracting Authority)**

Dr. Mifsud Bonnici stated Mr. Camilleri, two questions very briefly. Before, the lawyer for the appellant asked him and he responded yes, he said there were reports on Katari's accounts and the change in Katari's accounts and he responded yes. He would suggest to him that in the reports of E-Cubed and also von Brockdorff, the question of the alleged change in the accounts, no one entered into it. Mr. Camilleri stated he would remember a bit. Dr. Mifsud Bonnici stated he could check the report. He was suggesting to him that in the reports of E-Cubed and von Brockdorff, no one entered into the question of whether Katari's accounts, Property Plan's, call them what one would, were changed. Mr. Camilleri stated those that were submitted with the MBR to be clear. Dr. Mifsud Bonnici confirmed yes. Mr. Camilleri stated no.

Dr. Mifsud Bonnici stated in fact when they came to make the sieve of Katari's offer, it was correct to say they had one set of accounts and that they saw. Mr. Camilleri confirmed yes. Dr. Mifsud Bonnici stated the last question, it was correct to say the second technical guidance note, the second report of E-Cubed and the report of von Brockdorff, were requested only because the rectification response of the appellants was not a satisfactory one for them to be compliant with the tender. Mr. Camilleri stated yes, in the request for rectification they still said they could arrange the gearing ratios but in the reply it was that they were interpreting the methodology in that way, so since there was that response, after they also took legal advice on how they should proceed, they again requested E-Cubed Consultancy to look at it plus they again took a second opinion to be certain if the interpretation, how they calculated as such was good or not, he did not know if he responded.

Dr. Mifsud Bonnici stated good, that was all for cross-examination. The Chairman asked for cross-examination by the recommended bidder to the witness.

**Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri, counsel for the recommended bidder, began by asking Mr. Sharlo Camilleri about questions he was asked earlier regarding the evaluation process and the different stages in the process they carried out as the evaluation committee. He asked to refer to page 6 of the RFP, particularly section number 5, and made particular reference to 5.2, which stated: "The selection and evaluation process will consist of 4 stages. Stage 1 administrative evaluation, Stage 2 selection criteria, Stage 3 evaluation of technical proposals, and Stage 4 evaluation of financial proposals" then the recommendation for award. He asked if they agreed they followed this process and followed it in the order mentioned in section 5.2. Mr. Camilleri confirmed they agreed.

Dr. Camilleri asked regarding what he would call the price that would be paid, the fee that would be paid per year, whether the witness agreed this formed part of the offer or financial proposal. Mr. Camilleri agreed. Dr. Camilleri asked if they therefore agreed the financial proposal was the last point that was evaluated and that was evaluated in this case by them. Mr. Camilleri agreed. Dr. Camilleri asked if they agreed the financial offer was not just what he would call the price or concession fee, but there were a number of documents that formed this financial proposal and asked if he remembered this. Mr. Camilleri confirmed yes.

Dr. Camilleri stated if he could suggest that the offerors, obviously what interested him most was in his case the recommended bidder Valletta Luxury Projects, but he would speak more generally for now. They agreed the offerors did not simply mention a price but also provided documentation such as projections, business plans, etc. Mr. Camilleri agreed. Dr. Camilleri asked if as evaluation committee

they entered into these documents, obviously of the recommended bidder but also of the others and of everyone. Mr. Camilleri confirmed yes.

### **Financial Bid Details for Recommended Bidder**

Dr. Camilleri stated he would focus for a moment on the recommended bidder. He asked if the witness remembered, and if necessary to make reference to it, whether in the financial bid form submitted by the recommended bidder there was indicated a total sum of 870,000,000 concession fee. Mr. Camilleri stated he did not remember the figure offhand but... Dr. Camilleri asked to refer him to freshen his memory to exhibit CA 13 which was exhibited by the contracting authority itself. Mr. Camilleri confirmed.

Dr. Camilleri asked if he could confirm, to hold it a bit before him for now not to worry, whether he could confirm that in fact there it indicated concession fee paid per year, then the calculation of total over 65 years. Mr. Camilleri confirmed. Dr. Camilleri asked if he could confirm or tell them what the amount per year was, to read a bit the amount of one year. Mr. Camilleri stated 1.2 million. Dr. Camilleri asked if they agreed that then in the same table there was the calculation over 65 years which was 78 million. Mr. Camilleri confirmed yes, correct.

Dr. Camilleri stated he was also suggesting they also looked, particularly interested again he told him for the recommended bidder, at financial documents that were produced before them. If he could suggest that this 1.2 million payable per year also resulted from the projections they saw provided by the recommended bidder, he asked if he remembered. Mr. Camilleri confirmed yes. Dr. Camilleri asked if they ever had any doubt that the recommended bidder's offer where the concession fee entered was 78 million. Mr. Camilleri stated no. Dr. Camilleri stated that was all, thank you.

The Chairman stated very good, the interested party.

### **Cross-Examination by Dr. Ryan Pace (Interested Party)**

#### **Composition of Financial Bid**

Dr. Pace stated good afternoon, Mr. Camilleri first of all. He would make some reference not just to the tender but also to his testimony in the previous session. He asked if they agreed that beyond the projections etc that were mentioned, essentially the financial bid was composed of the financial bid form and the xml form with the tender structure. Mr. Camilleri agreed. Dr. Pace stated good. He would make some reference to several documents. He would make reference to exhibit CA13 which the colleague just showed, presented by the contracting authority, asking him to tell them from the financial bid form and xml tender structure, exhibit CA 13, if it was correct to say it was the financial

bid form. In case he would give it to him again, no problem. Mr. Camilleri stated exhibit CA 13 was the financial bid form correct.

Dr. Pace confirmed that was the financial bid form, very good. He would also make reference if he pleased to a document the witness presented in the previous session which was the tender evaluation page, he did not know if perhaps they could pass him a copy, whether to pass him a copy or he had a copy before him. Mr. Camilleri confirmed yes. Dr. Pace asked if it was correct to say that was the xml format. Mr. Camilleri agreed. Dr. Pace asked if the document shown a bit earlier, which was CA13, in which case with that document the witness presented in the previous session, those together, if they agreed those formed the financial bid of the recommended bidder. Mr. Camilleri agreed. Dr. Pace stated they agreed, very good.

### **Manual Input and XML Format Details**

Dr. Pace asked him to hold a bit before him the xml format please. Regarding this particular form, xml format, he would call it a form, the witness told them that this its description so to speak, the details inside it were inserted manually. Mr. Camilleri agreed. Dr. Pace stated good, so he would take him a bit from above and they would keep going down. Where there was noted the name of the consortium Valletta Luxury Projects, they agreed that was inserted manually. Mr. Camilleri stated he assumed, he was never involved in this part. Dr. Pace stated OK so when he told them, he would put it differently. Mr. Camilleri stated he did not know. Dr. Pace stated it did not matter.

When the witness told them the details inside it were inserted manually, was he referring only to price. Mr. Camilleri confirmed yes for price. Dr. Pace stated for price only good. He would take him from the first to the bottom side of the document please. The 1.2 million noted in this document, the xml format, this, meaning he confirmed with his oath that it would have entered, was inserted manually by Valletta Luxury Projects. Mr. Camilleri stated that was what he assumed, he repeated again it was not part of, they obviously found the figure there in the system, he did not want to say under oath they inputted it when...

Dr. Pace stated yes but he knew how, he was asking Mr. Chair so, he would not go on the assumption with all due respect. Dr. Mifsud Bonnici stated that was why he made reference to Mr. Camilleri's previous testimony because he remembered it was said the price was inserted manually by whichever offeror, whether it was the 1.2, the 32 million, 40 million, whatever, but what was said, so he was asking them to confirm that point, that was all he was asking, in line with what was testified last time. The Chairman stated he remembered this too, in line with what the witness said last Friday, to confirm, did he have anything to add. Mr. Camilleri confirmed. Dr. Pace stated he confirmed it.

### **Contract Period and Price Discrepancy**

Dr. Pace stated so Mr. Camilleri in that same document, meaning in this xml format, if it was correct to say in the field where there was the price, it read textually as follows: "Grand total including concession fees covering the contract period but exclusive of VAT." Mr. Camilleri agreed. Dr. Pace asked if they also agreed the contract period was, as he had just testified today, of 65 years. Mr. Camilleri confirmed yes. Dr. Pace stated good, so the 1.2 million was in that field as a figure for whole contract period.

He would make some reference to the tender document now if it did not matter, he did not know if he had before him the tender document and he would go first to the point so as not to waste time. The RFP, follow with him, was saying like this, of "in case of any discrepancy," he thought page 17. "In case of any discrepancy between the information provided in the financial bid form and the grand total in the tender response formal xml tender structure, the letter shall prevail." So, if it was correct to say that according to this clause he just cited, this document of the 1.2 million applied and not the financial offer shown before CA13. Mr. Camilleri agreed. Dr. Pace stated they agreed, good.

### **Request for Clarification Process**

Dr. Pace stated now subsequently, and he would make reference to exhibit CA 14, Mr. Chair, which was a document presented by the contracting authority, perhaps a copy could be passed to the witness please. He asked if Mr. Camilleri had the document before him. Mr. Camilleri confirmed yes. Dr. Pace asked him to explain this document, what it was, how they arrived at this document, what they did as technical evaluation committee. Mr. Camilleri stated this was a request for clarification sent to the bidder. Dr. Pace asked when he said request for clarification sent to the bidder, by whom was it sent. Mr. Camilleri stated by the technical evaluation committee. Dr. Pace asked what they requested of the bidder.

Mr. Camilleri stated they indicated the difference between the financial bid form. Dr. Pace asked the difference in what, in the amount. Mr. Camilleri stated in the figures. Dr. Pace stated correct. Mr. Camilleri continued, between the financial bid form and the xml format where they noted the yearly concession fee was 1.2 million which if they made a multiplication by 65 years resulted in 78 as grand total, but in the tender response format it was 1.2 million, and there they asked him to confirm if the amount and grand total should be 78,000 as included in the financial bid form. Dr. Pace stated 78 million. Mr. Camilleri apologized.

Dr. Pace asked if it was correct to say they took as the correct amount the amount noted in the financial bid form and not the amount noted, as he just testified before, in the xml tender structure. Mr. Camilleri confirmed yes. Dr. Pace asked how they arrived at that action, meaning what led them, what gave them the conviction they could do what they did, and he was asking this Mr. Camilleri in light of the fact he told them in his testimony today the price could not be changed. Mr. Camilleri stated as indicated in the document itself, they considered this as an arithmetic error they could arrive at with the information they had in the tender document itself.

### **Tender Document Provisions on Arithmetic Errors**

Dr. Pace stated correct, he would take him again to the tender document, page 17, second paragraph. "This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if as and when necessary applicable." Meaning to see if he understood correctly, they calculated or were guided to calculate this part of the tender document to arrive at asking the recommended bidder to change, he would say change, or confirm what was his offer. Mr. Camilleri confirmed yes. Dr. Pace stated yes, good.

But the witness had just told him a bit ago they took as correct the amount indicated in the financial bid form. Mr. Camilleri agreed. Dr. Pace asked him to indicate from this clause he just cited, "this condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if as and when necessary applicable," where it was permitting them to vary the xml tender structure. Mr. Camilleri stated it was not mentioned here. Dr. Pace confirmed it was not mentioned. So, if it was correct to say, since it was not mentioned, according to what was noted in the tender, that request for clarification, the contracting authority, the tech, whoever could not make it. Mr. Camilleri asked if he was asking him to confirm or not.

Dr. Pace stated he was asking, the witness just confirmed it was not mentioned and therefore he was staying with the dictation of the tender, therefore he was saying if it was correct to say since it was not mentioned and they could not make an amendment to any xml tender structure, effectively they could not make it. Mr. Camilleri stated it seemed to him there was something else but... Dr. Pace stated to take his time and check. He took his time to go over it. To facilitate if necessary Mr. Chairman, to give breadth to the tender and to read if they found somewhere else. The Chairman stated he had the tender document before him. Dr. Pace stated yes that was why, meaning so...

### **Legal Advice and Interpretation**

Mr. Camilleri stated as explained well also in the report, about it, now he was remembering they had taken legal advice to see if their interpretation was good because their interpretation was from the documentation they had in their hands, they could arrive at an arithmetic error that existed. Meaning the discrepancy between the financial bid form and xml format, which did not agree between them, they were seeing as an arithmetic error. Although in the financial bid form alone there was not in the calculation, it was detailed and evident enough to indicate the yearly concession fee and the annual, the total of the bid. If one made the multiplication all and also in the written documents, one arrived that there was an arithmetic error between the financial bid form and the xml format. The fact that in the tender document, in that clause it was not mentioned, they did not take it as excluding it.

Dr. Pace stated to conclude more than anything, they were agreeing in the tender document it was not mentioned. Mr. Camilleri stated it was not mentioned. Dr. Pace stated nothing more from the witness.

#### **Re-Cross Examination by Dr. Delia**

Dr. Delia stated the witness said they were given legal advice that they could correct an arithmetic error. Mr. Camilleri stated no, they requested confirmation because this was not rectification, meaning... Dr. Delia stated the witness said legal advice. Mr. Camilleri confirmed they requested legal advice. Dr. Delia asked what they told them. Mr. Camilleri stated whether they should consider it correctly as an arithmetic error.

Dr. Delia stated correct. So, he could tell him the arithmetic sum that had an error in it that therefore they permitted to be corrected, what was it? Which sum was wrong. Mr. Camilleri stated the total that was included in the xml. Dr. Delia stated when saying arithmetic, he needed to tell him  $A + B, 1 \times$  whatever because when one saw the form CA... Dr. Mifsud Bonnici stated he should respond Mr. Chairman. Dr. Delia stated no. Dr. Mifsud Bonnici stated to respond to the question. Dr. Delia stated it did not matter; he would ask him another question.

The Chairman stated he would listen. Dr. Delia asked in CA 13 was there an arithmetic error when making  $1.2 \times 65$ . Mr. Camilleri asked in which. Dr. Delia stated that was an arithmetic no, times,  $1.2 \times 65$ , was there an arithmetic error there. Dr. Mifsud Bonnici stated they were now dealing with... Dr. Delia stated no he was asking him. In the form exhibit CA 13, was there an arithmetic error please. Mr. Camilleri stated since there was not, in fact also in the report... Dr. Delia stated there was no arithmetic error. So then when given advice they could fix an arithmetic error, what arithmetic error did they fix if there was not one.

Mr. Camilleri stated in the bid in general because there were two... Dr. Delia asked which was the arithmetic error that they fixed or allowed to be fixed, which multiplication, which addition, which aggregate, which average, he would not mention ratio so as not to open books, which arithmetic formula did they allow to be corrected? None was the answer. The Chairman stated no, he would make the question, and the witness would give the response. Did he have any response to give Mr. Camilleri. Mr. Camilleri stated no.

### **Scheduling Discussion**

The Chairman asked about re-examination before, and thanked Mr. Camilleri. He would be suspending for a few minutes, they were supposed, 5 minutes all. He asked if they would not reach Professor Formosa. Dr. Delia stated no, if they took 5 minutes surely not. He was going to ask if, so they should take a recess. The Chairman stated OK they would continue gentlemen.

Dr. Delia stated what he wanted to ask only so then they would manage to think how they would do things, last time they had started with Mr. Sharlo Camilleri whom they finished today, Alan Craig whom they finished today, and there was the gentleman who could not make it, was he here today too? Mr. Matthew Vella. The Chairman stated no. Dr. Mifsud Bonnici stated if he may, he was informed he would not be available in the coming days because on sick. Obviously if the board needed, they could ask him to send the certificate.

The Chairman stated he was seeing him directly before him, there were no interferences before them like this. Mr. Godwin Mifsud. Dr. Delia stated no he did not need a certificate but, let them start with Prof. Formosa. The Chairman stated let them prepare the Professor then they would speak and close after.

### **Witness Testimony**

***Prof. Saviour Formosa (ID: 306268M) summoned by Dr. Delia***

#### **Role as Chairman of Evaluation Committee**

Dr. Delia thanked Prof. Formosa for being with them. He asked him to confirm he was the Chairman of the evaluation. Prof. Formosa stated he was the Chairman of the evaluation and adjudication committee yes. Dr. Delia stated he understood correctly from what those before him testified that he did not have a vote, however. Prof. Formosa stated the Chairman did not have a vote and neither did the Secretary. Dr. Delia asked what then his primary function was. Prof. Formosa stated the role of the chairman was to facilitate the process, bring the members together and obviously, if necessary, request clarifications and send for example requests, ToRs to the experts who made the check.

Dr. Delia stated so as not to keep making all the premises they made before, because he was present, he was following what the witnesses were saying. Prof. Formosa stated and he had a big headache.

### **Knowledge of Account Changes**

Dr. Delia stated there was an explanation from witness Alan Craig which they showed last Friday, a timeline, he explained with some change or alteration and filings, and today he made reference again to them of one of the bidders, he knew what he was referring to, of Katari, the change in the accounts in a period. Prof. Formosa stated yes, he knew what he was referring to. Dr. Delia asked if they knew about those. Prof. Formosa stated the remit of an evaluation board started after the submissions in the ePPS. The board had no intervention or knowledge of what was done before, it started from all the documentation that came after the ePPS. Obviously, the board had knowledge of the clarifications because they were part of the documents they reviewed.

Dr. Delia stated meaning what they heard during these proceedings, he, he would speak about him, he did not know about it. Prof. Formosa stated no. Dr. Delia stated now he knew about it. Prof. Formosa stated correct, here everyone we were not. Dr. Delia stated he was there. If he had known what he came to know now, would he have done, would he have called for some technical advice report to be made. Prof. Formosa asked if he could respond. Dr. C Pace stated there was an objection. Dr. Mifsud Bonnici stated no, there was an objection. The Chairman stated he accepted the objection. Dr. Delia stated hypothetical so he would not try then. The Chairman stated he was doing his job.

### **Experience on Other Boards**

The Chairman asked if he was on other boards at times. Prof. Formosa stated yes, he was both chairmen, at times evaluator, at times observer also on... Dr. Delia asked if he ever had a situation. Prof. Formosa stated boards of the European Commission too. Dr. Delia asked if he ever had situations like today's. Prof. Formosa stated the boards always started as; he would repeat to him from when their remit started not what happened before. Dr. Delia asked if he was ever on a board where it resulted there was a change in what were accounts of one of the bidders. Prof. Formosa stated no. Dr. Delia asked never, this was the first time. Prof. Formosa stated here he was hearing it for the first time.

Dr. Delia stated now he understood this had an effect on... Dr. C Pace stated Mr. Chair he would object again. Dr. Delia stated the adjudication. Dr. C Pace stated he would object again. Prof. Formosa stated there could not be an effect because they did not know about it. The Chairman stated and he responded too to be fair; he accepted the objection.

## **Verification of Financial Documentation**

Dr. Delia asked if there was some additional technical advice report made about the presentation of documentation, not of the substantive technical part, but of the financial part, of the various bidders. Prof. Formosa asked for patience because let them work on a question of fact. Exactly which stage was he referring to. Dr. Delia stated as a fact. Prof. Formosa stated he wanted to know. Dr. Delia asked as a fact, did the board make some type of verification on the documentation that was submitted before it by the various tenderers, particularly the financial. Dr. Mifsud Bonnici asked in which phase but on the first phase. Dr. Delia stated when they started. Prof. Formosa asked meaning toward the administrative, the technical, the financial.

Dr. Delia stated his question was very simple, did the adjudication and evaluation board make any verification of the financial documents that were submitted by the various particular bidders. Prof. Formosa stated the documentation the board had before it, as they already explained where it needed legal, here sorry the advice of experts, there they brought them and there was where the review was done. He was trying to understand his question for which part of the documentation. Dr. Delia stated financial. Dr. Mifsud Bonnici stated the audit financial statements for those he was reading. Dr. Delia stated yes OK. Dr. Mifsud Bonnici stated financial documents could... Dr. Delia stated he did not know what they gave him, if he did not have the bids before him, he could not say.

The Chairman asked to continue with the question. Dr. Delia stated perhaps they gave them management accounts, perhaps there was someone who did not give audited account, he did not know, truly he did not know. The Chairman asked if he had anything to add before he continued with his questions, to continue. Dr. Delia asked whether the board made any verification of the financial documents, financial documentation submitted by each bidder, if one gave them only one year, they verified that year, if one gave them six, those six years, if one gave them management accounts and the other reports, whatever they gave them. Prof. Formosa stated he thought he had the documentation, the result of them from a report from the document of Dr. Gordin Cordina.

Dr. Delia stated but that was not the question he asked. Prof. Formosa stated that was where they were. Dr. Delia stated the only thing they had visibility of was the reports of E-Cubed and the report of Prof. von Brockdorff, they did not have visibility of the tender documents of the other bidders, he did not have it, he could not make reference to them. He was asking if a process of verification of the submitted documents was done, it was not very difficult, either it was done or not done. Prof. Formosa stated he had nothing to add because already... Dr. Delia asked but was it done or not done. Prof.

Formosa stated the work that was done was what was there. Dr. Delia stated no, he was not telling him. Dr. Mifsud Bonnici stated there was the report on it too.

Dr. Delia stated no whether it was done by the board he was asking, the board, he was asking him as a board, he was not asking what Mr. Cordina did. Prof. Formosa stated the board made its review internally meaning but then went to an expert, they went to many external experts so for transparency they verified what they were thinking. Meaning the result of the question he asked, the verification was also done by the external expert. Dr. Delia asked if they relied on what the experts did. Prof. Formosa stated without doubt, he would explain something, he came from a field where when one had a review like this, one needed peer review, one needed another expert to make a review of those procedures and processes.

### **Selection and Briefing of Experts**

Dr. Delia stated now and Dr. Cordina did that. They agreed first the people, these experts they did not engage them. Prof. Formosa stated the procedure said... Dr. Delia stated because the witness told him they engaged the experts. Prof. Formosa stated yes, he would explain a bit now. When one needed a second opinion meaning or an expert and in this case they had various experts, one requested, he as Chair, requested of the contracting authority that they needed an expert in such field, in this case they needed various experts. The person was chosen, was given to them, who he was, or who she was, in this case they also had who she was, by the contracting authority.

Dr. Delia asked then the appointment, the brief, what they needed, they decided. Prof. Formosa stated the ToRs they always wrote. Dr. Delia asked sorry. Prof. Formosa stated the ToRs, the terms of reference were written by the board. Dr. Delia asked if they requested that this expert or these experts, any of them, to enter into this, the verification of the submitted documents. Prof. Formosa stated he could read him the ToR they gave to, he thought he had it there, he was not certain if he did not have it. Dr. Delia stated but he was asking if to the experts or which of them... Prof. Formosa stated he would read him the ToR to tell him exactly what they asked.

### **Terms of Reference for Expert Review**

The Chairman stated if he did not have it before him, to pass him a copy of them. Prof. Formosa read the terms of reference; this was a technical expert appointed. "The evaluation adjudication committee for the concession, requires a technical report to be provided by you which includes technical expertise on the following matters: whether the view of the technical expert submissions provided show that the tenderers as per submissions provided, satisfy the economic and financial standing

criteria as set out in the pages 8 and 9 of the request for proposals document. Reference is made to such criteria."

The Chairman stated it was correct to say he was reading from Annex 1 of Exhibit 4.1. Dr. Mifsud Bonnici stated he could confirm from there. Prof. Formosa stated because they did not have these clauses. The Chairman stated yes but it was important that he needed to follow with them too and he had a volume of documents. Dr. Delia asked which document Mr. Chairman. The Chairman stated CA 4.1, Annex 1. Dr. Delia stated correct that was it. Now apart from these terms of reference they gave to this expert, were there other terms of reference to someone else or to this one related to the financial documents that were submitted.

Prof. Formosa stated for his question, the terms of reference were what they were. Meaning the request, they made to Dr. Gordon Cordina was... Dr. Delia stated this was the only reference, that was all. The Chairman asked if there was anything else. Dr. Delia stated no nothing more.

#### **Closing of fifth Session**

The Chairman asked for cross-examination. Hearing none, he thanked the Professor. The Chairman thanked all those present and adjourned to the next day, Wednesday 28th January 2026 at 9.00hrs.

#### **Sixth Day January 28, 2026.**

#### **Minutes – 28th January 2026.**

On January 28th, 2026, at 09:00 am, the PCRB reconvened, to commence the hearing following the fifth hearing held on January 27th, 2026.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallek – Member
- Mr Lawrence Ancilleri – Member

#### **Attendance:**

#### **Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative.
- Dr Damien Degiorgio – Legal Representative.
- Dr Christian J Farrugia – Legal Representative.
- Mr Sean Legault – Company Representative.

#### **Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative.
- Dr Kyle Decelis – Legal Representative.
- Dr Andrea Gera de Petri – Legal Representative.
- Mr David Vella – Company Representative.
- Mr Ian DeCesare – Company Representative.

**Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative.
- Mr Paul Attard – Company Representative.

**Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.
- Mr Karl Azzopardi – Company Representative.
- Ms Maria Zerafa – Company Representative.
- Ms Marisa Marmara – Company Representative.
- Mr Robert Falzon – Company Representative.
- Prof. Saviour Formosa – TEC Chairperson.
- Perm. Sec Godwin Mifsud – TEC member.
- Dr Matthew Joe Farrugia – TEC Secretary.
- Ms Francesca Cassar Spagnol – Company Representative.

**Department of Contracts.**

- Dr Audrey Marlene Buttigieg Vella – Legal Representative.

The Chairman opened proceedings, greeting those present and announcing the third official session of case number 2131. He invited the appellants, noting it was the turn of witness Matthew Xuereb to give his testimony.

**Witness Testimony**

***Mr. Matthew Xuereb (ID: 281288M) summoned by Dr. Delia***

The Chairman asked Dr. Delia to proceed. Dr. Delia thanked Mr. Xuereb for coming and asked him to say a bit about who he worked with, or whether he was self-employed, what he did, what his profession was, how long he had been in that profession, and whether he had any specialisation in any particular field.

Mr. Xuereb stated he worked with Deloitte in Malta, he had been with them for 15 years, he was currently a director in the financial advisory division on transactions, meaning he had been in that department for 15 years, 4 years as director there. His work was specifically to assist companies with transactions, financial due diligences, helping them on debt advisory, meaning practically an advisory service on finance.

## **Background and Involvement in the Evans Building Tender**

Dr. Delia stated they were there because they were discussing a tender process, they were calling it the Evans Building tender. Over the last few years with Deloitte, was he engaged by some client or by Deloitte itself to work on this Evans Building project. Mr. Xuereb stated Deloitte was engaged to assist their client on this process. Dr. Delia asked who the client was. Mr. Xuereb stated ESE, European School of English. A team from Deloitte assisted them at that time, he personally was not specifically involved when they were making the submission, the only thing he was involved in was as a third party review of the opinion of the team that was working on the project on the question of the gearing which they would be speaking about today, and basically today he was there because the director who was taking care of that project had now retired, meaning he reached 60 years of age and decided. Dr. Delia asked who that was. Mr. Xuereb stated Raphael Aloisio.

### **Report ESE 007**

Dr. Delia stated they had presented a document, making reference to Doc ESE 007, dated 16th January 2026, and asked if he had a copy of it. Mr. Xuereb confirmed yes. Dr. Delia asked if that document was dated 16th January 2026, signed by him, if that was his signature. Mr. Xuereb confirmed yes. Dr. Delia asked him to say how he came to be engaged to make this report or advice, and to tell them what it was. Mr. Xuereb stated as during the time when the tender process was ongoing, there was a discussion as he mentioned before about the gearing ratio and how it should be calculated and whether the approach taken by the client was within the scope of the clause in the tender document, and part of this process it was requested that now because of this session they produce a report based on what they had already discussed.

Dr. Delia stated he would not make him explain everything because he thought the board was present, but asked him only to go to the last page, point numbers 1, 2, 3 and 4, there were not many, to read them succinctly so that at least they had it on record that he was confirming them under oath. The Chairman noted that obviously at the deliberation stage they would be taking everything into account.

### **Conclusions on Gearing Ratio Calculation Methods**

Mr. Xuereb stated they concluded there were two methods that could be applied that fell within the same definition that was in the tender document to calculate the gearing ratio, which they were calling Method 1 and Method 2, and in his opinion both applied under the definition. They were not aware of any accounting standard that said one had to use Method 1 or Method 2, meaning both were generally accepted in the industry. Method 1 appeared frequently in the field of financial analysis, which they used especially when there was much more volatility because it was a weighted average, meaning it was not something one did not see, it was something they actually gave almost preference to over the other method in certain approaches, and Method 2, which was the average of the average,

met the definition they were saying, but it was more sensitive to large one-off numbers, meaning Method 1 tended to be more stable and more representative where there was volatility.

Dr. Delia stated thank you, nothing more from the witness.

#### **Cross-Examination by Dr. Clement Mifsud Bonnici (Contracting Authority)**

Dr. Mifsud Bonnici introduced himself as the lawyer for the contracting authority and stated he would be asking some questions, hopefully not lengthy. He asked to confirm correctly what the witness had just said that he did not work on the ESE bid. Mr. Xuereb stated no, at the moment in time the only involvement he had was that internally there was a discussion whether the approach taken on the gearing calculation he agreed with because obviously... Dr. Mifsud Bonnici stated but that was ex post facto, after the bid was submitted, when the clarification request came out and ESE requested them. Mr. Xuereb stated probably yes because obviously as he said he was not involved actually on the specific matter exactly where it was. Dr. Mifsud Bonnici asked if he had also not worked on any other bidder's offer. Mr. Xuereb stated he was working, that was why they had it segregated, on another bid but it was never submitted, meaning he had no, there was some client, someone else who was considering it but then they withdrew, they never submitted a bid.

Dr. Mifsud Bonnici stated so and therefore he thought because of the background just given, he was testifying here as an expert witness, bringing his expertise. Mr. Xuereb confirmed yes exactly. Dr. Mifsud Bonnici stated the board and they as appellant could rely on what he told them. He wanted his honest and genuine opinion as an expert.

#### **Clarification on Method Nomenclature**

Before asking that question, in his report it was certainly a typo but good to clarify, sometimes he said Method A and Method B and sometimes further on he referred to them as Method 1 and Method 2. He understood the other witnesses had referred to them, meaning there had been Mr. Alan Craig of Mazars and Mr. Raphael Aloisio, everyone referred to them as Method 1 and Method 2, did he have any objection to having the questions put to him on Method 1 and Method 2. Mr. Xuereb stated Method A was Method 1 and Method B was Method 2. Dr. Mifsud Bonnici stated it was a triviality to clarify.

#### **Expert Preference Between Methods**

Dr. Mifsud Bonnici stated moving to his question, the witness's honest opinion as an expert, if he had to, ignoring this case, someone asked him to interpret that clause in the tender which everyone now knew and he would not quote again, instinctively which would he apply, Method 1 or Method 2, and in the question he was not implying one was better than the other, he wanted his instinct, where he would go for Method 1 or Method 2, bearing in mind he obviously had an obligation of independence.

Mr. Xuereb stated honestly from his side there was not one or the other, he never saw something independently in the proper sense, meaning he could not tell him to use one or to use the other, normally one examined the situation and examined what made most sense in the situation. Meaning if one there had much volatility in the number, coming from large volatility in absolute numbers, because there the gearing ratio was speaking about relativity, the numerator versus the denominator, and it was a relative number. Now if one had much magnitude in those numbers, one obviously had to consider if the debt went from X to Y which was double or triple, taking a simple average of the ratio in itself in the three, the average simple average across the three-year period gave much more volatile and not necessarily a representative output, so what made sense was, one could take in those situations, one could take the average of the numerator and the average of the denominator, it was two different approaches to get to the same output.

Dr. Mifsud Bonnici stated he understood him, when he did something in his work, perhaps there was no parallel, but he had a way of doing things and that was what he wanted from him, to understand that if it came before him, what he would apply. He would ask a slightly different question. So, the witness preferred to use Method 1 if he saw variances, if there were no variances, would he go for Method 2. Mr. Xuereb stated variances in the absolute normally, meaning if one had something consistent, then a simple average passed, but when there was more volatility, then obviously a weighted average made more sense.

Dr. Mifsud Bonnici stated meaning if he understood correctly, one did an element of reverse engineering, meaning one saw the figures one had and when one saw a spike, then went for Method 1 because according to him it was more linear. Mr. Xuereb stated let him put it like that. Dr. Mifsud Bonnici stated he thought he had the answer, he would continue. Dr. Delia stated no, since he told him he would answer, let him not continue. The Chairman asked if he had anything to add.

Mr. Xuereb stated because from his side obviously a gearing calculation as he was seeing it here, one never saw it in isolation, normally one saw a number of other metrics around it. Now in this particular case there was a definition which was an average of the last 3 years. The average gearing over the past three years, both approaches gave a gearing number, and both were correct. The question whether one applied one or the other, normally his personal position, when he had a client irrespective of what tender situation, if looking from the transaction side at what he would potentially see, he would look if there was much volatility, or extreme case, one year one had no debt, the year after this went and made an investment and perhaps the company's equity had an injection and this 1,000 became 100,000 and the debt went up, let him say the equity went up to 100,000, the debt went up to 100,000, so there in the second year one had a gearing of 1, in the first year one had a gearing of 0. There a simple Method 2 gave an average gearing of 0.5. Method 1 gave a gearing which

was higher than 0.5, because it gave more weighting to the actual debt position, which was the higher amount, quantity, so in reality what they were trying to see was the substance, not the relativity, the relativity was ignoring the absolute figures. Method 1 gave weighting to the absolute numbers, Method 2 did not, so that was where the reference to volatility was coming from, it tried to iron out volatility that came out just from seeing relativity by applying more weighting to what really mattered which was the actual debt.

Dr. Mifsud Bonnici stated the weighted average he said. Mr. Xuereb confirmed because it was a method, effectively the difference was Method 1 became a weighted average, Method 2 was a simple average. Dr. Mifsud Bonnici stated they agreed the tender said nothing about weighted average, however. Mr. Xuereb stated neither did it say simple average, it said an average, an average could be both.

#### **Exclusive Use of Method 1 by ESE**

Dr. Mifsud Bonnici stated Mr. Xuereb, just to explain, there his work as a lawyer was to ask questions and the witness's work was to respond. The Chairman stated they were in cross-examination and asked the witness to respond when asked. Dr. Mifsud Bonnici stated he respected his position and opinion and that was why he was asking these questions. Dr. Delia stated and he answered him. Dr. Mifsud Bonnici asked if Mr. Xuereb knew that it was only the English School of English that applied that criterion with Method 1. Mr. Xuereb stated he came to know a few days ago. Dr. Mifsud Bonnici asked if he knew there were five other offerors who instinctively used Method 2. Dr. Delia stated that was absolutely out of context and had nothing to do with his testimony. The Chairman asked him to let the question be made and the witness respond please. Dr. Mifsud Bonnici asked if he knew there were five other offerors who applied... Mr. Xuereb stated he came to know a week ago.

#### **Step-by-Step Analysis of Both Methods**

Dr. Mifsud Bonnici stated he would go to his report, starting with Method B, Method 2, where the witness described it as: "the mathematical average of each individual year's gearing ratio." Just to see they understood exactly how one calculated it, he was a lawyer obviously, it maybe he was not seeing correctly but that was why he would go through it step by step together to see they were seeing correctly. He was seeing 5 steps. First one had to take and calculate the ratio of the first year. Mr. Xuereb confirmed yes. Dr. Mifsud Bonnici stated debt over equity year 1. The second step was to calculate the debt over equity of year 2. Mr. Xuereb confirmed yes. Dr. Mifsud Bonnici stated the third step was debt over equity of year 3. Mr. Xuereb confirmed yes. Then in the fourth step one had to add these three. Mr. Xuereb confirmed yes. Then in the fifth step one calculated the average and made division by 3. Mr. Xuereb agreed. Dr. Mifsud Bonnici stated good.

He would now go to Method 1: "The average debt level of the entity over the course of the three consecutive years as a ratio to the average level of equity in the same consecutive years." Here too he found five steps, and they would go through them together. First one had to add the sum total of the debt of the 3 years. Mr. Xuereb confirmed yes. Then the second step was to divide by 3 to calculate the average. Mr. Xuereb confirmed one could. Then in the third step one made the sum total of the equity. Mr. Xuereb confirmed yes. In the fourth step one again calculated the average, made division by 3, and then in the last step one made a ratio of the average of the first and the average of the second. Mr. Xuereb stated there was a different approach by which one could come out with the same number, the sum of the numerator, the sum of the denominator, and one took the sum of the numerator division by the sum of the denominator, in 3 steps one could come up with the same approach.

Dr. Mifsud Bonnici stated but he wanted to understand. Mr. Xuereb stated mathematically one still arrived at the same number. Dr. Mifsud Bonnici stated so the witness was saying with the two methods. Dr. Delia stated no that was not what he said, he said with the approach of how it was calculated, 3 steps or 5 steps. The Chairman stated wait, there were various mathematical methods by which one could arrive. Mr. Xuereb confirmed exactly for Method 1.

Dr. Mifsud Bonnici stated sorry, he would ask the question again. If he understood correctly, it maybe he did not understand correctly, no matter, the witness could tell him he did not understand correctly and he did not need anyone's help because he was a competent person and expert. The Chairman stated as long as there was no objection to the questions, they would stop there in order to proceed.

Dr. Delia stated no, he could make the objection to the question. The Chairman stated he had the right to make the objection. Dr. Delia stated or else if what the witness said came to be considered as something he did not say, that was why he had objected. The Chairman stated he was making an objection, as they said yesterday, he should make the objection to him and he would decide as necessary, they would proceed.

Dr. Mifsud Bonnici thanked him and asked if he understood correctly that for Method 1 there were two ways to skin a cat, one could either make these 5 steps as he said or then there was the simpler method he just told them of 3 steps. Mr. Xuereb confirmed exactly. Dr. Mifsud Bonnici stated they would go through those 3 steps together. First one made the sum total of the first 3 years of debt. Mr. Xuereb confirmed yes. Then one made the sum total of equity for 3 years, then one took the ratio of the two. Mr. Xuereb confirmed exactly. Dr. Mifsud Bonnici asked if he did not agree that in the second method there was no calculation of the average. Mr. Xuereb stated no because...

Dr. Mifsud Bonnici asked him to listen a bit first then respond. How he knew the average was that if one took the average of the height of these 4 members, one made the sum total and made division

by 4, he understood calculating an average that way, making the sum total then division by 4. He asked to show him in that second method where the calculation of the average was and to try to explain to him as a simple lawyer who did not understand. Mr. Xuereb stated no, average was a ratio from one to another. Meaning when one took the sum total of 3 years and division by the sum total of 3 years, it was an average in its own right.

Dr. Mifsud Bonnici asked if it was correct to say that if one took all the illustrations given in his report and applied Method 1 as now explained with these 3 steps, without calculating the average, one arrived at the same outcome as if one had not calculated the average. Mr. Xuereb asked to repeat that. Dr. Mifsud Bonnici asked if it was correct to say that if one took any one of his illustrations and calculated Method 1 using his 3-step approach, one arrived at the same conclusion as if one applied the 5-step approach for Method 1. Mr. Xuereb stated one should end up in the same position. Dr. Mifsud Bonnici therefore suggested the witness had introduced this step of calculating the average and wrote average in Method 1 artificially in order to argue this method also would satisfy that criterion in the tender, that was his suggestion. Mr. Xuereb stated no, the average was included there because the calculation was an average by definition. When taking the sum of three years division by the sum of the others, or the average debt over a 3-year period division by the average debt of equity over a 3-year period, it was an average. Dr. Mifsud Bonnici stated that was all.

#### **Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri stated he would not be lengthy. He would take the witness back to the calculation of Method A and Method B, also referred to as Method 1 and Method 2, without entering into questions of whether he agreed or disagreed that both methods applied. He wanted only a clarification however on something the witness said. He understood correctly that the witness was saying when there was an element of volatility, Method B or Method 2, what he called the mathematical average of each individual year's gearing ratio, was more susceptible so to speak, there was more impact on it because of the volatility. Mr. Xuereb stated he would say again regarding volatility, one had to see case by case. Let him do it this way: there was a situation where in one year one had equity of 1,000 and debt of 0, then an investment was made and perhaps there was an injection into the company's equity and this 1,000 became 100,000 and the debt went up, let him say the equity went up to 100,000, the debt went up to 100,000, so there in the second year one had a gearing of 1, in the first year one had a gearing of 0. There a simple Method 2 gave an average gearing of 0.5. Method 1 gave a gearing which was higher than 0.5, because it gave more weighting to the actual debt position, which was the higher amount, quantity, so in reality what they were trying to see was the substance, not the relativity, the relativity was ignoring the absolute figures. Method 1 gave weighting to the absolute numbers,

Method 2 did not, so that was where the reference to volatility was coming from, it tried to iron out volatility that came out just from seeing relativity by applying more weighting to what really mattered which was the actual debt.

Dr. Camilleri stated so it smoothed out, so to speak, the volatility. Mr. Xuereb stated it smoothed out volatility but made more, gave more weighting to what mattered which was the absolute figure. In the end of the day, let him put it this way, there was a situation where one had 500,000 debt and 500,000 equities in one year, giving a gearing of 1. The year after, an enormous project occurred, there was debt of 5 million and equity of 2 million. On the simple average Method 2 gave a lower gearing than Method 1. Now in reality there what was of interest? What was of interest was where there was the most debt and the calculation worked in the opposite, meaning if one had a situation where one had high gearing on a small amount of debt but then on large amounts of debt one had low gearing because some equity injection was made, obviously for that reason in his opinion Method 1 gave a more representative position for the company.

#### **Scope of Report and Instructions Received**

Dr. Camilleri stated he wanted clarification on the initial part of his testimony where he was explaining his involvement also in this report. The witness started this report by saying "Dear Directors, you have requested us to provide our perspective on the alternative approaches that may have been correctly adopted in computing the gearing ratio etc." He understood correctly that there the witness was referring to the instructions he or the firm where he worked received to prepare this specific report of January 2026. Mr. Xuereb confirmed yes. Dr. Camilleri asked if he was not referring to his earlier involvement he mentioned before. Mr. Xuereb confirmed correct. Dr. Camilleri stated the report was addressed to "Dear Directors" and he understood correctly those were the directors of European School of English Limited. Mr. Xuereb confirmed yes. Dr. Camilleri asked if regarding this particular report he produced, he had ever spoken to or been spoken to by the Arrigo Group. Mr. Xuereb stated he had never spoken to them. Dr. Camilleri asked if he received any instructions from them. Mr. Xuereb stated no. Dr. Camilleri thanked him.

The Chairman asked the interested party if they had any questions. Receiving none, he thanked the witness.

#### **Admission of Documents – JG Exhibits**

The Chairman asked who was next. Dr. Mifsud Bonnici stated Mr. Jason Grech. The Chairman asked the clerk to note in the record that documents were exhibited, a set of 12 documents and a packet headed with reference MSPP/02/2022, which documents were exhibited by Dr. Audrey Marlene

Buttigieg Vella, being marked as JG1, JG2, JG3, JG4, JG5, JG6, JG7, JG8, JG9, JG10, JG11, JG12, JG13. He also asked to note all the parties.

Dr. Camilleri asked that they could be reassured however that the content of them did not contain anything that was sensitive or part of the bids. The Chairman stated they would take a recess, finish a copy for everyone, give them a few minutes to look, but he needed to give the right, in the sense if one did not need minutes to look at them, others did, he needed to give that right. Dr. Mifsud Bonnici stated what was there was a breakdown of the megabytes, then there was the more formal opening report, then there were various corrigenda and extensions of the tender documented as they occurred, some of them already in the acts. Dr. Camilleri stated if that was the content, they could. Dr. Delia asked what the extension one was. Dr. Mifsud Bonnici stated there were extensions as communicated on the ePPS but also the corrigenda published on. Dr. Delia stated he wanted to see that because...

The Chairman stated they would take a recess, make a copy for everyone, they could look at them, then they would continue, to remain present so that if there was need for Jason Grech to come up and testify, they would continue. So, a recess for now.

#### **Closing of Appellant Evidence**

The Chairman called for silence and stated they could proceed. So, these 13 documents were exhibited. He asked for confirmation of whether the appellant's evidence was closed or if there was need for a representative of the DOC. Dr. Delia stated evidence closed. The Chairman stated evidence closed, very good. They would move on to the stage of evidence for the contracting authority. He asked to be told who their first witness was. Dr. Mifsud Bonnici stated Mr. Gordon Cordina please. The Chairman asked to proceed with Mr. Gordon Cordina and invited Mr. Cordina to take his place.

#### **Witness Testimony**

##### ***Dr. Gordin Cordina (ID: 93272M) summoned by Dr. Clement Mifsud Bonnici***

Dr. Mifsud Bonnici introduced himself as the lawyer for the contracting authority and stated he would ask questions briefly. He asked Dr. Cordina to tell them who he was, his academic qualifications, and his profession.

Dr. Cordina stated his profession was economist, he had graduated from the University of Malta and Cambridge, England, he spent the first 10 years of his career working at the Central Bank where for some years he was head of the research department, then he entered the academic world where he was head of the economics department at the University of Malta, then he moved into private sector consultancy where he served a number of roles. He served six months as director general of the national statistics office, three years on the board of HSBC Malta, five years on the board of Bank of

Valletta between 2008 and 2013, and for the last five years he was chairperson of the board of directors of Bank of Valletta.

### **Involvement in the Tender**

Dr. Mifsud Bonnici asked him to say a bit about what his involvement was in this tender. Dr. Cordina stated his involvement was as a consultant for the public entity that was taking care of this tender. He was involved in a preliminary study carried out for the purposes of determining the parameters that had to be set in the tender in what concerned financial aspects. He was also involved in the analysis of the submissions to evaluate the manner in which those submissions were or were not meeting the requirements of the same document.

Dr. Mifsud Bonnici stated to be more specific, before the bids were submitted, did he have any involvement in drafting the conditions in the tender on the selection criteria of economic and financial standing. Dr. Cordina confirmed yes, he had given advice on this act. Dr. Mifsud Bonnici asked if after the bids were submitted, it was part of his work as consultant to see whether the bids were compliant with these selection criteria of economic and financial standing. Dr. Cordina confirmed he did that work too.

### **Confirmation of Reports**

Dr. Mifsud Bonnici stated in the acts there were two reports, CA 4.1 and CA 4.2, one dated August 2023 and the other December 2023, and asked the secretary to pass him a copy. He asked Dr. Cordina to confirm these were his reports and confirm them under oath. Dr. Cordina asked to see the reports please. The Chairman confirmed the board's secretary would pass them to him. Dr. Cordina thanked him and confirmed the work was his.

### **Iconic Hotels Bid Non-Compliance**

Dr. Mifsud Bonnici asked to go to page 5 of that report, section 3, Iconic Hotels composed of a consortium between ESE and Arrigo Group of Hotels, where the conclusion was reached that the bid was found not compliant with the requirements of the tender. He asked Dr. Cordina to explain why he reached that conclusion and would also pass him a copy of the tender in the section where the criteria in question were. Dr. Cordina stated the element that led to this conclusion, as also explained in the report, was due to the fact that one of the operators forming part of the consortium that was bidding had an average of the gearing ratio over the 3 years that exceeded the maximum that was allowable by the tender document. Therefore, from the application of the formula of the average to each gearing ratio value for the 3 years of information submitted, since the result exceeded what was permissible, he had to conclude the bid was not compliant.

### **Methodology for Calculating Gearing Ratio**

Dr. Mifsud Bonnici asked him to explain how he made the calculation of the gearing ratio, to explain step by step how they did it. Dr. Cordina stated each ratio belonged to each year. So, from a set of financial statements of one year, one extracted a ratio, the same procedure was carried out to extract another ratio for the second year and for the third year consecutively. In this way one had 3 values belonging to consecutive years. From those 3 values, one applied the average formula which involved the ratios being added and divided by 3 to produce the average for those 3 years. That was the procedure by which one found the average of these 3 gearing ratios which in truth was no different from the normal understanding of how one calculated an average from a set of numbers.

Dr. Mifsud Bonnici stated before him there had been 3 expert witnesses who testified before this board and gave their opinion on this criterion, and if he could summarise, the main criticism was that the tender was not asking for an average of averages. He asked Dr. Cordina to tell them what he thought about this and why he interpreted and applied the tender in that way, and whether there was any other way to interpret the tender, perhaps they had understood his reports wrongly. Dr. Cordina stated the comment about average of averages he thought needed more explanation as to why it was being used in this context and in what way it was being used, and where it was intended to lead them, because he did not feel the concept of average of averages applied to what they were speaking about currently.

What perhaps one could address, because there was then the second report he prepared and he could understand there were questions along the lines of the question being asked now, whether one could arrive at a gearing ratio by adding the balance sheet values for 3 years, both for the denominator and the numerator, then producing one ratio, he thought there with all due respect to the professional opinions of other experts, was where he disagreed that it was a valid procedure particularly in the context of a request in this tender. Because when one went to add debt and capital and arrived at one value for debt, one value for capital and took a ratio, what would one have done? One would have created a fictitious business, a fictitious enterprise that was the sum of 3 financial statements and taken from them one gearing ratio, so for one year. Meaning instead of having information about that business, its 3 gearing ratios taken year by year with the average taken as required, one created another business that was the sum of three statements and instead of having an analysis of 3 years, one had one gearing ratio, of one occasion, of this fictitious business created in this manner.

For that reason, he could not agree with a method different from the one he used as he explained earlier. He thought it was also worth adding that when one requested 3 years of information to be used, there was a good reason why this was done, and the reason was that each year should be allowed to speak with its own voice. So one could not take equity of one year which might be low and dangerous for the company's performance and add it to that of another year which might be offsetting

it and give a picture that the company had equity in a way that did not recognise that in one of those years it had serious problems that could bring serious financial difficulties. That was why one requested information not just of one year but of more and wanted each year to speak with its gearing ratio. That was why, he thought everyone understood, and the history of risk management and risk analysis was beautiful because it also had roots in the wisdom of history and the Bible, the story of Joseph for example, the seven years of hardship and the seven years of prosperity, it was something mankind had always tried to analyse and avoid, people preferred stability and even in business, if he had a stable business model that every year was giving a stable gearing ratio and he could extract a gearing ratio from them, he could not then compare it with another business where there was more instability and therefore more risk, he could not allow the components to obscure that instability. That was why the tender requirements were written as they were written and he then made his analysis according to those tender requirements in a way that gave what, in the end, the public authority wanted to obtain from this tender.

#### **Response to Alternative Method Proposed by Previous Experts**

Dr. Mifsud Bonnici stated he would take up exactly what he had just explained in detail. The expert Mr. Alan Craig saw a different perspective from Dr. Cordina. He said the method applied by Dr. Cordina and the Tender Evaluation Committee applied in such a way that if one had a bad year in those three, one was penalised and therefore he preferred, he said he preferred the other method because it was more linear and gave a weighted average. Dr. Cordina stated first of all as they were saying, in risk management the bad hurt them more than the good benefited them, that was why businesses and individuals were risk-averse, so it certainly was not the intention to create some calculation where difficulties were masked by very positive entries, because he needed to see those difficulties every year and know they were there so as not to let a risky business model look as though it were a more stable business model. That was why it was important to see the gearing ratios in each year. So, if anything, he would say it was important to see the method of 3 gearing ratios and their average precisely to understand how stable or how risky that business was. The idea that one offset the other was certainly not something to be desired in the analysis of this type.

He also mentioned the idea of weighted average. One could make calculations to show that while the two methods did not give the same result, the method he did not apply could be called a weighted average, yes, but if the person who wrote the tender wanted a weighted average, he would have requested a weighted average and would also have given the weights that had to be used, because when one made a weighted average, one could not make arbitrary weights as one saw fit to show the good in one way and the bad with less weight. Meaning while he respected the professionals mentioned and their professional opinion, his professional opinion was entirely different.

### **Criterion Number 5 – Equity Requirement**

Dr. Mifsud Bonnici stated he would move to something else and thanked Dr. Cordina, noting he thought he was clear. On the same page, he would go to criterion number 5. Dr. Cordina asked the lawyer to pause a moment to turn the page. Dr. Mifsud Bonnici continued. Dr. Cordina asked him to excuse him and to continue. Dr. Mifsud Bonnici stated to take his time, going to criterion number 5 for Iconic Hotels, still on the same page, which read: "Tenderers must have had at least 10 million in equity or available shareholder funds in the tenderers last audited financial statements." Here for ESE, he found them not compliant, for AGH, which he understood was the Arrigo Group of Hotels, he found them compliant, and then the overall opinion was compliant. He asked how he arrived at that conclusion if he found ESE non-compliant.

Dr. Cordina stated there were a number of criteria that had to apply to each company when speaking about a consortium. Then there were criteria, and this was clearly specified in the tender requirements, so the argument about the gearing ratios mentioned a little earlier, the tender requirements stated that requirement had to apply to each member in the consortium, in the case where there was a consortium. Others, the other criteria, were at the level of the tenderer not at the level of each member in a consortium tenderer, and therefore in that case, although one was not compliant, the other was compliant and was strong enough so that in their aggregate, that consortium arrived at the result that overall it was then compliant.

Dr. Mifsud Bonnici thanked him and stated that was all from the witness.

### **Cross-Examination by Dr. Adrian Delia (Appellant)**

The Chairman asked to proceed to cross-examination of the witness and whether Dr. Delia had any questions. Dr. Delia stated yes. He greeted Dr. Cordina and thanked him for being with them. When he began telling them the positions he occupied, he told them that today he was Chairman of Bank of Valletta, was he understanding correctly. Dr. Cordina confirmed yes.

### **Bank of Valletta Conflict Check**

Dr. Delia asked which of these companies he was asked to analyse were banking with Bank of Valletta. Dr. Cordina stated he did not know. Dr. Delia asked if he had not checked. Dr. Cordina stated he did not know and it was not his job to check. Dr. Delia stated that was not what he asked him. Dr. Cordina stated and he would be doing wrong. Dr. Delia stated he asked him if he had not checked. The Chairman stated he had something to clarify. Dr. Cordina stated he thought the lawyer had the duty and the right to ask him questions, but he also thought he had the duty and right to respond truthfully according to the oath he took. The Chairman stated that was also the duty and right to respond and he would give him the chance to do so.

Dr. Cordina stated as Chairperson of Bank of Valletta, he held a position that was not executive. He sat on an independent governance board that did not enter into the day-to-day business and transactions and accounts except for governance oversight reasons, and he did so on a strict need-to-know basis for reasons of regulation, banking law, and ordinary governance. So in the context of the work he did outside the bank, he was not going to check the bank's clients to find out what they were doing for the purposes of the work he did outside the bank, and he thought this should be obvious and this was the correct way he always proceeded and as was also authorised by the regulator from Frankfurt, the European Central Bank.

Dr. Delia thanked him for answering what he had not asked him, and now asked him to please answer what he had asked him. Had he checked whether any of these companies were banking with Bank of Valletta. Dr. Cordina stated no he had not checked. Dr. Delia stated that was that answer.

#### **Authorship and Scope of Gearing Ratio Clause**

Dr. Delia stated Dr. Cordina made reference to a particular clause and told them he was involved from the beginning in what were the tender parameters as well as that he participated in the drafting, he would use the word the colleague used, of the selection criteria, the clause that began "a gearing ratio of not more than 3" and continued, which he obviously used to prepare his reports. Had he written that. Dr. Cordina confirmed yes, he had written that clause. Dr. Delia thanked him. He asked if he wrote that clause because someone asked him what they wanted and he articulated what was requested, or because he decided there was a need for some methodology and set it down himself as he thought that need should be explained to bidders. Dr. Cordina stated this was a requirement he felt he had to advise should be there.

Dr. Delia asked meaning not only did he write it, but he also wanted it to be there and wrote it himself, was there input from third parties regarding whether this clause should be there and how it should be written or was it his and his alone. Dr. Cordina stated it was his and was also agreed by the authority that ultimately issued the tender, but this criterion and other criteria, he felt they had to be in the tender requirements for the authority to achieve its objectives as explained to him from the beginning when he was given the assignment.

Dr. Delia asked who gave him the assignment to make the two reports of August and December he mentioned. Dr. Cordina stated the assignments came from the evaluation committee, both to make the first report where the assessment of the bids was made as well as the second report later. The tender evaluation committee was who passed it to him to do this work. Dr. Delia stated yes but was it correct to say it was not the evaluation committee that chose him. The witness was saying it gave him the brief, if he was not mistaken, that was what he said, was it not. Dr. Cordina confirmed the tender

evaluation committee, as far as he understood, chose him to do this work and also gave him the terms of reference.

Dr. Delia stated so, they agreed it gave him the terms of reference. He was suggesting to him that it did not choose him however, that someone else chose him. Dr. Cordina stated he had no information on that point, for him, as he saw things, the tender evaluation committee engaged him to do this work and gave him terms of reference to be able to do it. Dr. Delia stated witnesses who testified under oath including permanent secretaries before this tribunal told them he was chosen by the contracting authority, the MSPP. Dr. Mifsud Bonnici stated he was testifying about what he knew. Dr. Delia stated he was giving him information, and the colleague made reference to previous testimony, he was making reference to previous testimony. The Chairman stated he would leave it on that basis.

Dr. Cordina stated this was correct in his opinion at least in the visibility of how he was seeing it when speaking about the initial report where the criteria that went into the tender were established. Dr. Delia stated no, he was speaking about the reports. Dr. Cordina confirmed on those reports. Dr. Delia stated the TEC members testified under oath that he was chosen and he was selecting the word chosen not engaged, chosen by the contracting authority and not by them. Dr. Cordina stated his relationship on this work was exclusively with the TEC. Dr. Delia asked meaning the contracting authority never spoke to him. Dr. Cordina stated on this work no. On this work he always worked with the chairperson of the TEC and its administrative body.

Dr. Delia stated but the TEC was not yet composed when they began drafting the tender document, the TEC did not even yet exist. Dr. Cordina stated exactly, that was what he was trying to explain. He had worked for the MSPP when the tender document was being drafted. Dr. Delia stated because the TEC did not exist at that time. Dr. Cordina stated then he worked for the TEC when they came to the evaluation. Dr. Delia stated let them go again, he was not saying big things, they had heard testimony. Dr. Mifsud Bonnici stated there was no point in asking him. Dr. Delia stated on the part of the TEC. The Chairman stated at this point, the last intervention of Dr. Cordina he thought explained well how the facts occurred and asked if there were other questions.

Dr. Delia stated no, the chronology they agreed on, he was not doubting the chronology. Dr. Cordina was saying he was first engaged by the contracting authority to draft, subsequently he was saying he was engaged by the TEC to make these reports. He was suggesting to him he was not chosen by the TEC but was chosen by the contracting authority because up to know that was what they had heard. Dr. Mifsud Bonnici stated he had suggested to him and had the answer; they would move on. The Chairman asked Dr. Cordina if he had anything to add on this point, to tell him no then. Dr. Cordina stated no he had nothing to add to what he had already explained. The Chairman stated to continue with other questions.

### **Original Drafting and Subsequent Evaluation Work**

Dr. Delia stated now, so was he understanding correctly that he was originally engaged to write at least this part of the tender document, that he was engaged to assist in the evaluation, and he was also subsequently engaged to clarify whether the evaluation was being done correctly. Mr. Cordina confirmed yes, this work was done from his side.

### **The Gearing Ratio Clause and Methodology**

Dr. Delia thanked him and stated they would speak a bit about the gearing ratio. Dr. Cordina had mentioned "the average of these 3 gearing ratios," did he agree he said that phrase. Dr. Cordina stated he mentioned average of 3 where each one belonged to a particular year. Dr. Delia stated correct, and he would refer him to the clause he wrote and asked to look together at the part that said or requested an average of 3 gearing ratios. Dr. Cordina asked if he could read. Dr. Delia confirmed yes, from the clause please.

Dr. Cordina read: "A gearing ratio of not more than 3, this is to apply as an average of a consecutive 3 year period between years 2018-2021, both years included and in the case of tenderers submitting the proposal as a joint venture/consortium/association/group of economic operators, this ratio is to be satisfied by each economic operator member of the same."

Dr. Delia stated correct, they had read that several times. But that was not what he asked him, not to read that clause, but to tell him where it was written "average of 3 gearing ratios," that was what he asked him. Dr. Cordina stated "an average of consecutive 3-year period." Dr. Delia stated 3-year period. Meaning they or he requested an average of a 3-year period. They agreed that even if he wanted it, even if he honestly fully believed it would have been better if they had given an average of 3 gearing ratios, it was not written there. Dr. Cordina stated he continued to maintain the rational and logical way to interpret this requirement was to take the gearing ratio year after year, after another, and take the averages. Now lawyer, he told him too that the same concept could correctly be expressed with different words and phrases. This phraseology for him, in his professional opinion, was correct and sufficient to convey to every professional to work with the method he indicated a little earlier.

Dr. Delia stated certainly not every professional because with respect, he told them, he made reference to other professionals who did not understand it that way. The Chairman asked to make the question. Dr. Delia stated but his question was not his interpretation, because it seemed to them the interpretation could not be given by the person who wrote it because they would not be objective, the board had to give the interpretation or decide whether the interpretation of third parties was correct or not. His question, he would ask it again because he had not been answered and he would

change it slightly, did they agree that in that paragraph nowhere was there a written requirement calling for an average of 3 gearing ratios, nowhere.

Dr. Cordina stated he wanted to comment on the fact. Dr. Delia stated but to answer that first because he was in cross-examination, whether it was yes or no, then he could explain as much as he wanted. The Chairman stated he was in cross-examination meaning at this point. Dr. Cordina stated Mr. Chairman every time he said two words something was assumed about him not answering the question, they could not keep working that way, with all due respect, here they were all professionals. Dr. Delia stated as a professional he informed him and there was no need to tell him what his duty was, Mr. Cordina, that if he asked a direct question he had to give a yes or no answer, he should not tell him what the duty was, he would tell him what the procedure was.

The Chairman asked for calm, at this stage not to speak over each other, it was very simple, they were in cross-examination, a question was asked, there was no address, and a response was also given without deviation, he would respond to the question, it was that simple. Dr. Delia thanked the Chairman and asked Mr. Cordina if they agreed that nowhere in that paragraph was there a written requirement for 3 gearing ratios please. Dr. Cordina stated they did not agree. Dr. Delia stated good, then to indicate where it was written. Dr. Cordina stated "gearing ratio of not more than 3, this is to apply as an average of a consecutive 3-year period." The Chairman stated very good, further questions. Dr. Cordina stated he also wanted to add that the fact he was involved in various stages of this work in no way impinged on his objectivity either at that time or today. The Chairman stated they would continue with other questions, then if there was a need for re-examination, but to limit himself to a question that was asked, they were in cross-examination.

### **Second Report and Alternative Calculation Method**

Dr. Delia stated he would now make reference to his second report of December, CA 4.2, and the first paragraph. When he was being asked questions by the colleague, he explained why he felt it was better to use the methodology that first extracted a ratio for one year, the second year, the third year, and then took their average, rather than having total debt divided by total shareholders' equity. He said it was better because it gave a better picture. Now they were not there to see which of these methods was the best, that was not their task, but to help the board understand whether any of these methods could be used without falling foul of the requirement of the tender. He however went a step further after making his August report and stated: "The RFP clearly states that the criterion of the gearing ratio is to be computed as an average of a consecutive three-year period." Now his question was, assuming one was better than the other, assuming both the same, assuming one had advantages and the other disadvantages, it did not matter, but that which calculated using the method of 3 years'

debt divided by 3 years' equity, where did it fall foul of this paragraph that he himself wrote. Not of what he wanted, of what he wrote.

Dr. Cordina stated he would repeat again that what he wrote, he would repeat again the rational way to interpret the tender requirement was to take the average of the 3 gearing ratios and this was for the reasons he mentioned earlier, primarily and among other things, that when one added 3 numbers from 3 financial statements of different branches, in truth one would be creating a fictitious business, a bigger fictitious enterprise, then producing one gearing ratio instead of producing an average of the 3 as required by the tender condition.

Dr. Delia stated he was not going to argue with him, he could argue that if one had 3 ratios of 3 years and took the average of those 3 ratios, one created enormous distortion, as much as he wanted, he could give examples. The Chairman asked to make the question. Dr. Delia stated he would ask him, he would give this example for him to give his comment on whether it created a distortion or not. What did the gearing ratio talk about a company? What did he seek to establish. The colleague when asking for the average of these gentlemen's heights, he was imagining he was establishing the average height of Maltese men over say 60 years. Dr. Mifsud Bonnici stated how one calculated gearing ratio and how one calculated average were different things.

Dr. Delia confirmed totally. He asked Dr. Cordina, when they requested the gearing ratio, what did the gearing ratio talk about a company. Dr. Cordina stated gearing ratio was the ratio, to explain it in a way to be understood, of the quantity, amount, value of debt which generally had a fixed cost associated with it of interest and obviously had to be repaid, as a ratio of the equity or capital of the company which was the source of funding there to absorb losses, and therefore it was a very important indicator of the resilience of how strong a company was vis-à-vis the risks it could face, because if it had high capital which was loss absorbing, giving a relatively low gearing ratio, first it meant the company was capable of handling the risks that could give it low profits or losses in the future. If on the other hand it had high debt compared to equity, then in that case that resilience and strength against risks would not be there. That was why this was a very important ratio in financial analysis.

### **Illustrative Examples on Gearing**

Dr. Delia stated good, so let him continue on what he was saying. He had a company that had a thousand euros debt and a hundred euros equity, what was its gearing ratio. Dr. Cordina stated 10. Dr. Delia stated good, a company that had a million in debt and five hundred thousand in equity, what was its gearing ratio. Dr. Cordina stated two. Dr. Delia stated two, so one was doing very badly according to him, the 10, and the other was doing very well, the 2. Which had the most risk, the one with a million in debt or the one with a thousand. Dr. Cordina stated it was not obvious that a gearing

ratio of 2 was better than 10, because if he. Dr. Delia stated it had a million in debt and five hundred thousand equities. Dr. Cordina stated but this was like government debt to GDP, they would be saying how large the country's debt was, but what was important was to compare it with the repayment ability of the country which was the GDP.

Dr. Delia stated how much did they want to speak about GDP. The Chairman stated the answer was that of 2, correct, let them keep it at a million and a half million because otherwise. Dr. Delia stated now he would give him another example. Dr. Cordina stated he had not yet responded. Dr. Delia stated he would give another example. The Chairman asked for calm and asked Dr. Cordina if he had anything to add on that.

Dr. Cordina stated certainly he had something to add, as the lawyer gave examples, he would give his own with humility. The company that had a gearing ratio of two, so it had equity of half a million as mentioned, that one had equity of half a million, it was capable of handling losses of up to half a million in a year, while the company that had only equity of a hundred was certainly not going to handle losses of half a million. Dr. Delia stated it had a thousand in debt, the one that had a hundred had a thousand in debt. Dr. Cordina confirmed yes but imagining it had a loss in that year of two thousand. Dr. Delia stated yes, he was enjoying it. Dr. Cordina stated to imagine. Dr. Delia stated the job at hand Mr. Cordina. The Chairman asked for decorum.

Dr. Delia stated in real life terms however, if he had a million in debt and equity of half a million, and had a problem, so he had a cushion of half a million, he understood him, but he had the other company with a thousand and a cushion of only 100 euros, much easier to find help, to find a solution, to go to the bank for the first one than the second one. If one took the blow, the second one might not recover from it but the first one. Dr. Cordina stated lawyer, he did not agree with him and hoped he would not enter into an argument telling him that banks did not work that way. The Chairman said they were moving towards the mortgage. Dr. Delia stated he would not argue about that. The Chairman stated to then make submissions, he thought tomorrow they had enough time for them. Were there other questions for this witness.

#### **Interpretation of the Three-Year Period Clause**

Dr. Delia stated he would explain however, since he said it was, he used the words "the only rational interpretation." He was not going to enter into the subjectivity of the adjective rational, but if there was a professional, there had been several, 3 worked on it, some 6 on it, there had been several not just one who calculated this gearing ratio requirement for an average of consecutive three-year period, for a three-year period not for three-years, for a three-year period because even the numeral was "for three-years," there were 3 years. Dr. Mifsud Bonnici asked for the question. Dr. Delia stated

no, but not on the words there, they were now speaking about the three-year period. The Chairman asked to make the question.

Dr. Delia stated yes, he would ask. So, if there was a professional or one company that understood this to mean one had to add the 3 years' debt, divide by the 3 years' equity and therefore had an average, they agreed this had an average, to which part of this clause was it falling foul. Dr. Cordina stated he would repeat again. Dr. Delia stated not whether it was better, whether it fell foul. Dr. Cordina stated he would repeat again that adding 3 numbers, 3 others, and taking their ratio did not constitute an average but constituted a ratio of two sums. The Chairman stated he understood him, were there other questions. Dr. Delia stated nothing more.

#### **Last Question on Accounting Standards**

Dr. Delia stated sorry, one last question, could he tell him which standard he referred to when he was drafting this clause, an accounting standard, a financial standard. The Chairman stated yes, was there any standard he referred to. Dr. Cordina stated he referred to no standard. The Chairman stated very good. Dr. Delia stated he referred to no standard, was he correct, because no standard existed. Dr. Cordina confirmed he was correct there were no standards applicable in this case. If there had been applicable things they would have used them, but obviously this did not mean the procedure was not valid. The Chairman stated good, they would proceed to cross-examination by the recommended bidder, Dr. Camilleri please.

#### **Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri stated he would eventually be making reference particularly to Dr. Cordina's reports of E-Cubed Consultancy linked to 8th August 2023 linked to the analysis of the different bids made by the various offerors who participated in this process. He wanted to start from a point Dr. Cordina explained earlier and to see if he understood him correctly, where he said that in these five criteria he then applied in his report for each offeror, there were certain criteria that applied to the bidder as a whole, meaning if one had a consortium, one had to aggregate, so to speak, all the bidders, then there were certain criteria that each participant in a consortium had to reach. Dr. Cordina confirmed correct, he was saying correctly.

Dr. Camilleri asked to also clarify, although it seemed it was also said, when speaking about the question for example of the gearing ratio, they agreed this was a requirement that had to be met by each participant in the consortium making its offer. Dr. Cordina confirmed yes, he agreed.

#### **Gearing Ratio of 3 as Generous Threshold**

Dr. Camilleri stated good. He would now take him to the calculation of the gearing ratio. Dr. Cordina had already explained it in some detail, he would ask him a question from someone who an expert in the field was obviously not. He understood the gearing ratio was looking at the debts of that particular

entity, divided by the capital, divided by the equity, not looking at assets meaning. So, when looking at industry standards, so to speak, in this field, of what was a healthy gearing ratio, was he correct that a gearing ratio of 3 was rather generous. Dr. Cordina confirmed yes. Dr. Camilleri stated meaning they agreed it was not an immensely demanding requirement. Dr. Cordina agreed with him, and this also came from the fact that when they were doing the work and also the preliminary studies, one should not forget that the country and the industry had just emerged from the COVID period and therefore one could not demand requirements from the industry beyond what was reasonable especially for those times.

Dr. Camilleri stated so Dr. Cordina was telling them, if he understood correctly, that a gearing ratio of 3 was reasonable in those times which were very particular times, but he agreed it was generous as a gearing ratio. Dr. Cordina confirmed yes, he agreed with him.

### **ESE Gearing Ratio Analysis**

Dr. Camilleri stated very good. He wanted to take him to his report mentioned before, exhibit CA 4.1 for the purposes of the transcript, speaking about the report of 8th August 2023. He asked the Chairman to pass him a copy. He wanted to take him particularly to where the analysis of the appellant's offer was being made, properly speaking not the appellant's offer but that of Iconic Hotels, a consortium between ESE the appellant and Arrigo Group Hotels which they had not seen. Taking him to the ESE column, he asked if he could indicate where the figures were in the detailed analysis that referred to the gearing ratio. Dr. Cordina stated in the detailed analysis, there was section 4 debt over equity. Dr. Camilleri confirmed that referred to the gearing ratio. Dr. Cordina confirmed yes.

Dr. Camilleri asked if they agreed, if he was seeing correctly, that under ESE the gearing ratio for 2018 was 1.03, for the second year was 2.81, for the third year was 7.78. Dr. Cordina confirmed yes. Dr. Camilleri stated they agreed this indicated a company that, he would put it in his words, was taking on more and more debt as time went on. Dr. Cordina confirmed yes. Dr. Camilleri stated he had no more questions, thank you.

The Chairman stated very good and asked the interested party if they had any questions. Dr. Pace stated nothing.

### **Re-Cross Examination by Dr. Clement Mifsud Bonnici (Contracting Authority)**

Dr. Mifsud Bonnici stated just one small question. If it was correct to say that to make an assessment of the financial strength of the bidders, in the tender there were not only criteria on the gearing ratio but there were other criteria too. Dr. Cordina confirmed correct. Dr. Mifsud Bonnici stated that was all, thank you. The Chairman thanked Dr. Cordina for his time.

### **Witness Testimony**

*Prof. Philip von Brockdorff (ID: 48860M) summoned online by Dr. Clement Mifsud Bonnici*

Dr. Mifsud Bonnici introduced himself as the lawyer for the contracting authority and stated he essentially had one question. There was a report by Prof. von Brockdorff titled "Technical Note on the submission made by Iconic Hotel Malta in relation to the gearing ratio as set in the RFP." It was marked for the board as CA5 and dated 9th January 2024. He asked if he knew which report this was. Prof. von Brockdorff confirmed yes. Dr. Mifsud Bonnici asked him to confirm it under oath. Prof. von Brockdorff confirmed he did. Dr. Mifsud Bonnici thanked him and stated that was all.

**Cross-Examination by Dr. Adrian Delia (Appellant)**

Dr. Delia greeted Prof. von Brockdorff, who returned the greeting. Dr. Delia stated he would ask him on behalf of the appellant please. Prof. von Brockdorff confirmed yes.

**Engagement and Documents Received**

Dr. Delia asked who engaged him to make this technical note. Prof. von Brockdorff stated the chairman of the evaluation board, Prof. Formosa. Dr. Delia asked if he informed him, they had already obtained some opinion on this matter. Prof. von Brockdorff stated yes, actually he sent him the correspondence, in fact he had received the evaluation document. Dr. Delia asked what the correspondence consisted of please. Prof. von Brockdorff stated it consisted of the technical note that E-Cubed had made and in fact there were also his terms of reference and the document the appellant had also sent.

Dr. Delia stated he had not understood him on the technical note. The technical note sent to him as correspondence was that of E-Cubed, to be clear. Prof. von Brockdorff confirmed yes, naturally yes, he had mentioned E-Cubed. Dr. Delia stated he had not understood him, it was fine. Prof. von Brockdorff stated it did not matter. Dr. Delia asked if he also mentioned some submission of the appellant. Prof. von Brockdorff confirmed yes. Dr. Delia asked if he was referring to how the appellant submitted the tender. Prof. von Brockdorff stated the explanation given about how the gearing ratio should be calculated. Dr. Delia asked meaning not how they in fact submitted their workings, but the explanation they were asked to give and were giving. Prof. von Brockdorff confirmed the explanation given by the appellant about their interpretation of how the calculation of the gearing ratio should be done, yes.

Dr. Delia asked if apart from these documents given to him to examine, anyone explained to him or he asked anyone or had occasion to speak to anyone to tell him what the person who wrote the requirement had in mind. Prof. von Brockdorff asked if he meant the gearing ratio. Dr. Delia confirmed yes please. Prof. von Brockdorff stated he was engaged to give a second opinion on what in fact E-Cubed had written about how the gearing ratio should be measured. Dr. Delia stated correct, this E-Cubed was signed by Mr. Gordin Cordina, had he spoken to Mr. Cordina about this. Prof. von Brockdorff stated no he had not spoken to him. Dr. Delia asked if he had not communicated with him. Prof. von Brockdorff stated no, he was asked to give a second opinion. Dr. Delia stated no he was

asking him for the record, in fact precisely to establish this, he was telling him. Prof. von Brockdorff confirmed yes.

### **Influence on Opinion**

Dr. Delia stated so there may have been someone, it could have been the evaluation committee itself, could have been the contracting authority, he could suggest, but he did not have to, because he was certain he would tell them the truth, who asked him or who suggested and told him listen, in this tender we wanted this, we needed this, we are looking for this, was there anyone who gave him that explanation. Prof. von Brockdorff stated absolutely no.

### **Methods of Calculating Gearing Ratio**

Dr. Delia stated there had been professionals of standing and well-known consultancy firms and auditors who came and gave testimony there, and these told them, he would try to render what they told technically in large reports in one or two sentences, that there was a method whereby one added the company's debt over 3 years, divided by shareholders' equity and precisely the equity of the members with that simple formula, meaning total of 3 years division by total of 3 years, and they calculated that gearing ratio. They told them this was acceptable or made sense or was not prohibited or it did not fall foul of anything. What did he say about this.

Prof. von Brockdorff stated from his professional background, as a professor of economics and also as a member of the board of the MFSA, Malta Financial Services Authority, the calculation of the gearing ratio on at minimum a yearly basis, meaning one divided debt by equity on a yearly basis, preferably it was done on a quarterly basis. If one took the system he had mentioned, one was actually not covering or taking into account the variability of debt and equity on a quarterly or yearly basis. It was obviously important to see how the variability in terms of debt and equity had to be monitored and estimated on a regular basis, on at least a yearly basis.

Dr. Delia stated but it still gave a gearing ratio which as he was explaining did not show what he was telling them. Prof. von Brockdorff asked to be excused for a moment. He would say, going back to what was done as a listing authority of the MFSA, he was not saying anything, meaning he was not disclosing anything, it was a professional duty, it was a professional method they applied when obviously evaluating applications for bonds of various millions from various companies. The gearing ratio was done on a year-by-year basis as a calculation and naturally the gearing ratio came out and one obviously compared year by year the variation.

Dr. Delia interrupted. Prof. von Brockdorff asked him to say what he wanted. Dr. Delia stated he was understanding what the attributes or good features were of using the methodology he was telling them. Prof. von Brockdorff confirmed correct. Dr. Delia stated it was favourable. That methodology, just to understand however, if it was taking the average of 3 ratios, if there was a ratio that although

it was small, low, was based on real numbers, actual numbers, figures that were very small, was it not giving a somewhat distorted impression compared to if one took the real numbers? Meaning he had a favourable year ratio, where he had 100 Euro or 1,000 Euro debt and 1,000 Euro equity, that was a favourable ratio, because it was only one, but it was not really telling him anything if he compared it to a year where he had a million in debt and 200,000 in equity, a lot more equity, but much more in real terms, if one did not capture it, with the average of ratios.

Prof. von Brockdorff stated the average of ratios, meaning if. Dr. Delia asked if it did not capture it, they agreed. Prof. von Brockdorff stated no, if one had a particular good year where there was increasing debt but increasing equity. Dr. Delia stated no that was not the example he gave him. He had a particular year where there was a good ratio, but it was good based on very low real figures, he gave an example, 100 in debt, 1,000 in equity, a new company was formed, 10,000 equities put in and not yet taken on debt.

The Chairman asked to make the question. Dr. Delia asked if they agreed that one would have a good gearing ratio. Prof. von Brockdorff stated it depended, but he should understand. Dr. Delia asked but if one calculated only for that year would it not be good, for that year only. Prof. von Brockdorff confirmed yes, the variability in terms of debt and equity obviously varied depending on whether there was an increase in debt or an increase in equity. Dr. Delia stated they agreed but let them take the first year before the increase. Dr. Mifsud Bonnici asked to let him finish. Dr. Delia stated with all due respect, he understood what he was saying and they understood exactly because that was what he wrote.

The Chairman asked for a concise question and concise response. Dr. Delia stated he was asking about a new company, the first year, the first full financial year, it had 10,000 equity and no debt, new, it had a good gearing ratio. Prof. von Brockdorff stated again he would say. Dr. Delia asked what the gearing ratio was. Prof. von Brockdorff stated he would go back to the requirement in the tender. Dr. Delia stated he was not asking him about that. The Chairman stated Prof. von Brockdorff, at this point they were in cross-examination meaning to respond to the question asked, there was no need to deviate at this point. Prof. von Brockdorff confirmed, naturally, meaning as Dr. Delia was saying, he was mentioning a particular year. Dr. Delia asked if that year had a good gearing ratio. Dr. Mifsud Bonnici stated yes or no. The Chairman stated it was a simple question. Prof. von Brockdorff stated if one had a situation where there was low debt relative to equity, yes obviously. Dr. Delia stated the second year had come, so he had 0 debt and 10,000 equities, the second year had come, to give him a chance. The Chairman stated to let him ask the question. Dr. Delia stated in the second year he kept 10,000 equity and added 10,000 debts, how much was the gearing ratio of the second year only, he was only asking that.

Prof. von Brockdorff asked to repeat as he had not heard him. Dr. Delia stated he had left 10,000 equities, how much he started with equity, he left it, but took the first 10,000 in debt, what was the gearing ratio there. Prof. von Brockdorff stated 1, that was it, again meaning he was calculating on a year-by-year basis. Dr. Delia confirmed yes, and asked Prof. von Brockdorff to listen to the question. The Chairman asked to make the question. Dr. Delia stated the third year he left 10,000, but now he took on much more debt, his gearing ratio went back up. Prof. von Brockdorff confirmed that was it. Dr. Delia stated meaning if he now had 100,000 it became 10. So, if he took the average, the first one came to 0 because he could not even calculate it. The Chairman stated he had said 0. Dr. Delia stated 1 and 10, what was the gearing ratio there. Dr. Mifsud Bonnici stated it came to more than 3. Dr. Delia stated yes but that was not the point.

Prof. von Brockdorff stated the ratio of that particular year was calculated again. Dr. Delia stated meaning if this company was seen not with his methodology, they lost those two years, so one was not taking them into consideration with this methodology, one was losing a little, did he agree. There was a distortion there compared to if one saw the actual total debt versus the actual equity in reality, in real terms, because the strength of a company could be described as a gearing ratio, meaning the proportion and so on, but in reality if there was a year with a large amount, that distorted it. The Chairman asked to make the question. Dr. Delia asked if he agreed with him or not on this example. Prof. von Brockdorff stated he would repeat again that a gearing ratio had always to be calculated on a year-by-year basis. Dr. Delia stated OK. Prof. von Brockdorff stated to indicate exactly how debt varied relative to equity. The Chairman stated OK, Prof. von Brockdorff.

### **Existence of a Standard**

Dr. Delia asked if what he was saying was indicated in some standard somewhere. The Chairman asked to repeat the question. Dr. Delia asked if what he was explaining was indicated in some standard somewhere, was there any standard. Prof. von Brockdorff stated if he looked, even if he thought, he could ask the AI, it would give the calculation on a year-by-year basis. Dr. Delia stated he did not know, he preferred to ask him because he was a professor and he knew him and knew how capable he was. Prof. von Brockdorff stated he would repeat again the methodology they had been applying at the MFSA; he had been on the board for at least 5 years. Dr. Delia stated if there was any standard, and if he told him yes, he would ask him which one it was. Prof. von Brockdorff stated that was the methodology they always applied, meaning the calculation was done on a year-by-year basis. Dr. Delia stated that was practice not a standard. He was asking him. The Chairman stated Prof. von Brockdorff, one moment, he would intervene. Simple question, was there a standard, yes or no.

Dr. Mifsud Bonnici stated and by standard they meant a document because perhaps standard was understood differently by many people. Dr. Delia asked if the Professor did not know what a standard

was. Dr. Mifsud Bonnici stated he had already responded, the answer had not pleased him, he kept asking the question in a different way. Dr. Delia asked in what different way. Prof. von Brockdorff stated he could say, he would repeat again, even doing a Google search in terms of how gearing ratio was calculated, there was always reference on a quarterly or year by year basis to do it exactly.

Dr. Delia asked the Professor please, with mercy, was there a standard or not. The Chairman stated simple, Prof. von Brockdorff. Prof. von Brockdorff stated convention told one, meaning it referred to a methodology he made reference to, that the gearing ratio was calculated on a quarterly or yearly basis. Dr. Delia stated they were not speaking about convention. Prof. von Brockdorff stated that in fact he could also tell them that when one had to look at a company's gearing ratio of 10 years, 15 years. The Chairman asked to be excused for interrupting, they were deviating he felt. The question was simple. Everyone knew what a standard was. Was there a standard on how to calculate the gearing ratio in a unique manner, yes or no in relation to a standard. Dr. Mifsud Bonnici stated to help the Chairman, they would quote which document or standard it was. The Chairman stated and if yes to refer them to which one, and if no, they would move on to further questions.

Prof. von Brockdorff stated at this moment he could not refer to any book that mentioned. Dr. Delia stated he would not suggest to him there was no standard. Prof. von Brockdorff stated no, he was not saying there was no standard, there was a convention he would repeat again, a convention of how one calculated the gearing ratio. Dr. Delia stated he was seeing if he understood correctly then. Prof. von Brockdorff stated to take into account. Dr. Delia stated he was telling him there was a standard, he did not know what it was called and he had not checked that standard himself. Prof. von Brockdorff stated no it was not a question of checking a standard. First there was also the requirement, it was clear that the calculation be done for three consecutive years.

### **Reference to AI and Two Methodologies**

Dr. Delia stated the last thing, Prof. von Brockdorff, because he prompted him with what he mentioned, what did he say it was called. Prof. von Brockdorff asked who. Dr. Delia stated the AI, had he asked it. Prof. von Brockdorff confirmed yes. Dr. Delia stated it told him there were two methodologies, what did he say to that. Dr. Mifsud Bonnici stated oh dear. Dr. Delia stated this was not a joke, the AI, ChatGPT, told one there were two methodologies. Dr. Mifsud Bonnici stated he objected to this question. The Chairman intervened.

Dr. Delia stated he was requesting reasons in order to exhibit the document. Prof. von Brockdorff stated in his opinion, he did not agree, even if there were two methodologies, the requirement in the document, in the tender for him was clear, the methodology that. Dr. Delia asked to explain where. Prof. von Brockdorff stated the methodology he applied to calculate the gearing ratio and that he applied as a member of the listing authority of the MFSA.

Dr. Delia asked him to explain because obviously none of the bidders were members of the MFSA. He asked to explain, for someone who was not a member of the MFSA and was not accustomed to the methods with which he worked, where in that paragraph was it written that there was the requirement for the average of the 3 ratios for the different years, where was it written, it was not long. Prof. von Brockdorff stated as he explained meaning. Dr. Delia asked where it was written, he had asked him. The Chairman asked to refer to the tender document in his response. Prof. von Brockdorff stated he would have a look at how it was written as it was 3 consecutive years, the average ratio for 3 consecutive years, he thought it was.

Dr. Delia stated no, it was not written like that. Dr. Mifsud Bonnici stated he had responded now, not to dialogue with the witness, a question had been asked and he had responded. Dr. Delia stated Mr. Chairman, he was reading from a document they did not have before them because it did not say that. He asked to read it again, meaning this was cross-examination. He stated not to try to stop him in cross-examination. The Chairman intervened. Dr. Delia asked him to tell him where he was reading from.

The Chairman stated if they pleased, because otherwise they would become ridiculous. Prof. von Brockdorff was asked to go to page 8 of the tender document, row numeral 4. Dr. Delia asked where what was he read please, because it did not result. Prof. von Brockdorff asked for one second. Dr. Delia stated he had just read "the average of 3-year ratio," where was it. It was not written that way. Prof. von Brockdorff asked to allow him a second and read: "As an average of a consecutive 3-year period." The Chairman stated OK.

#### **Interpretation of "Average of a Consecutive Three-Year Period"**

Dr. Delia stated correct, so the average requested was of the period, not an average of ratios, they agreed. The Chairman stated to let him respond. Prof. von Brockdorff stated "as an average of a consecutive 3-year period" meaning the gearing ratio was to be computed as an average of a consecutive 3-year period. He understood it that it had to be calculated on a year-by-year basis.

Dr. Delia stated correct, and if he understood it differently, he went against what? He had not mentioned a standard to him, had not mentioned or read him something from somewhere, so against what would he have gone wrong? He was respecting that he understood it that way and could understand it that way, but he who understood it differently, against what would he have gone. Prof. von Brockdorff stated certainly in his opinion, he would never arrive at calculating the way Dr. Delia was suggesting. Dr. Delia stated good, but he had arrived at calculating it that way, what did he do wrong. The Chairman stated he would then make submissions. Dr. Delia stated nothing more.

The Chairman stated then cross-examination of the Professor, hearing none. He thanked Prof. von Brockdorff for his time and asked who was next please. Mr. Godwin Mifsud.

## **Witness Testimony**

### ***Mr. Godwin Mifsud (ID: 252180M) summoned by Dr. Calvin Calleja***

Dr. Calleja greeted Mr. Mifsud and asked him to begin by telling them a bit about who he was, what qualifications he had, and what his profession was. Mr. Mifsud stated he was Godwin Mifsud, an economist, he studied at the University of Malta and the University of Essex in the United Kingdom, practically his entire career he was a public official. His first job was as an economic officer in the economic department and he grew up through the ranks, meaning in 2011 he was appointed as director and in 2015 he was appointed as director general in the division for economic policy. He currently occupied the post of permanent secretary in the Ministry for the Economy, Enterprise and Strategic Projects, a post he held since the beginning of January 2025, and before that he was first appointed as permanent secretary in the transport ministry in September 2023.

### **Involvement in the Tender**

Dr. Calleja asked what his involvement was in this tender and whether he knew which tender they were speaking about. Mr. Mifsud stated his involvement was as a member of the evaluation committee.

Dr. Calleja asked him a few questions about the offer of Valletta Luxury Projects. First, at what stage did they as a tender evaluation committee evaluate the financial offer of VLP and the other offerors. Mr. Mifsud stated they evaluated the offers in the final stage, meaning the stage where they evaluated the financial effect. Obviously they first began by looking at the administrative aspect, then the selection criteria, then the technical aspect, and finally the finances. Essentially the system, which was electronic, something that anyone who had made a tender had to understand, guided one through it, meaning one could not start from the finances so to speak or choose to start from somewhere else.

### **Discrepancy in VLP's Financial Figures**

Dr. Calleja asked what figure VLP entered in the xml tender response format. Mr. Mifsud stated 1.2 million. Dr. Calleja asked what figure they included in the financial bid form and in their financial projections. Mr. Mifsud stated in the financial projections, which was a technical requirement that was in the RFP, and also in the financial bid form, the figure was 78 million.

Dr. Calleja asked what steps they took as the tender evaluation committee in view of the discrepancy between the xml tender response format and the financial bid form and the financial projections on the other side. Mr. Mifsud stated obviously they noted there was a difference between the two figures and on their part they sought legal advice from Ganado Advocates where they requested some clarification on a procedural level about how one could approach the case itself. There were long discussions and he could say obviously the legal opinion guided the decision they ultimately took, but one also had to keep in mind the basis on which they took the decision they took. Essentially if one

looked at the text of the tender, there was text he would read, meaning: *"In case of any discrepancy between the information provided in the financial bid form and the grand total in the tender response format, the latter shall prevail."* But this continued: *"This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as and when necessarily and applicable."* And therefore the second rule essentially supplied the first rule because in fact the total of the financial bid form could be worked out, meaning here they had to be careful about the logic as it was here so as not to be misunderstood and to avoid essentially being misled, meaning if there was a discrepancy between the two, the rule told one that the tender response format should prevail, but in the case where this could be worked out and here all the information was available for this to be worked out and there was also the information one could bring from the financial projections, then essentially it should be corrected and that was also the advice given to them by their lawyers.

Dr. Calleja asked how they then as a TEC worked out the total, how they applied this rule he was mentioning. Mr. Mifsud stated he should also mention that another important element that guided him was what was in the regulations, he would ask to be allowed a minute to be able to quote and asked to be excused for how he was positioned. He was referring to the general rules governing tenders and particularly to regulation 17. Dr. Calleja asked him to explain a bit and say what that regulation was please.

Mr. Mifsud stated 17.1 said: "Admissible tenders will be checked for arithmetical errors by the tender evaluation committee." Dr. Delia asked him to tell them the clause again please. The Chairman stated 17.1, page 19. Mr. Mifsud stated he would start reading again: "Admissible tenders will be checked for arithmetical errors by the evaluation committee." And it continued: "Without prejudice to other errors which may be identified, the following errors will be corrected as follows," and there were a number of examples of arithmetical errors. Now in this section, he drew attention to 17.3 which stated: "The amount stated in the tender will be adjusted by the evaluation committee in the event of an error, and the tenderer will be bound by that adjusted amount. In this regard, the evaluation committee shall communicate the revised price to the tenderer through a confirmation request via the ePPS. If the tenderer does not accept the adjustment within five working days, his or her tender will be rejected and his tender guarantee forfeited."

Dr. Calleja asked if he had to understand that this was the rule they used as well as the rule he mentioned under the RFP. Mr. Mifsud confirmed that was it. Dr. Calleja stated the procedure under this rule referred to the communication of the revised price and asked how they issued this communication to VLP. Mr. Mifsud stated obviously the price could not be changed, that was clear, meaning here when speaking about the price, the price was what it was, meaning it was not something

one could request to be corrected, and here they made a request for clarification. In the request for clarification, he did not know if there was a need to read it but they could certainly refer to it.

Dr. Calleja asked if perhaps to help him a bit, was he not right that this was the clarification, referring him to Exhibit CA 14. Mr. Mifsud confirmed he was confirming it. Dr. Delia stated the colleague could not ask direct questions beginning with "am I not right" as he should remember it was his own examination. Mr. Mifsud confirmed it was CA 14. The Chairman stated it was CA 14 and to continue.

Dr. Calleja asked if he could explain a bit the content of exhibit CA 14 please. Mr. Mifsud stated CA 14 contained the communication made with the bidder, essentially, did he need to read it. Dr. Calleja stated he would ask him a question to perhaps help him. He asked to explain a bit what choice they gave Valletta Luxury Projects to change their financial offer. Mr. Mifsud stated there was never a change in the financial offer. It was worth noting also that the financial offer under the wording in the tender reference was the offer per year, not the global one, it was per year, so it was the 1.2 million as it was, and in the same way each bidders was the offer per year, technically considered as the financial offer. Now here they drew attention to the fact there was a difference between the financial bid form and what was in the tender, in the xml tender, and here they were saying that when one worked out the amount, meaning 1.2 million for 65 years, it gave the amount of 78 million, and they asked him to confirm whether this correction was accepted by him and obviously he was advised that if he did not agree, obviously the offer would be rejected.

Dr. Calleja asked what the response given to them by VLP was. Mr. Mifsud stated: "We confirm the arithmetic correction and accept that the grand total in the tender response format should be 78 million not 1.2 million." Dr. Calleja asked what the conclusion of the tender evaluation committee was based on this response. Mr. Mifsud stated as a tender evaluation committee they accepted the correction and considered the value of 78 million and when one properly considered the technical offer and also the financial offer, they saw that the BPQR, the best price quality ratio, in this case was in favour of the bidder he was mentioning.

#### **Cross-Examination by Dr. Adrian Delia (for the Appellant)**

Dr. Delia asked if Mr. Mifsud could have before him the two documents they would be dealing with or asking about, the financial bid form and the tender response format. Mr. Mifsud stated they were not before him, but he knew them. The Chairman asked for a copy to be given to him. Dr. Delia asked to have the two side by side. He asked if they could also have them so they could follow what he would be trying to show.

#### **Who Chose the Consultants**

Dr. Delia stated going back first, something quickly. He asked him to confirm if it was not the evaluation committee that chose the technical consultants but rather the contracting authority that chose them.

Mr. Mifsud stated to be clear, the correspondence between the TEC and the consultant was made by the chairman or the secretariat. Dr. Delia stated he was asking him something very simple, only who chose them, as his colleagues had already testified. Mr. Mifsud confirmed yes, they were chosen by the contracting authority, but the communication was made by. The Chairman stated it was clear and to proceed. Mr. Mifsud stated it therefore also appeared from the logic of who testified there that the communication was made by the TEC, but in truth the engagement was made by the contracting authority. The Chairman stated this was clear.

Dr. Delia stated meaning no, because he was telling them something different. Mr. Mifsud stated he was not saying anything different. Dr. Delia confirmed yes, different from Mr. Cordina, the engagement was made by the contracting authority, they agreed. The Chairman stated he would then make submissions to him at the end. Mr. Mifsud confirmed the engagement was made by the contracting authority. Dr. Delia confirmed the engagement was made by the contracting authority. Mr. Mifsud stated Gordin had said. Dr. Delia stated not what he said, what he himself was telling them. Mr. Mifsud confirmed the engagement was made by the contracting authority.

#### **The Discrepancy and Applicable Rules**

Dr. Delia stated now let them go back, he would refer him to where he read from the tender document, "in case of any discrepancy." In case of any discrepancy between the information provided in the financial bid, the financial bid being what was written in CA 13 where there were two numbers on it, the annual figure and the concession duration of 65 years, they agreed. Mr. Mifsud confirmed that was it. Dr. Delia stated, "and the grand total in the tender response format." Mr. Mifsud stated what was the grand total in the response format. Mr. Mifsud stated the grand total in the response format was 1.2 million. Dr. Delia stated good, so they agreed there was a discrepancy between the two documents. Mr. Mifsud agreed. Dr. Delia stated good and this clause was telling him unambiguously that when there was a discrepancy, the latter should apply, meaning the xml tender response format. Mr. Mifsud confirmed yes.

Dr. Delia stated just a moment, he would ask him little by little. So at that point in time, was it not the case that from the very first moment one had to say the 1.2 applied, stopping there because it was below the minimum. The Chairman asked to let him respond. Mr. Mifsud stated but doctor, he had not given him a chance to respond. As he explained there was the first part which was clear, if there was a discrepancy between the financial bid form and the tender response format, the tender response format should prevail, but if there was a discrepancy and this could be checked from information already in the tender, this should be corrected.

Dr. Delia asked where that came from, they would read in English, "this condition shall not apply," asking to be given a chance. The Chairman asked to make the question. Dr. Delia stated this was the

rule, this rule only not applied, "this condition shall not apply to financial bid forms where the total can be arithmetically worked out," it was not telling one when there was a discrepancy between one and the other. Dr. Mifsud Bonnici asked what the question was. Dr. Delia asked where the arithmetical error was, where was the arithmetical error in the financial bid form. The Chairman asked the witness to respond. Mr. Mifsud stated the financial bid form was correct. Dr. Delia thanked him. Dr. Mifsud Bonnici stated no, let him explain because the answer was not to his liking. Dr. Delia stated he had not stopped him. The Chairman asked Mr. Mifsud to respond.

Mr. Mifsud stated here there was a situation where there was, as they had said, a distortion, to call it that, between the information in one page of a document and information somewhere else. Now this was the result obviously, there was an arithmetical incorrectness. Dr. Delia asked how, where was the arithmetical incorrectness. Mr. Mifsud stated well. Dr. Delia asked which mathematical sum was worked out wrongly. There was a difference between one document and another. The Chairman asked to let him respond. Mr. Mifsud stated he could answer, he had no problem. Dr. Delia confirmed to answer him. Mr. Mifsud stated technically what was in the xml was the rate multiplied by 1 instead of by 65, that was arithmetically incorrect. Dr. Delia asked where the 1 was. Dr. Mifsud Bonnici stated he had responded and to continue. The Chairman stated that was his response. Dr. Delia stated he was not seeing the 1. The Chairman stated Dr. Delia, the board would make its own evaluation there. Dr. Delia asked where this arithmetical sum was in the xml form. Mr. Mifsud stated he had responded.

Dr. Delia stated good and asked him to find the clause giving permission in the tender to correct the arithmetic in the xml since the tender was telling one in the financial form only could it be corrected, he asked to be shown where. Mr. Mifsud stated he had already explained that clause 5B here one had to consider when evaluating the financial bid and apart from that he had already explained regulation 17, he thought those two points together provided the necessary basis so that they could correct the error that was made and submitted, and he could add something else. Meaning here he thought the arithmetical error was, here there was a question of proportionality, he was not the lawyer who would explain it, but he thought here there was a question of proportionality, especially when one considered the quantum of the offer before them.

The Chairman stated that would then be the subject of submissions at the end by the lawyers. Were there other questions. The recommended bidder was asked if it had questions in cross-examination.

#### **Cross-Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri stated a few questions in cross-examination briefly. Mr. Mifsud first told them that the system itself guided one through a process to evaluate the offers made by the offerors. Mr. Mifsud confirmed he confirmed that. Dr. Camilleri mentioned that he told them about administrative, then the selection criteria, then technical, then financial, they agreed. Mr. Mifsud agreed.

Dr. Camilleri stated Mr. Mifsud told them that when they evaluated, after they evaluated, it seemed to them that after considering both the technical offer and the financial offer, when these were worked together, they gave the best BPQR which then led to the choice of the recommended bidder, they agreed. Mr. Mifsud agreed.

Dr. Camilleri stated he would ask him a small question about the technical offer. Did they not agree that they compared the technical offers of all those offerors that passed the administrative part and the selection criteria part, they agreed. Mr. Mifsud agreed. Dr. Camilleri asked if he remembered whether the offer made by VLP was in any way as documentation deficient. Mr. Mifsud stated no. Dr. Camilleri asked as a volume of documents submitted, he imagined they opened all the files sent to them by the various offerors, not only VLP, but they also agreed. Mr. Mifsud agreed. Dr. Camilleri asked from what he remembered whether they remarked upon or saw or noticed that VLP made some offer that as volume was far less than others. Mr. Mifsud asked if he meant volume of papers. Dr. Camilleri confirmed as volume of papers, or number of documents, or designs or whatever. Mr. Mifsud stated two years had passed, the volume of papers he thought was also material, here they were speaking about substance, the evaluation was made, if there were questions on particular points, he was there to answer them, but he could not respond on the volume and the thickness and the weight. Dr. Camilleri stated he was not going to ask him about that, what he was asking was because he imagined, and to tell him if he was wrong, that if there had been some bidder who submitted far less material than others, he imagined they would have indicated it in their reports. Mr. Mifsud stated if they were speaking about a criterion that according to the RFP, they could request clarification or correction on, that was done and all of that was documented.

#### **Financial Offer and the 78 million Figure**

Dr. Camilleri stated very good. He would now pass him to the financial offer. Did they not agree that where the financial offer was concerned there were various forms that had to be submitted as part of the offer of each offeror, they agreed. Mr. Mifsud agreed. Dr. Camilleri asked regarding the concession fee in particular, did they not agree that it was clear from the various forms submitted that the offer of Valletta Luxury Projects was of 78 million, they agreed. Mr. Mifsud stated as he said, obviously there was what was submitted in the financial offer, apart from that there were the financial projections submitted that supported the global offer of 78 million.

Dr. Camilleri asked if they did not agree that the mathematical, arithmetical calculation they made to arrive at 78 million was a simple multiplication of 1.2 million by 65. Mr. Mifsud confirmed. Dr. Camilleri asked if he also confirmed that this total agreed with the other figures submitted in other forms submitted by Valletta Luxury Projects. Mr. Mifsud confirmed. Dr. Camilleri stated that was all from the witness, thank you.

### **Cross-Examination by Dr. Ryan Pace (Interested Party – Katari)**

Dr. Pace stated yes and asked for permission. He introduced himself as the lawyer for the Katari, who was the interested party in this appeal and appellant in the second appeals. He asked to be allowed to ask some questions, some of which might be repetitive, but he would ask them. He asked to start a bit from the end of the testimony. Mr. Mifsud mentioned, obviously from his own initiative, but there were arguments that were more legal arguments that had to be made, the question of proportionality. Was he not right that this was not a most financially advantageous tender, they agreed. Mr. Mifsud agreed. Dr. Pace stated this was a BPQR tender. Mr. Mifsud confirmed that was it. Mr. Mifsud added however it still had financial implications because it had. Dr. Pace confirmed yes that it had financial implications. He asked them to agree it was not the most economically advantageous. Mr. Mifsud confirmed. Dr. Pace stated it was not a question of price only, let them simplify further.

### **Structure of the Financial Bid**

Dr. Pace asked if he was not right that the financial bid according to the call document was essentially composed of two documents, the financial bid form and the tender xml format, they agreed. Mr. Mifsud agreed. Dr. Pace stated earlier reference was made to exhibit CA 13 which was a document exhibited by the contracting authority. Was he not right that was the financial bid form. Mr. Mifsud confirmed that was it. Dr. Pace stated Mr. Sharlo Camilleri who testified in a previous sitting presented a document of which he had given him a copy. Was he not right that document was what in the tender was referred to as the tender response format, the xml tender structure. Mr. Mifsud agreed.

Dr. Pace stated was he not also right that on that document, the tender xml structure document, there was a price of 1.2 million indicated. Mr. Mifsud agreed. Dr. Pace asked if they did not also agree that the 1.2 million indicated on that document was essentially inserted by the bidder proposing it, they agreed. He asked if they agreed that according to this testimony Mr. Mifsud was giving, Valletta Luxury Projects on the tender xml structure offered 1.2 million, they agreed. Mr. Mifsud agreed. Dr. Pace stated in the field where the 1.2 million was indicated, it mattered if he could read it out as he had the document with him. At the bottom of the 1.2 there was a sentence that was a bit clear. Mr. Mifsud confirmed: "Grand total including concession fees, covering the contract period, exclusive of VAT." Dr. Pace stated good, contract period, did they not agree that the contract period according to the call document was 65 years. Mr. Mifsud agreed. Dr. Pace stated so according to that document, the tender xml structure, Valletta Luxury Projects offered 1.2 million for 65 years. Mr. Mifsud confirmed that was it.

Dr. Pace stated so far, they had agreed. Now in his testimony he made reference to an adjustment in the tender document where among other things, written in bold on page 17, it stated: "In case of any

discrepancy between the information provided in the financial bid form and the grand total in the tender response format, xml tender structure, the latter shall prevail." He would now convert this into numbers in the context of the Valletta Luxury Projects offer. Was he not right that this paragraph, now going to the next paragraph, was saying that in the case of Valletta Luxury Projects, the offer of 1.2 million should apply and not the offer of 78 million. Mr. Mifsud agreed.

### **The Clarification Communication**

Dr. Pace made reference to exhibit CA 14. Mr. Mifsud asked what CA 14 was. Dr. Mifsud Bonnici stated the financial bid form. Dr. Pace stated no, CA 14 was the clarification. Mr. Mifsud confirmed it was before him. Dr. Pace asked was he not right that this clarification sent in exhibit CA 14, the contracting authority, when he said them he meant the contracting authority, essentially indicated to the bidder, to the preferred bidder in this case Valletta Luxury Projects, not to fix the 78 million in the financial bid form but to fix the 1.2 million in the xml tender structure, they agreed. Mr. Mifsud stated no, they essentially did not ask for anything to be changed. Here it was the stage where they were making an assessment of the financial offer and when doing this, they noticed there was this difference between those two main documents, meaning they were speaking about the tender response format and also the financial bid form. Now here they asked for confirmation that what was offered as concession fee, which was clear, and the concession fee was per annum, was 1.2 million.

Dr. Pace asked where he got the 1.2 million from in the xml tender structure, he had just read to him. Mr. Mifsud stated it came from both documents, there was the yearly concession fee in CA 13, meaning it was clear it was the rate excluding VAT per year. Dr. Pace asked what was there, to explain a bit. Mr. Mifsud stated there was yearly concession fee. Dr. Pace asked what was indicated in the financial bid form. Mr. Mifsud stated there was 1.2 million, there were 3 fields, there was the yearly concession fee, the rate per year and the duration, and the line below made a multiplication giving 78 million. Dr. Pace confirmed 78 million, that was the financial bid form. Mr. Mifsud confirmed that was it.

Dr. Pace stated correct, but in the tender xml structure they agreed because he himself told him so, they agreed that the 1.2 million was referring to a grand total. The Chairman asked if the microphone was still on. Mr. Mifsud confirmed that was it. The Chairman stated it was now on, to continue. Dr. Pace stated was he not right then, binding him to his own testimony Mr. Mifsud, that the 1.2 million indicated in the xml tender structure, in the field within the xml tender structure itself, was referring and he would use the exact words to grand total, they agreed. Mr. Mifsud agreed. Dr. Pace stated for the contract period. Mr. Mifsud agreed. Dr. Pace stated and the contract period was 65. Mr. Mifsud agreed.

Dr. Pace stated so with exhibit CA 14 they asked him to clarify, and not to use the word change, to clarify not the 78 million but the 1.2 million. Mr. Mifsud stated not even that. Dr. Pace asked why they did not agree. Mr. Mifsud stated here he would say again it was the stage where they were considering the offer in its entirety, they. Dr. Pace stated no but he was on the financial; to allow him a second, he was on the financial offer, and he was asking him to testify on the question. He stated Mr. Mifsud, what they asked clarification about was the 1.2 million not the 78 million. Mr. Mifsud stated no. Dr. Pace asked why not. Mr. Mifsud stated he would explain. What was the xml format? The xml was a document like other documents submitted by the bidder with the difference that it was also publicly visible. Now when they made the evaluation, they made the evaluation on all the information and when they noticed this discrepancy, they wanted to confirm that the grand total was in fact what was in the financial offer, meaning it was 1.2 million per year for 65 years with a grand total of 78 million. Dr. Pace asked when they carried out the financial scrutiny, when the TEC carried out the financial scrutiny, was not the financial scrutiny carried out on the financial offer. Mr. Mifsud stated the financial scrutiny was carried out on all the information in hand. Dr. Pace stated no, just a moment. Mr. Mifsud asked what he understood by financial scrutiny. Dr. Pace stated just a minute. He had at the beginning asked him and he confirmed yes that the financial offer was comprised of two documents, the financial bid form and the tender xml structure, and he agreed with him. They agreed. Mr. Mifsud confirmed that was it. Dr. Pace asked so when they carried out the financial scrutiny, they carried out the financial scrutiny on the financial offer, they agreed. Mr. Mifsud confirmed that was it. Dr. Pace stated and the financial offer was those two documents was it not. Mr. Mifsud confirmed that was it. Dr. Pace stated so they had clarified it. So now that they had clarified it, he would ask him the question again in the light of these clarifications. What they asked to be clarified from those two documents was the 1.2 million not the 78 million. Mr. Mifsud stated the TEC was convinced. Dr. Pace asked him to answer the question and then give the explanation. Mr. Mifsud stated he would explain, this was the third time he was asking the same thing, meaning he.

The Chairman stated he would give a small direction. Obviously, the questions being asked were about the clarification. Now the clarification, factually, that was beyond the question and answer, he was capable of reading it. Now in the third and fourth line specifically, they said: "While the financial bid form provides for a yearly concession fee of X amount which when multiplied by the variable of 65 years etc., the grand total inputted in the tender response format provides for 1.2 million." Meaning the clarification, in his eyes, explicitly, was referring to both these documents, the question was referring to these two documents. Meaning he had to understand that at this point the response had to be in the context of these two documents as well.

Dr. Pace stated exactly, the question he asked linked to these two documents was therefore in the clarification sent in CA 14, was he not right that they asked for clarification about the 1.2 million, meaning in the tender xml format and not about the 78 million in the financial bid form. Mr. Mifsud agreed. Dr. Pace stated good.

### **The Second Part of the Discrepancy Clause**

Dr. Pace stated now he would refer him again to the second part of the clause he had cited, which he would read for the purposes of recording since he knew it at his fingertips: "This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary applicable." He asked if they agreed that these two lines nowhere referred, as the 3 lines before did to the tender response format xml structure, but only to the financial bid form. Mr. Mifsud stated here the word was forms, meaning they were speaking about plural, they were speaking about the financial submissions provided by the tenderer. Dr. Pace stated the word was forms, good. Did they agree that, now allow him, in that phrase the tender response format was nowhere a form, they agreed. Mr. Mifsud stated format was a thing. Dr. Pace stated he would repeat the question he asked before. In those two lines, "this condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as and when necessary applicable," did they agree that nowhere was there written tender response format xml tender structure. Mr. Mifsud stated no, it was not written there, if he was looking for the textual words they were not there. Dr. Pace stated not written, not there, so let them stick to the textual.

In his testimony however he made reference to the article, to section 17 of the general rules governing tenders and was testifying that they applied that section, they agreed. Mr. Mifsud agreed. Dr. Pace stated he made reference to 5 circumstances provided for by section 17, they agreed. Mr. Mifsud stated obviously there were 5 circumstances but the sentence before said "without prejudice to other arithmetical errors which may be identified etc." meaning it continued there, meaning there was the possibility of looking at and correcting errors that were beyond those 5 identified ones.

Dr. Pace stated meaning he was saying, and he asked to make sure he was understanding correctly so as not to waste time and everyone's time, and he would enter into each of those circumstances. He was saying that in the tender document there was nowhere anything saying that arithmetical corrections could be made in the tender xml format, they agreed. Textually. Mr. Mifsud confirmed textually, if one looked for the textual words, they were not there. Dr. Pace stated he was also saying now in this testimony. Mr. Mifsud stated but one had to consider the spirit of all this and he thought. Dr. Pace stated but the spirit would be seen by them or by a priest because. The Chairman stated there was then the re-examination case and certainly submissions would be made on it. Dr. Pace stated let them stick to questions if it was not a problem. He was saying textually it was not there, they agreed.

Mr. Mifsud agreed. Dr. Pace stated but now he was also telling him that this request for clarification was not even one of the circumstances A, B, C, D and E in section 17, they agreed. Mr. Mifsud confirmed and at no time had he told him one of them. Dr. Pace stated nothing more from the witness.

**Re-Cross Examination by Dr. Joseph Camilleri (Recommended Bidder)**

Dr. Camilleri stated two small clarifications please on what had been said. A question was just asked a little while ago where it was said or suggested that the xml format was not a form, but if he remembered correctly, a little earlier Mr. Mifsud had referred to them as the two forms. Did they not agree that in truth the xml response format was effectively a form. Mr. Mifsud confirmed that was it. Dr. Camilleri asked if it had the format of a form. Mr. Mifsud stated it was the format of a form and what he initially said and still maintained was that one had to keep in mind that these were like two sides of the same coin, meaning this was one submission, meaning one could not say something in one place and somewhere else say the opposite and remain consistent with oneself, meaning the need for clarity and consistency here was important.

Dr. Camilleri stated now these two forms, because he was effectively confirming that the xml response format was also a form, did they agree they formed part of the financial offer, both of them financial. Mr. Mifsud agreed. Dr. Camilleri stated and they agreed that the financial offer as he told them before, if he remembered correctly, did not include only these but also included the other financial material submitted by each bidder. Mr. Mifsud agreed. Dr. Camilleri stated that was all.

**Re-Cross Examination by Dr. Clement Mifsud Bonnici (Contracting Authority)**

Dr. Mifsud Bonnici asked if it was not right that apart from the financial bid form, the bidder that was recommended in the tender also indicated in the financial projections the method by which the concession fee was calculated. Mr. Mifsud confirmed that was it, he had already said this earlier, meaning the financial projections supported a grand total of 78 million as an offer. Dr. Mifsud Bonnici thanked him.

The Chairman thanked Mr. Mifsud. He asked if there were any other witnesses to bring. Dr. Mifsud Bonnici stated Marisa Marmara, and they would close with her. The Chairman stated Ms. Marisa Marmara.

**Witness Testimony**

***Ms. Marisa Marmara (ID: 558978M) summoned by Dr. Calvin Calleja***

Dr. Calleja asked Ms. Marmara to briefly tell them who she was, what qualifications she had, and what her profession was. Ms. Marmara stated she was a graduate from the University of Malta in public policy and management and held a Masters in knowledge-based entrepreneurship. Today she occupied the role of CEO at Housing Projects Solutions Limited and from a career perspective she was always involved in general management of companies.

### **Role in the Procurement**

Dr. Calleja asked what role she had in this procurement. Ms. Marmara stated she had an administrative role in the sense of coordination, for example of the experts that helped them in the process of formulating the tender documents and also in the appointment of the TEC members, the tender evaluation committee. Dr. Calleja asked first of all what role she occupied within the contracting authority in this period she was mentioning. Ms. Marmara stated she was CEO of the MSPP.

### **Extensions to the Submission Period**

Dr. Calleja asked her a few questions about the extensions issued by the contracting authority for the term, for the submission of offers. First, how many extensions were there to the period of submissions. Ms. Marmara stated there were 3 extensions. Dr. Calleja asked if she could guide them as to when each extension was issued. Ms. Marmara confirmed yes, there was one extension from the 3rd of March to the 19th of April because there were two clarifications from different bidders who wanted to see if the contracting authority could not extend the time so that they would have more chance to prepare the offers, and the two subsequent extensions were because there were technical problems on the ePPS, on the system that tenderers used to submit their proposals.

Dr. Calleja stated very good. He asked them to focus on the extensions they issued because of these technical problems. He asked when the first extension was issued because of a technical problem. Ms. Marmara stated on the 17th of April. Dr. Calleja asked why this extension was issued and asked her to tell them what the technical problem was. Ms. Marmara stated there was a problem with the upload limit. Dr. Calleja asked what it was, how much was it. Ms. Marmara stated the upload limit had to be 200MB, even according to the tender document itself they had issued.

Dr. Calleja asked who informed them of this technical problem. Ms. Marmara stated they were informed through the DOC, who had received correspondence from a particular bidder, she thought it was AX, where they had a problem with the upload limit. Dr. Calleja asked if she could tell them approximately the date of this email. Ms. Marmara checked and stated the 12th of April.

Dr. Calleja stated she told them they were contacted by the department of contracts. He asked what steps they took as contracting authority after this contact was made regarding this technical problem. Ms. Marmara stated they liaised with the Department of Contracts since they were the administrators of the system who recommended they make an extension so that they could check with their service providers who were European Dynamics to look at this problem and how it could be resolved and eventually resolve it. Dr. Calleja stated when he referred to the system, he understood she was referring to. Ms. Marmara stated the e-PPS.

Dr. Calleja stated he would now refer her a bit to a clarification they issued after the extension, which was document CA10, if she had it before her. He asked why they issued this clarification. Ms. Marmara stated she would make sure she was looking at the correct document, CA10. The Chairman confirmed yes. Ms. Marmara confirmed they informed because the contracting authority wanted to inform the economic operator that the technical matter had been resolved through an enhancement in the system.

### **Third Extension**

Dr. Calleja stated very good, they would now move a bit to document CA11. If through document CA10 they informed the market that the technical problem had been resolved, why was this third extension issued. Ms. Marmara stated because they were contacted again both by the DOC and by bidders, by certain bidders, that there was again a technical problem. This time the difference was that while the first time they were informed there was a problem with the upload limit, this time the problem was related to the parts, they could not upload, she thought only up to 4 parts could be uploaded.

Dr. Calleja stated she mentioned they were also contacted by certain bidders and asked if she could tell them who these bidders were. Ms. Marmara stated yes, they had telephone contact, the PricewaterhouseCoopers offices had called them, and they also had correspondence with DB. Dr. Calleja asked who PricewaterhouseCoopers were representing. Ms. Marmara stated they did not know. Dr. Calleja asked in what period they received these phone calls and emails from DB. Ms. Marmara checked and stated on the 20th of April. Dr. Calleja asked when the third extension was issued. Ms. Marmara stated on the 20th of April.

Dr. Calleja asked what verifications they made to ascertain that this problem regarding uploading more than 4 parts of tenders truly existed. Ms. Marmara stated they checked with the DOC, they verified with the DOC, also on the basis of correspondence received from DB itself. Dr. Calleja asked what advice the Department of Contracts gave them. Ms. Marmara stated the DOC gave them the same advice as the first time so that they could resolve the problem, they should give an extension so they could go back to European Dynamics and see what the problem was and resolve it. Dr. Calleja asked how long this third extension was for. Ms. Marmara stated for one week. Dr. Calleja asked on what date the tender was therefore closing. Ms. Marmara stated she thought the 28th of April, yes. Dr. Calleja stated that was all from his side, thank you.

### **Cross-Examination by Dr. Adrian Delia (for the Appellant)**

Dr. Delia thanked her for being with them. He asked if when the tender was being drafted and written to reflect the needs of the contracting authority, she was involved in it. Ms. Marmara confirmed yes. Dr. Delia stated she was involved in it because he was assuming she was not the one who wrote it. Ms. Marmara stated no, no. Dr. Delia stated she would have engaged some people to write the tender for her. Ms. Marmara confirmed yes there would have been, they had a process on it. Dr. Delia asked if she could tell them who was engaged. Ms. Marmara stated they appointed a number of experts, among whom was E-Cubed Consultancy, particularly Dr. Gordon Cordina. Dr. Delia asked what the company was called. Ms. Marmara stated E-Cubed Consultancy, where for example from E-Cubed's side they helped them to establish the criteria that for them as the contracting authority were important to verify for example the economic and the financial capacity and the strength of the bidders of the offers.

Dr. Delia asked and before this, from their side of the company, besides herself, inside the company, were there other people involved, meaning when she said they because they wanted, they engaged to see what they needed, internally were there other people, technical people he was referring to. Ms. Marmara stated no as technical people they were always externally appointed. Dr. Delia stated meaning from the company's side it was her. Ms. Marmara confirmed yes. Dr. Delia stated and then she engaged these experts. Ms. Marmara stated and obviously the company's board of directors, meaning one always, it was more from her end. Dr. Delia stated but the people involved from MSPP to instruct the technical people on what they needed, that was her. Ms. Marmara confirmed yes.

### **The Gearing Ratio**

Dr. Delia stated on the question of the gearing ratio, which he thought she followed not badly, did she enter into any great detail with the consultants to tell them what she wanted or did she tell them listen she wanted something that would safeguard that the companies chosen were strong, and now they would tell them, how far did she say or not say. Ms. Marmara stated yes, their main objective, as she explained earlier, was that there be a number of criteria on which one could assess the financial and economic capacity of the bidders. Dr. Delia stated meaning she did not enter into any discussion or debate with him to explain how this gearing would work, how she wanted it, there was nothing. Ms. Marmara stated no because she was not technical in this aspect. Dr. Delia stated nothing more from the witness.

The Chairman asked if there were any questions in cross-examination. Dr. Camilleri stated nothing from their side. The Chairman thanked Ms. Marmara.

### **Closure of Evidence**

Dr. Delia stated he understood the first direction was given in the second one. For correctness, at the moment they were made, since they began with the first one technically, there had to be at least one page in the second one where it was stated that today all the evidence of the first appeal was closed, or with the number, and all the parties were declaring they were applying the evidence as already stated and there was no further evidence.

### **Closing of Sixth Session**

The Chairman thanked all those present and adjourned to the next day, Thursday 29th January 2026 at 10.00hrs.

### **Seventh Day January 29, 2026.**

#### **Minutes – 29<sup>th</sup> January 2026.**

On the 29th of January 2026 at 10:00am the Public Contracts Review Board reconvened, for the hearing following the sixth sitting of the 28th of January 2026.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Vincent Micallef – Member
- Mr Lawrence Ancilleri – Member

#### **Attendance:**

#### **Appellant: European School of English Limited. (C19714)**

- Dr Adrian Delia – Legal Representative.
- Dr Damien Degiorgio – Legal Representative.
- Dr Christian J Farrugia – Legal Representative.
- Mr Sean Legault – Company Representative.

#### **Recommended Bidder: Valletta Luxury Projects.**

- Dr Joseph Camilleri – Legal Representative.
- Dr Andre Gera de Petri – Legal representative.
- Dr Kyle Decelis – Legal Representative.
- Mr. David Vella – Company Representative.
- Mr Ian DeCesare – Company Representative.

#### **Interested Party: Katari Hospitality JV.**

- Dr Ryan Pace – Legal Representative.
- Mr Paul Attard – Company Representative.

## **Contracting Authority: Malta Strategic Partnership Projects Limited.**

- Dr Clement Mifsud Bonnici – Legal Representative.
- Dr Calvin Calleja – Legal Representative.
- Mr Karl Azzopardi – Company Representative.
- Ms Marisa Maramara – Company Representative.
- Mr Robert Falzon – Company representative.
- Prof Saviour Formosa – TEC Chairperson.
- Dr Matthew Joe Farrugia – TEC Secretary.

### **Final Submissions**

The Chairman noted that the submissions were to incorporate both appeals, 2131 and 2132. All parties agreed to this.

#### **Final Submissions by Dr Adrian Delia (for the Appellant)**

Dr Delia referred to the preliminary plea concerning the lack of integrity of justice. Assuming that there is a lack of jurisprudence on this issue in our courts, he made reference to Article 106 of the Concession Contracts Regulations and quoted:

*“Any tenderer or any person, having or having had an interest, or who has been harmed or risks being harmed, by an infringement or by any decision taken including a proposed award in obtaining a contract, a rejection of a tender, a reconciliation of a call for tender after the lapse of the publication period, may file an appeal by means of objection for the PCRB which shall contain in a clear manner, the reasons for their complains”.*

Dr Delia stated that this was an all-encompassing and clear article. He referred to *Truevo Payments Ltd vs DOC*, appeal dated 30th June 2021, and quoted:

*“Dan ir-regolament huwa wiesgha bizzjed biex jghati interess lis-socjeta Credorax, tappella mid-decizzjoni tal-kumitat evalwattiv. Din is-socjeta kellha nteress fil-materja tas-sejha tal-offerti u wriet dan l-interess meta ppruvat tippartecipa fin-negozjati”.*

He noted that they had components participating in the offer besides interest.

*“Din ir-regola ta nteress tista tkun differenti, mir-regola ta nteress guridiku li joperaw totalment b’mod generali ghal kawzi quddiem il-qrati taghna”.*

In our courts, there is extensive jurisprudence, such as cases where one has five dependants and only one of them appeals.

*“Pero trattandosi ta ligi specjali, hija bbazata fuq direttiva ta l-Unjoni Ewropeja u hija din li ghanda applikazzjoni ghal kaz immaterja”.*

This is a clear principle and an article upon which the Board can rely to reject the preliminary decision, as well as the specific jurisprudence of both the Board and the courts.

They based their appeal on four parts. Referring to 31st January 2024, the commencement of this appeal, he mentioned the exclusion letter sent to Iconic Malta-Nobu. This letter referred to the well-known paragraph repeatedly read during testimony, and he quoted the exclusion part:

*“Further, the workings presented in your submission, for the gearing ratio are not in line, with what was requested in the RFP. You computed one gearing ratio by taking the ratio of the aggregate sum, of that, and aggregate sum of equity, of the three financial years, and this was done for each member of the consortium”.*

They were told they were not in line with what was requested, but no explanation was given as to why. They reiterated what they had in fact done. He quoted from the rejection letter:

*“You were given the opportunity to rectify this shortcoming and to submit a Gearing Ratio which complies with the requirements of the RFP. You disagreed and maintained that your method of computation of the Gearing Ratio was correct”.*

On the second page, he quoted:

*“No account can be taken of any reservation in the Proposals submitted by Tenderers, any disagreement, contradiction, alteration or deviation shall lead to the proposals not being considered any further”.*

The grievance was whether the appellant’s bid was compliant or not. In the exclusion letter, they were told they were not in line with what was requested, and they repeated the method they had used. They were informed that the appellants were given the opportunity to use the Evaluation Board’s method and, since they did not, they were excluded by the Evaluation Board. He read the clause:

*“A gearing ratio of not more than 3”.*

Dr Delia referred to witness testimonies where they were asked what the gearing ratio shows. It is used to assess the financial strength of a company, and it makes sense to consider the average over three years. He quoted:

*“This is to apply as an average of a consecutive three-year period”.*

The request was not for three individual yearly ratios. It would have been clearer had the request specified an average of yearly ratios over three years. He referred to page 19 of the tender, which states the method of the evaluation process used by the committee, and asked the Board to review the formula requested in the clause mentioned.

The Committee should have noted that the use of their formula was mandatory if non-compliance would result in exclusion. Mr Cordina wanted a specific method, but this should never have resulted in exclusion, as exclusion requires a clearly mandatory instruction.

The appellant did not bring a witness to testify on instinct, but, expert witnesses, and no one could challenge how report SE2 was presented.

Mr Alan Grech and Mr Raphael Aloisio, who enjoys a very good reputation in court, would not risk be answering differently. He is a professional with no interest in lying, and they provided detailed explanations. Mr Matthew Xuereb from Deloitte also testified and explained their terminology after intense cross-examination. Both methods give a clear picture of a company’s strength, and neither contradicts what is written.

Professor Von Brockdorff, also an expert, did not state that there was a standard method, but repeatedly said that he uses the same system at MFSA, while not opposing the appellant’s

methodology. Both the Evaluation Committee witness and Ms Marisa Marmara testified that they referred to Mr Cordina as the expert. He was the same person who drafted, recommended, and evaluated the applicable terms, and was then asked to interpret a clause he himself had written.

He could not be objective, as he had a vested interest in protecting his position. In the tender, he wrote “the only rational”. Dr Delia stated that when he questioned the Evaluation Committee on an unrelated subject, Row 2, they had no knowledge of it. This was a tender worth millions. The Committee admitted that after hearing the expert, they sought second opinions, reviewed technical notes, and had doubts. Doubts should favour participation, not exclusion.

The appellant’s experts justified their approach, which was understandable. It called for an average, not average ratios. Dr Delia illustrated this with an example: in Room 1 there are 5 people wearing blue caps and 1 wearing a red cap; in Room 2 there are 10 wearing red and 30 wearing blue; and in Room 3 there are 1,000 wearing red and 100 wearing blue.

According to Professor Cordina’s ratio, blue would prevail. However, if you add  $1 + 10 + 1,000 = 1,011$  red caps and  $5 + 30 + 100 = 135$  blue caps, red clearly prevails. For these reasons, the appellant’s exclusion should be revoked.

Dr Delia referred to Court Case 269/2015 LM of 18th January 2024, *James L Hawkins vs Seasus Ltd*, and *J Zammit vs Michael Zammit Tabone* of 28th February 1997.

Dr Delia then moved to the second grievance concerning the Valletta Luxury offer. He had asked Mr Sharlo Camilleri about the bid price and whether it could change. Mr Camilleri replied that it was €1.2 million and could not change. Referring to page 15, he quoted:

*“Any requests for clarification or rectification made in connection with the Tenderer’s Financial Projections under Note 2 to Clause 5 may not, in any circumstance, lead to any change in the Financial Offer and/or the Financial Bid Form”.*

From page 17, he quoted:

*“In case of any discrepancy between the information provide in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail”.*

He mentioned Mr Godwin Mifsud, who testified extensively. There was a discrepancy between the two documents: one stated €1.2 million, while the other stated €1.2 million multiplied by 65 for the second price, with the latter being decisive. At that point, a decision had to be taken. He quoted:

*“This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected”.*

The XML discrepancy should not apply to the financial bid form if the issue was merely an arithmetic error. However, the appellant had no arithmetic error. The witness attempted, in extremis, to refer to correction of arithmetical errors, but none existed.

Dr Delia referred to case law, *Allied Consultants Ltd vs DOC*, 13th January 2014, where the global price did not correspond with the unit price, constituting an arithmetical error.

Dr Delia then addressed the third grievance regarding Katari. He referred to ESE 1, a report by European School of English Ltd reviewing the financial plans and property holding of Katari Ltd for the

years 2018–2021, dated 27th March 2024. This report was the most thoroughly explained and withstood all questioning. It was a fact that there were deadline extensions.

Mr Alan Craig named the precise dates involving Mazars. Ms Marmara explained all reasons related to cases AX and DB, and Mr Jason Grech detailed all extensions. For whatever reason, extensions were granted.

Coincidentally, during that timeline, there were entries, filings, and substantial changes to Katari's accounts with MBR. Dr Delia noted the testimony of the first witness, Dr Baldacchino, who unprompted stated that this was not a run-of-the-mill case, emphasizing her extensive experience.

Mr Cordina, of BOV, did not mention this and did not verify the company's accounts, even at the most basic level. He did not inquire about any conflict of interest, unlike the Board prior to the hearing.

Referring to Article 81 of the Concession Contracts Regulations, Part 6 of the PPR, as well as Articles 191(1) and 199, Dr Delia explained how the Board could react where procedures were flawed and bids excluded on administrative grounds.

The aim was to verify the strength of the company and whether anything had changed. This was not an issue of late filing, but of whether the filed accounts were thorough and correct. No standards were cited other than those proposed by Mr Cordina. Dr Delia knew that the company director signed more than one set of accounts on the same day in September, including both the Craig and ICAM reports. A tender with such inconsistencies could not be awarded.

Referring to the fourth grievance, he addressed the methodology of scoring. He cited Article 61(1):

*“Contracting Authority has the freedom to organise the procedure leading to the choice of the concessioner”.*

This was also confirmed by Ms Marmara, who testified and explained. He continued quoting:

*“The document simply states that each technical offer submitted will be evaluated in accordance with the award criteria and the associated weighting given shall be determined as per the Evaluation Grid found in Section 1 no.6.3. It is further specified that the ‘submissions made by tenderers shall be evaluated in terms of appropriateness and a relevance of the proposed approach with a consciousness, internal coherence and with a level of detail”.*

These were generic statements. This Board has consistently held that scoring systems must be transparent and allow bidders to understand how they are evaluated. For example, if 60% is financial and 40% substantive, bidders must know how points are allocated. If machinery numbers are assessed and one bidder has fewer, they can decide whether to bid or adjust their price.

This process must be transparent. The appellant argued that the explanation of scoring was insufficient. The appellant was not even evaluated on scoring but nonetheless felt obliged to adhere to the law.

### **Final Submissions by Dr Ryan C. Pace**

Dr Ryan Pace noted that, in his submissions, he was required to address the first appeal and the grievance. Mr Pace, on behalf of Katari Hospitality JV, stated that the grievance, both in writing and

orally, says a lot but ultimately says nothing. He believes that this grievance was strategically directed against Katari Hospitality JV.

ESE argued, and he quoted:

*“a number of inexplicable extensions to the closing date for submissions, were specifically aimed to favour Katari Hospitality’s bid”.*

He stated that he was pleased to note that the appellants brought forward witnesses who testified to the opposite. Every extension requested was not made by his clients, and this is clearly stated in the appeal’s answer from the Contracting Authority. In her testimony, Ms Marmara explained the dates and details of every extension, as well as the reasons for them. The extensions were valid and were granted to all bidders, including DB, AX, and Nobu. The other bidders showed no interest in requesting extensions from the Contracting Authority in order to favour Katari.

The grievance was based on assumptions, seemingly created to sling mud without justification. Dr Pace believes that while the process may have lacked certain elements, he was not prepared to say that there was “cogent suspicion of collusion”. He noted with approval that the other party did not mention this in his submission; however, it was still written that there was collusion. This alleged collusion was said to be between the Contracting Authority and his client, regarding extensions requested by someone else and supposedly intended to favour his client. Dr Pace stated that this does not make sense, either to say or to write. He quoted:

*“Without such extensions and without submitting the amendments to its financial statements in the interim, Katari Hospitality would not have managed to meet the requisite economic, financial and technical capability criteria set out in the Concession”.*

He stated that, in fact, Nobu was the only bidder that was non-compliant, not Katari. Proof of this was contained in Alan Craig’s report. Dr Pace said that he respected Mr Craig’s professional opinion and his honesty. Dr Delia, in his submission, referred to “basic ingredients numbers”. Dr Pace had asked Mr Craig, as a general principle, whether every director is obliged to present “a true and fair view of his assets”, to which Mr Craig replied in the affirmative.

Dr Pace stated that Mr Craig had carried out a desktop exercise referred to as a forensic report, whereas a true forensic report would involve significantly more work. For the purposes of the report, Mr Craig met with ESE but not with MBR, nor with an auditor or an architect. Dr Pace asked whether the report addressed substance or form, and the witness replied, “for both”.

The substance consisted of the numbers, and there was no mention of any errors in those numbers. The expert from the other side, who was also the auditor of the group, stated that there were no errors in the numbers but that there was an issue with the form. Despite this, they alleged that his client was conspiring to renew extensions in order to become compliant. These were competitors of his client. It appears that they also had difficulties with certain interpretations made by all the professionals who testified.

Dr Craig had an issue with the form. However, neither Dr Craig nor the Board were the competent authority; that authority was MBR. Dr Pace asked Mr Craig whether MBR could refuse the submission, and he replied yes, adding that according to their interpretation, it had not been refused.

Dr Pace stated that he could not fully understand what the witness was trying to convey. He said that the 63-page report served only to slow down the process and accuse his client of suspected collusion. This was a national project. The expert concluded by stating that there were no errors in the numbers. The opposing party appeared to be anticipating how to remove his client, who was one step ahead, in the event that his client was granted a right on the common grievance. That grievance, directed at his client, amounted to nothing more than mudslinging in the hope that it would stick, after which the opposing party would claim that the process was defective.

This third grievance, which Dr Pace described as dangerous, lacks substance, as confirmed by witness Alan Craig. Turning to the second and only grievance in his appeal, Dr Pace referred to the bid and price of Valletta Luxury Projects. He cited the testimony of Mr Sharlo Camilleri and Mr Godwin Mifsud, both permanent secretaries and members of the Technical Evaluation Committee, in relation to the financial offer.

He explained that every tender consists of three stages: administrative, technical, and financial, each with a separate set of documentation. His client progressed to the final stage. The financial offer consists of two documents: the financial bid form and the XML tender format, which, according to the witnesses, the Technical Evaluation Committee is obliged to examine.

Valletta Luxury Projects submitted a financial bid form containing three fields:

- one inserted by the Contracting Authority, number 65, relating to the concession period.
- one field to be manually inserted by the bidder relating to price; and
- one field based on the price, indicating the grand total.

The financial bid form submitted by Valletta Luxury Projects indicated €78 million. The second document was the XML tender structure, which was also to be completed by the bidders. One field required the grand total of the concession fee covering the contract period, excluding VAT. The contract period was 65 years for all bidders. Valletta Luxury Projects submitted €1.2 million in this field.

Dr Pace referred to the tender document issued by the Contracting Authority and highlighted what he considered the most important section. He quoted:

*“In case of any discrepancy, between the information provided in the financial bid form, and the grand total in the tender response format, XML tender structure, the latter shall prevail”.*

The tender clearly states that the XML entry prevails over the financial bid form. Accordingly, Valletta Luxury manually inserted €1.2 million. However, the witnesses also referred to a second clause stating that *“this condition shall not apply to the financial bid form”*. The Contracting Authority described this as a clerical error, which Dr Pace found deeply concerning.

The Contracting Authority attempted to address the clerical error in the second paragraph, which he quoted:

*“This condition, the XML structure and thus the 1.2 million, shall not apply to financial bid forms where the total can be arithmetically worked out or corrected if, necessary applicable”.*

Dr Pace questioned the witnesses regarding the clarification letter, which later became a rectification, exhibited as CA14. He asked what they expected to be corrected: the €78 million in the financial bid form or the €1.2 million in the XML tender structure. Both witnesses replied that they expected the €1.2 million in the XML to be corrected.

He again quoted:

*“This condition shall not apply to financial bid forms”.*

Dr Pace stated that he agreed with the opposing party on this point. This condition should never have been applied, as the error, according to the Contracting Authority, was in the XML structure, not in the financial bid form (CA13), which clearly showed the concession fee of €78 million. Both witnesses admitted that there was no reference to the XML structure. The wording of the tender allowed for errors to be corrected only in the financial bid form.

Dr Pace stated that the circumstances outlined in Clause 17 of the General Governing Rules were inapplicable to this case. Mr Godwin Mifsud testified that the circumstances justifying a clerical error did not fall within letters A to E, and that reliance was placed instead on the phrase “without prejudice to arithmetic error”.

When evaluating price, the Technical Evaluation Committee assumed the right to ask Valletta Luxury Projects to correct the €1.2 million, stating that it would have been “dumb and passive” not to accept the €78 million offer. Dr Pace disagreed with this reasoning.

He stated that, in order “not to be dumb”, the Committee discarded a two-year document, allowed an error that breached the principle of self-limitation, and requested the Contracting Authority to correct the XML tender structure, despite the tender explicitly stating otherwise and despite the circumstances not being covered by the General Governing Rules.

Dr Pace questioned how a public process can proceed based not on what the tender document states, but on the desire not to appear “dumb”. Even if the Committee believed Valletta Luxury Projects’ offer to be advantageous—a view Dr Pace does not share—the process must be governed strictly by the tender document. The Committee misinterpreted its role by acting on a right that was not granted by the tender. Once such an approach is allowed, Dr Pace concluded, then everyone becomes “dumb”.

#### **Final Submissions by Dr Clement Mifsud Bonnici (for the Contracting Authority)**

Dr Mifsud Bonnici stated that he would begin with the second grievance. He said that he was disappointed with the manner in which the process had concluded. The other parties raised exceptional grievances that were not even addressed during the evaluation process. There was no proof in respect of most of the grievances raised.

Referring to the price of Valletta Luxury Projects, he stated that the appellants were attempting to find a black-letter interpretation of only part of the RFP. The Committee did not discard the tender, even though Dr Mifsud Bonnici was aware of many cases where the court refused the RFP and the tender documentation for failure to adhere to the principle of proportionality.

The first grievance concerned the nullity of the appeal and the issue of standing raised by the Contracting Authority and the recommended bidder. Dr Mifsud Bonnici stated that it was the first time he had encountered a joint venture where not all partners had lent their credibility to the appeal. His arguments were intended to corroborate what had already been stated.

He made two observations. The first was that partners in a joint venture must be jointly and severally liable. The other parties did not contest this issue, Dr Mifsud Bonnici questioned where they were and whether they wished to remain involved in the project.

The second observation related to Rule 2.3 of the General Rules Governing Tenders, which he quoted as follows:

*“All partners in the joint venture, are bound to remain in the joint venture, until the conclusion of the contracting procedure”.*

He explained that this regulation is reflected in the Kazistic ECJ judgment, were, unlike the position of a subcontractor, a member of a joint venture cannot be changed until the conclusion of the process. It would have been preferable had Messrs Arrigo been present.

The principle of introducing a grievance solely for one’s own benefit derives from civil procedure and is also recognised under Maltese and European public procurement law. If the appellant had satisfied the gearing ratio criteria and had been awarded the full technical score of 100, they would still not have been the recommended bidders, and Valletta Luxury Projects would still have been awarded the tender.

Referring to paragraph 32 of their reply, he stated that the calculations therein were correct and were never contested. He gave the example of a student who studied hard for an exam and was proud of his work after completing all the papers. However, upon receiving the results, the student failed paper 1, and the examiner did not even look at papers 2 and 3.

In the present case, the appellant paid €50,000 for a review of the process; however, this was irrelevant, as there was no possibility of coming first. The Board should examine all exceptions and grievances. If the sentence regarding Support Services were not present, the merit of the second grievance would have been dismissed outright; however, the Board would still need to decide on the matter.

With regard to the merit of the first grievance, the applicable standard of proof was that of manifest error of assessment. The appellants were required to demonstrate that the Committee and the consultants acted unreasonably and committed a manifest error. The application of the selection criteria, particularly those relating to economic and financial standing, is technical in nature, and it is this standard that applies.

He referred to **Net Company vs DOC 367/2025/1**, which applies to the present case in relation to the interpretation of selection criteria. Referring to paragraphs 47 and 48 of the judgment, he quoted:

*“Il-kwistjoni dwar x’modules jew funzjonijiet għandhom jitqiesu bħala «standard functional requirements of business domains» hija però iktar waħda ta’ sura teknika milli fattwali, u b’hekk, hawnhekk il-Qorti trid bilfors tagħti ċertu affidabbiltà lill-kumitat ta’ evalwazzjoni, għaliex dan huwa mogħni b’ħafna iktar għarfien tekniku Tassew huwa prinċipju miżmum fil-ġurisprudenza, li fejn jidhlu kwistjonijiet ta’ materja teknika, il-kumitat evalwattiv fi ħdan l-awtorità kontraenti għandu jithalla jgawdi minn diskrezzjoni wiesa’, u minħabba f’hekk, bħala regola din il-Qorti spiss iżzomm lura milli tindaħal fl-apprezzament tekniku tal-kumitat evalwattiv, sakemm ma jintwerewx raġunijiet gravi jew konvinċenti biżżejjed biex tagħmel hekk”.*

This principle was recently clarified in **Bessui Joint Venture vs DOC 379/2025/1**. That case did not concern selection criteria but rather the terms of reference. The court found that since the clause was not technical, was clear, and unambiguous, the standard of manifest error of assessment did not apply. Referring to paragraph 50, he quoted:

*“Kif mistqarr mill-kumpanija appellanti stess, din il-klawsola «hija ċarissima u bla ebda ambigwià», u ġaladarba din il-klawsola ma kinitx titlob xi dehen tekniku partikolari biex tintfieh, l-interpretazzjoni m’haddna mill-membri tekniċi tal-kumitat ta’ evalwazzjoni, ma tibqax waħda fundamentali b’halma taf tkun każijiet oħra li jinvolvu kwistjonijiet ta’ sura teknika”.*

The court thus stated that where a clause is technical, such as a selection criterion, the standard of manifest error of assessment applies, whereas it does not apply to non-technical clauses. In the present case, since the clause was technical, this standard was applicable. Dr Mifsud Bonnici outlined six reasons why the appellants’ bid failed to meet the required standard of proof.

First, the clause was clear, and all other bidders applied it as requested by the Evaluation Committee. He quoted:

*“Reasonably well informed, normally diligent tenderers interpreted the same way”.*

This was the same standard applied in the SIAC case. Method 1 did not require an average calculation. Dr Craig testified honestly and used the word “implicitly” in relation to the average. Dr Aloisio and Mr Xuereb agreed that there were alternative methods that could be used without calculating an average.

All experts who testified were credible, reputable, and should not be challenged. The appellants alleged that Dr Cordina had a conflict of interest; however, they failed to mention that Deloitte checked the figures of the bids that were rejected, even though Deloitte did not perform the calculations themselves. The gearing ratio, on its face, was not challenged.

The Court of Appeal has held that a member of the Evaluation Committee may also draft the tender without this constituting a conflict of interest. He referred to **JamesCo Trading Ltd vs Active Ageing and Community Care 308/25/2**, paragraphs 44 and 45, quoting:

*“Daqskemm min jgħin fit-tfassil tad-dokument tas-sejha jagħmel dak ix-xogħol fl-interess u għall-benefiċċju tal-awtorità kontraenti, daqshekk ieħor li l-membri tal-kumitat ta’ evalwazzjoni jaġixxu f’isem u fl-interess tal-awtorità kontraenti. Ma jistax ikun għalhekk li hemm xi kunflitt bejn lirwol ta’ min jabbozza d-dokument tas-sejha, u min ipoġġi b’halma evalwatur fuq il-kumitat ta’ evalwazzjoni”.*

*“Il-fatt innifsu li wieħed jiġi kkonsultat dwar kif għandhom jinħarġu l-ispeċifikazzjonijiet tekniċi tas-sejha jew ikun involut fl-abbozzar taddokument tas-sejha, u fl-istess waqt ikun involut fl-għarbiel tal-offerti b’rabta ma’ dik is-sejha, ma jippreġudikax għalhekk l-integrità tas-sejha, anzi jaf ikun ta’ benefiċċju, għaliex b’halma qiegħda tgħid sewwa l-kumpanija appellanti, f’sitwazzjonijiet b’hal dawn jonqos bi kbir ir-riskju li l-kumitat ta’ evalwazzjoni jifhem id-dokument tas-sejha b’tali mod li ma jkunx jaqbel mal-ħsieb oriġinali tal-awtorità kontraenti”.*

**Third reason:** the Board should adhere to the directives of the Court of Appeal. Both Mr Xuereb and Mr Craig preferred Method 1, as it was more linear and used a weighted average. They stated that the RFP did not refer to a simple average; however, logically, the word “average” in the tender refers to a simple average.

**Fourth reason:** Dr Craig criticised Method 2 on the basis that it penalises a bidder for a bad year, whereas Method 1 conceals any financial distress experienced by the company during that period. The intention behind the method was clearly explained by Ms Marmara and Mr Cordina. The Government was obliged to verify that, given the 65-year duration of the concession, the company was financially sound. Mr Xuereb stated that the preferred method depended on what made sense

after reviewing the company's performance over three years. Method 1 was therefore used through reverse engineering.

The appellants did not like the result of Method 2 and introduced another methodology — an average — in order to pass regardless. Referring to **FM Core Ltd vs The Ministry of Gozo 374/2020/1**, paragraph 15, the case concerned selection criteria relating to economic and financial standing. The Court of Appeal held that, in the case of a consortium, the criteria must be satisfied collectively:

*“Filkaż ta’ konsorzju, ukoll jekk membru wieħed waħdu għandu qagħda finanzjarja soda u jista’ bis-saħħa ta’ hekk jikseb finanzjament għall proġett, madankollu, jekk it-twettiq tal-kuntratt jeħtieġ il-parteciġazzjoni tal-membri kollha tal-konsorzju, il-kuntratt jista’ jiġi frustrat jekk membru wieħed ma jkunx jista’ jkompli l-attività tiegħu għax mgħobbi bi djun li ma jiflaħx għalihom. Dan jikseb urġenza akbar fil-każ tallum meta tqis illi l-kuntratt huwa maħsub li jseħħ għal seba’ snin u nofs”.*

This demonstrates that the Government's intention was justified and reasonable.

**Fifth reason:** Method 1 was inappropriate because, if a company starts with a bad year and later improves, it would be unfair to exclude it solely on that basis. This was a red-flag case, as the final year selected by ESE was 2020, the worst year, which failed to satisfy the RFP requirements.

**Sixth reason:** Dr Cordina stated that when Method 1 is used and totals are aggregated, the result is not an average but a fictitious business entity that never existed, as was done by ESE to conceal its weakest year.

The Evaluation Committee acted fairly towards the appellants by giving them an opportunity to rectify the issue, which they chose to ignore. In their grievance, they claimed that the reason for rejection was unclear; however, he quoted:

*“The gearing ratio for the European School of Language, which was calculated as an average of an aggregated three-year period was 3.88. The reservation and the deviation was because it was different to the request of the tender and duly rejected.”*

#### **Final Submissions by Dr Calvin Calleja (for the Contracting Authority)**

Dr Calleja noted that, regarding the second grievance, both in the ESE and the Katari grievances, there was a selective citation of the tender requirements relating to the grand total. Dr Delia referred to the XML tender structure without taking into account the financial bid form and the financial projections included in every offer. It is true that the financial offer amount could not be changed after the submission deadline; however, if there was a discrepancy between the bidder's grand total in the XML and the financial bid form, the XML amount would prevail.

The appellants decided to skirt around four regulations. Referring to page 17 of the RFP, clause 6B, the Contracting Authority clearly guided what was to be considered when evaluating the financial offers, and he quoted:

*“The financial offer will be assessed on the basis of the concession fee offered by the tenderer”.*

The concession fee is paid annually in advance by the concessionaire to the CA. The Board was asked to examine the letter of award and the letter of rejection issued by the CA, items 2.1 and 2.2. In the

section relating to the scoring of admissible tenders, which were compliant at every stage, it is evident that the exercise was not based on 65 years but on the one-year concession fee.

The second regulation concerns when the grand total could be arithmetically worked out. The XML is not only subservient to this rule but is also dis applicable.

The third regulation, mentioned by Mr Mifsud, is found in Rule 17 of the General Rules Governing Tenders, which not only authorises the Evaluation Committee to check arithmetical errors but obliges the Committee to do so.

The fourth regulation states that the Tender Evaluation Committee had every right to request a clarification from Valletta Luxury Projects regarding their financial offer. The financial offer is designated as Note 3, which means that a rectification could not be made, but a clarification could.

Dr Calleja explained the regulation that disappplied the XML tender structure. It is irrelevant what is submitted in the XML if the total is arithmetically unreachable; one must prevail on the total derived from the tender documentation. The RFP is a contract between the CA and all bidders, and the regulation favours arithmetical calculation or correction. All that was required was €1.2 million multiplied by 65 years, resulting in €78 million.

The Evaluation Committee could have arrived at the total independently without applying an arithmetical correction, but for the sake of transparency, it applied the correction under Rule 17 of the Governing Rules of Tenders. The Committee adhered to the procedure outlined in clause 3 of Rule 17.

When a confirmation request was sent to Valletta Luxury Projects, they were not asked to change the grand total of €78 million but to confirm it, failing which the offer would be rejected. Valletta Luxury Projects confirmed the amount. To demonstrate that the Evaluation Committee was entitled to seek such clarification, he referred to three European Union cases: Archus and Gama C131/16, Slovensko C599/10, and Manova C336/12.

He also referred to the court judgment in AIB Insurance Brokers 237/2021, paragraph 30. From this jurisprudence, three conditions can be identified as having been satisfied by the clarification request. The first regulation is that a clarification request cannot be used for a new submission. In this case, the request was based solely on information already contained in the financial bid form and projections.

The second regulation is that the bidder should not gain an advantage as a result of the clarification request, which did not occur in this case. The third regulation is that the clarification request should not allow substantial changes to the offer. In fact, Valletta Luxury Projects did not submit any new information or documentation in its clarification note. The principle of proportionality dictates that the Evaluation Committee was right to request clarification. Dr Pace, on behalf of Katari, stated that neither appellant explained how the Committee's decision breached the principle of proportionality.

The tender sought the best quality for the best price, with 40% of the total points allocated accordingly. The CA provided that, in the event that two bidders obtained the same score in the BPQR, they would be given the opportunity to submit a higher offer to determine the awarded bidder.

Referring to Case Polaris Marine 329/2023/1, paragraph 59, he explained that the Department of Fisheries sought two RIBs and that the appellant's offer was rejected for several reasons. One issue was that the logo was affixed to the cabin instead of the navigation console, which was designated as

Note 3. The award criterion was the cheapest price. The difference between the awarded bidder and the appellant was €120,000, and the Court of Appeal found that this difference justified the purpose of the call.

One must consider what the decision of the Court of Appeal would be in the present case, where the CA had the opportunity to save €40 million compared to the second-ranked bidder. The appellants wanted the CA to adopt a strict, black-letter interpretation of the RFP and to reject the awarded bid.

Referring to Case Krypton Chemists 322/2025/1, paragraph 24, where the court stated that the CA must distinguish between formal and substantial irregularities, he noted that a minor error was insufficient grounds to exclude an offer.

Referring to Euro pharma 445/2025, paragraph 35, he quoted:

*“Din il-Qorti tqies li l-għan ewlieni wara s-sejha għall-offerti de quo agitur ma kinitx li l-Awtorità kontraenti toqgħod tfettaq u tfittex ix-xagħra fl-għagina sabiex telimina l-konkorrenza”.*

This, he concluded, is precisely what the two appellants were attempting to do through their grievances.

#### **Final Submissions by Dr Clement Mifsud Bonnici (for the Contracting Authority)**

Dr Mifsud Bonnici explained the third and fourth grievances. He stated that there appeared to be an argument concerning an alleged conflict of interest involving Dr Cordina. However, any such allegations against Dr Cordina were not proven. Dr Cordina’s assistance in the evaluation process had been known since February 2024. Paragraph 44 of the Government’s response listed the names of the individuals assisting the Evaluation Committee, and no grievances were raised in this regard. Therefore, the Board should ignore this submission in its decision.

He further explained that the other parties accepted the tender documents in their entirety and that, if there were any issues, they could have sought a pre-contractual remedy up to the last day, without the need to pay a deposit. The appellants did not even specify which criterion was causing them concern.

Dr Mifsud Bonnici stated that this was territory he had already chartered ten years ago in the case of *Managing Consulting Industry*. Regarding the third grievance, he quoted:

*“It is respectfully submitted, that a number of inexplicable extensions to the closing date, where specifically aimed to favour Katari”.*

He said that, based on the evidence given by Mr Craig and the extensions granted, this grievance should not have been raised, as the allegations were null. Ms Marmara testified that the extensions were made for genuine reasons and that other bidders who were not present experienced technical issues. Mr Craig stated that his observations were *prima facie*; however, both Dr Cordina and the Committee were required to decide on the submitted documents.

With regard to the first grievance, the appellants claimed that they would have qualified if Method 1 had been applied. In the third grievance, they alleged that there were inexplicable extensions specifically aimed at favouring Katari; however, Katari would have been advantaged if Method 2 had

been applied. There was therefore no consistency in the appellants' arguments, and the appeal should be dismissed.

### **Final Submissions by Dr Joseph Camilleri (for the Recommended Bidder)**

Dr Camilleri stated that he would focus on the second grievance, which was the only grievance raised by Katari. He noted that it was important for the Board to consider the positions taken by all parties, together with their submissions, grievances, and responses. This was relevant both to recall the starting point of the proceedings and because exceptions had been raised by all parties which required consideration. He clarified that he would not repeat all the arguments contained in their reply, but that this did not mean that their position had been abandoned.

He referred to the concession fee price submitted by Valletta Luxury Projects. He discussed the appellant's desire to apply the regulation that the XML response format could never be changed, as well as the interpretation of the exceptions to that regulation. By way of example, he said that if bidders were requested to supply caps to civil workers and one bidder submitted an offer of €100,000, it would not be fair to change that price to €90,000 after seeing that another bidder had submitted €95,000.

Conversely, it would also not be fair if a bidder quoted €20,000 and later realised that another bidder had offered €100,000, prompting the latter to invent some excuse to adjust their price to gain greater profit. Dr Camilleri agreed that the price submitted initially should never change; however, he maintained that there are exceptions applicable to the circumstances of this appeal.

There was no doubt that Valletta Luxury Projects' offer was €78 million from the outset. Had they known the prices of the other bidders, they could have submitted an offer of €50 million and still been awarded the concession.

In these circumstances, the applicable regulatory exceptions must be applied. Dr Camilleri maintained that Valletta Luxury Projects' offer was consistently €78 million from the beginning. Both the RFP and the General Rules Governing Tenders granted the Contracting Authority the right to seek clarification of the €78 million offer. Referring to specific provisions, he quoted:

*"In case of any discrepancy, between the information provided in the Financial Bid Form, and the grand total in the XML tender structure, the latter shall prevail".*

And:

*"This condition shall not apply to financial bid forms, where the total can be arithmetically worked out, and/or corrected if as and when necessary and applicable".*

He noted that the term 'Financial Bid Form' in the first paragraph was capitalised and therefore a defined term, unlike its use in the second paragraph. He agreed with Dr Calleja that the appellants' argument—to change the 'financial bid form'—would mean relying exclusively on the XML tender structure. However, if the second provision were interpreted as meaning that no correction could ever be made, the need for this exception would cease to exist. This exception, which the appellants sought to exclude, has a broader interpretation.

This did not imply that the price itself could be changed. There is a clear distinction between changing a price to gain an advantage and confirming the offer originally submitted, which in this case was the highest by €40 million.

This opportunity was provided by the RFP, specifically page 15, which was quoted by the appellants. He quoted:

*“Any request for clarification or rectification made in connection with the tenderer’s final projections, may not in any circumstance lead to any change in the financial offer or bid form”.*

No one was requesting a change to the financial bid form. Sharlo Camilleri categorically stated that there was no doubt that the offer was genuine. Mr Godwin testified that the €78 million figure was clearly stated in the financial documents, in the projections, in the workings, and in the financial bid form.

Under the General Rules Governing Tenders, there is provision for the correction of errors. Clause 17.1 refers to “without prejudice to arithmetical errors”, and Clause 17.3 states that “the amount stated in the tender will be adjusted by the evaluation committee in the event of error, and the tenderer will be bound by that adjusted amount”. This explained the process followed by the Contracting Authority, and no party claimed that the Authority had failed to comply with the rules.

The appellants argued that this correction should not apply. Dr Camilleri emphasised that such an argument ran contrary to the established facts. The Contracting Authority applied all the relevant RFP regulations and general principles in order to confirm the highest offer.

### **Conclusion of the Hearing**

With no further submissions, Mr Kenneth Swain thanked all parties and formally concluded the session.

End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sittings of the 23<sup>rd</sup> January 2026, 27<sup>th</sup> January 2026, 28<sup>th</sup> January 2026 and 29<sup>th</sup> January 2026.

Having noted the objection filed by Katari Hospitality JV (hereinafter referred to as the Appellant) on 12<sup>th</sup> February 2024, refers to the claims made by the same Appellant with regards to the tender of reference MSPP/02/2022 listed as case No. 2132 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Ryan C. Pace
Appearing for the Contracting Authority:	Dr Clement Mifsud Bonnici & Dr Calvin Calleja
Appearing for the Preferred Bidder:	Dr Joseph Camilleri
Appearing for the Interested Party:	Dr Adrian Delia, Dr Damien Degiorgio & Dr Christian J Farrugia

Whereby, the Appellant contends that:

- a) The criteria for award was declared as being “the concession will be awarded to the tender submitting the proposal with the best price -quality ration and which is administratively and technically compliant. “
- b) The concession document detailed in very unambiguous way how the financial offer had to be construed. Important references include *“The financial offer will be assessed on the basis of the Concession Fee offered by the tenderer. No financial offer will be made on the ground rent payable to the Lands Authority and no additional or other financial offers will be evaluated.”* Moreover it stated that *“In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail.”*
- c) It cannot be ignored that on 28 April 2023, the Contracting Authority issued information showing that Valletta Luxury Projects offered the sum of €1,200,000 for the whole duration of the concession, i.e. 65 years.
- d) It is now incomprehensible how now this same offer has been mutated to mean a concession fee of €1,200,000 on a yearly basis. By doing and deciding so, the Contracting Authority has moved away from the same specification as listed in the concession document (reference to quote above) and therefore it distorted the level playing field which should be allowed to all economic operators.

- e) It is to be noted that all economic operators understood what was required out of them and if anything it was the responsibility of the recommended bidder to avail itself of the right to request clarifications if need be.
- f) Section 17 of the General Rules Governing Tenders is in this case inapplicable since the 'error' is not of an arithmetical nature, but one in the actual raw data (financial bid) provided.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 22<sup>nd</sup> February 2024 and its verbal submission during the hearing held on 22<sup>nd</sup> February 2024, in that:

a) ***Successful Tenderer has submitted the highest Yearly Concession Fee***

The Contracting Authority submits that this ground is unfounded in fact and in law. Rather, it contends that the Successful Tenderer has submitted a financially compliant proposal and the highest Yearly Concession Fee of €1,200,000 per year. This contention is corroborated by the RFP and the Successful Tenderer's proposal, as shall be set out below.

The Financial Bid Form requested tenderers to submit a "Yearly Concession Fee" in cell C9 and automatically the form would arithmetically calculate the GRAND TOTAL in cell D10 using the following formula: "=SUM(C9\*D9)". Cell D9 provided the duration of 65 years of the concession. Against this background, in particular, that the financial offer was meant to be assessed on the Yearly Concession Fee, the members of the evaluation committee came to the conclusion that it was clear that the Successful Tenderer inputted the Yearly Concession Fee of €1,200,000 as the Grand Total on the Tender Response Format on ePPS. The evaluation committee was also comforted by the fact that the Successful Tenderer indicated and restated the amount of €1,200,000 as a "Yearly Concession Fee" in 2 different locations in its proposal its financial projections and its financial bid form. The evaluation committee issued a request for the confirmation of an arithmetical correction, namely, that the Grand Total in the Successful Tenderer's Tender response Format should have been €78,000,000 and not €1,200,000. The Successful Tenderer confirmed the arithmetical correction and accepted that the Grand Total in the Tender Response Format should be €78,000,000 and not €1,200,000 without changing in any way the substance of the offer. The evaluation committee also took the view that the general condition in the RFP stating that: "in case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail did not apply in this case given that the GRAND TOTAL of the financial bid form could be arithmetically worked out and/or corrected, as explained above in paragraph 49.c. The Contracting Authority submits that the RFP was clear and unambiguous when it stated that: "This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable", and therefore, the preceding general condition in the RFP was inapplicable in this case. In any case, the Contracting Authority submits that the evaluation

committee has acted correctly, prudently, diligently and consistent with the general principles of public procurement, in particular, self-limitation and proportionality.

The Appellant's suggestion that the Successful Tenderer's proposal is rejected is draconian and exceeds what is necessary to achieve the objectives of the RFP. The evaluation committee had at its disposal less onerous options. In this instance, and at this stage, the evaluation committee elected to request a confirmation of an arithmetical correction from the Successful Tenderer. The Contracting Authority submits that this must have been right move by the evaluation committee, otherwise, the Appellant would not have predicted its use in its Appeal without having known what the evaluation committee did. The Appellant's arguments that a confirmation of an arithmetical correction was not possible here is, respectfully, wrong. First, the obvious clerical error in question could have been arithmetically calculated by reference to the financial bid form and the financial projections. Second, the Rule 17.1 of the General Rules Governing Tenders does not provide for an exhaustive list of errors that may be so addressed, in fact, it reads: *"Without prejudice to other arithmetical errors which may be identified [...]"*

b) ***Inadmissibility of the Fourth Demand***

The Contracting Authority submits that the fourth demand requested by the Appellant is inadmissible at law and ought to be rejected. That this demand cannot be upheld by this Honourable Board since it exceeds its competence and powers. This Honourable Board is, as its name implies, a review board which reviews whether decisions taken by a contracting authority are legal or otherwise. This Honourable Board considers "appeals" made by aggrieved bidders in terms of Regulation 106 of the CCR against a specific decision taken by a contracting authority, such as the rejection of a bid or the recommendation of award. This Honourable Board's assessment is limited to "accede or reject the appeal" which has to be strictly an application for the review of the contracting authority's decision after closing of bids-see Regulation 112(h) of the CCR-and it cannot evaluate bids and award public contracts since the responsibility of evaluation of bids, and quite frankly, the expertise and competence, lies with the evaluation committee and not with this Honourable Board.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 22<sup>nd</sup> February 2024 and its verbal submission during the hearing held on 22<sup>nd</sup> February 2024, in that:

- a) The concession fee offered by VLP was clearly that of € 1,200,000 per year (and not the total over the term of 65 years). There are several factors which confirm this, including:
  - i. The fact that this is stated clearly in the financial bid form, and in the cash flows and financial projections;

- ii. The fact that an offer of € 1,200,000 over 65 years is much lower than the minimum indicated in the RFP – no tenderer would have knowingly proposed a concession fee which would clearly lead to disqualification;
  - iii. In any event, VLP was requested to confirm its offer, in terms of a procedure which is envisaged both in the RFP and in the General Rules Governing Tenders.
- b) The case of NqauyMT as referred to by the appellant is irrelevant to the case at hand. If anything this is clear cut case were the principle of proportionality should prevail.

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

## **PART I – BACKGROUND AND PROCEDURAL HISTORY**

### **A. The Concession Procedure**

The present appeal arises from concession procedure MSPP/02/2022, issued by Malta Strategic Partnership Projects Limited (hereinafter 'MSPP' or 'the Contracting Authority'), for the award of a sixty-five year works concession for the regeneration and reuse of the Evans Building in Valletta as a superior quality tourism accommodation establishment. The Evans Building is a scheduled heritage property of considerable architectural and historical significance situated in the capital city of Malta, subject to protection under the Cultural Heritage Act, Cap. 445 of the Laws of Malta.

The concession model adopted by the Contracting Authority envisaged that the eventual concessionaire would be responsible for the full design, development, management, operation and maintenance of the Evans Building throughout the concession term, at the conclusion of which the property, together with all improvements, would revert to the Government of Malta. The concessionaire was required to bear the full operational risk of exploiting the works; the Request for Proposals (hereinafter 'RFP') expressly stated that no revenue or financial assistance of any kind would be forthcoming from the Contracting Authority or the Government of Malta. The estimated aggregate value of the concession, calculated in accordance with Regulation 53 of the Concession Contracts Regulations by reference to the total turnover anticipated over the full sixty-five year duration, was stated in the RFP at €300,025,420 exclusive of VAT.

The procurement was conducted pursuant to the Concession Contracts Regulations, S.L. 601.09 (hereinafter 'CCR'), which transpose Directive 2014/23/EU of the European Parliament and of the Council of the 26<sup>th</sup> February, 2014 on the award of concession contracts. The RFP was published on the ePPS electronic procurement platform on the 27<sup>th</sup> November, 2022. Following three extensions to the original closing date, each attributable to verified technical difficulties with the ePPS platform, the procedure closed on the 28<sup>th</sup> April, 2023. A total of twenty-one bids were received, of which eight distinct proposals were ultimately admitted to substantive evaluation. The evaluation framework was structured on a Best Price Quality Ratio (hereinafter 'BPQR') methodology, comprising a sixty per cent technical weighting and a forty per cent financial weighting.

## **B. The Appellant**

The Appellant, Katari Hospitality JV (hereinafter 'Katari' or 'the Appellant'), is a joint venture that submitted a proposal in procedure MSPP/02/2022 and participated fully in all stages of the evaluation process.

## **C. The Impugned Decision**

By letter dated 31<sup>st</sup> January, 2024, the Contracting Authority notified Katari that its offer had been unsuccessful, as it did not represent the bid with the best Price Quality Ratio (BPQR). The same letter communicated that the concession procedure was being recommended for award to bidder TID000191554, Valletta Luxury Projects (hereinafter 'VLP' or 'the Recommended Bidder'), on the basis of a yearly concession fee of €1,200,000 excluding VAT, described as the offer with the best BPQR. It is this decision (hereinafter 'the Award Decision') that forms the subject matter of the present appeal.

## **D. Procedural History**

The present appeal was filed on the 12<sup>th</sup> February, 2024, within the time prescribed by Regulation 106 CCR. The prescribed deposit of €50,000 was duly paid by the Appellant. The Contracting Authority filed its reply on the 22<sup>nd</sup> February, 2024. VLP filed its reply on the 22<sup>nd</sup> February, 2024.

The present appeal was heard concurrently with Case No. 2131, being the appeal of European School of English Limited, acting as a member of the Iconic Hotel Malta – Nobu Consortium (hereinafter 'ESE' or 'the Consortium'), against the same Award Decision in the same concession procedure. Both appeals raise, as their central legal question, the lawfulness of the Tender Evaluation Committee's treatment of VLP's financial offer, and in particular its decision to seek confirmation of what it characterised as an arithmetical correction in the Grand Total entered by VLP in the XML Tender Response Format on the ePPS platform. The Board heard both appeals over four hearing days on 23<sup>rd</sup>, 27<sup>th</sup>, 28<sup>th</sup> and 29<sup>th</sup> January, 2026.

The Board has had regard to the full body of material adduced in the proceedings, including the written submissions and oral arguments of counsel for all parties, and the documentary evidence forming part of the record. The Board also has regard to the evidence adduced in Case No. 2131, in particular the oral testimony of Mr Jason Grech, the Director of Contracts' ePPS system administrator, and the evidence of MSPP Chief Executive Officer Ms Marisa Marmara, insofar as that evidence is relevant to the shared legal questions arising in the present appeal.

### **E. Relationship to Case No. 2131**

The Board is this day handing down its decision in Case No. 2131, in which the Board has addressed, *inter alia*, the identical legal question arising on VLP's financial offer. The findings in Case No. 2131 on that shared question are coextensive with and mutually reinforcing of the findings in the present decision. Where the analysis in the present decision and the analysis in Case No. 2131 address identical legal questions, the reasoning in both decisions is complementary and consistent. Neither decision is to be read as displacing or qualifying the other. The present decision stands as a complete and self-contained document.

The relationship between the two cases and its consequences for the relief available in the present proceedings are examined in detail in Part IV below.

## **PART II – THE FINANCIAL OFFER FRAMEWORK**

### **A. The Structure of the Financial Offer Requirements**

The financial offer framework established by the RFP requires careful examination, as the dispute in the present proceedings turns entirely upon the proper interpretation and application of that framework.

The RFP prescribed, with considerable precision, the components of the financial offer. Tenderers were required to submit: first, a Concession Fee, payable annually in advance by the Concessionaire to the Contracting Authority, in an amount not less than €302,000 per annum; and second, an annual ground rent payable to the Lands Authority, fixed at €146,000 per annum. The RFP made clear, in terms admitting of no ambiguity, that the financial offer would be assessed exclusively on the basis of the Concession Fee offered by the tenderer, that no offer was to be made on the ground rent, and that no additional or other financial offers would be evaluated.

The Concession Fee was defined in the RFP as the annual fee payable by the Concessionaire to the Contracting Authority as determined in accordance with the proposal submitted by the Concessionaire. The fee was to be indexed on an annual basis in accordance with changes in the Harmonised Index of Consumer Prices for Malta as published by Eurostat, or at a rate of one per centum per annum, whichever was the higher.

## **B. The Financial Bid Form and the XML Tender Response Format**

The mechanics of the financial offer submission operated through two distinct instruments, the interaction between which lies at the heart of this appeal.

The first instrument was the Financial Bid Form (identified in the clarification correspondence as 'CA13'), a structured spreadsheet available for download from the ePPS platform. Tenderers were required to enter their proposed yearly Concession Fee in cell C9 of the form. The form was designed to compute automatically, in cell D10, the Grand Total for the full concession term by applying the formula where cell D9 was pre-populated with the concession duration of sixty-five years. The Financial Bid Form thus required tenderers to state an annual figure and performed, automatically, the multiplication required to derive the aggregate consideration payable over the full concession term.

The second instrument was the XML Tender Response Format. The primary electronic submission filed by tenderers through the ePPS platform. The XML Tender Response Format contained a dedicated field for the Grand Total of the financial offer. This field bore the caption 'Grand Total including Concession Fees covering the Contract Period.' The Contract Period was defined in the tender documents as sixty-five years. Tenderers were required to input their Grand Total manually into this field on the ePPS platform; this was the figure that would be published as part of the Summary of Tenders at the opening of financial offers.

The RFP contained the following provision governing the relationship between the two instruments and the priority to be accorded to each in the event of a discrepancy:

*"In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail. This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary/applicable."*

## **C. The Opening of Tenders and the Published Schedule**

Upon the opening of financial offers on the 28<sup>th</sup> April, 2023, the Contracting Authority published a Summary of Tenders (referred to in these proceedings as Document 'A', annexed to the appeal). That document recorded that VLP had submitted a Grand Total of €1,200,000 in the XML Tender Response Format on the ePPS platform. Read on its face, and consistently with the definition of the Grand Total field as the aggregate consideration covering the Contract Period, this figure represented VLP's total financial commitment over the entire sixty-five year concession term. As such, and as a matter of simple arithmetic, it amounted to an average annual concession fee of approximately €18,461, a figure dramatically below the prescribed minimum Concession Fee of €302,000 per annum.

A markedly different position emerged from VLP's Financial Bid Form. In cell C9 of that form, VLP had entered the figure of €1,200,000 as its yearly Concession Fee. The automatic formula in cell D10 duly computed the Grand Total as €78,000,000, being the product of €1,200,000 multiplied by sixty-five. VLP's financial projections and cash flow statements, submitted as part of its proposal, likewise reflected a concession fee of €1,200,000 per annum throughout the concession term.

The position was therefore as follows: VLP's Financial Bid Form correctly computed an aggregate Grand Total of €78,000,000; but VLP's XML Tender Response Format stated €1,200,000 in the field designated for the aggregate Grand Total covering the Contract Period. The annual figure had been entered into the field reserved for the sixty-five year aggregate.

#### **D. Clarification Request CA14 and VLP's Confirmation**

Upon identifying this discrepancy, the Tender Evaluation Committee (hereinafter 'TEC') issued Clarification Request CA14 to VLP in the following terms:

*"The Evaluation Committee noted the following Arithmetic Error/s with regard to your submission: While the Financial Bid Form provides for a 'Yearly Concession Fee' of €1,200,000 which when multiplied by the variable of 65 years in the form itself gives a 'Grand Total' of €78,000,000, the Grand Total inputted in the Tender Response Format provides for €1,200,000. In line with Clause 5 of Section 1 Instructions; 'In case of any discrepancy between the information provided in the Financial Bid Form and the grand total in the tender response format (xml tender structure), the latter shall prevail. This condition shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected if, as, and when necessary/ applicable.', the Grand Total in the Tender Response Format should be €78,000,000 and not €1,200,000. Kindly confirm this arithmetical correction and your acceptance of the revised Grand Total in the Tender Response Format."*

VLP confirmed the correction and accepted that the Grand Total in the XML Tender Response Format should be €78,000,000. On the basis of this corrected figure, the TEC evaluated VLP's financial offer, awarded VLP the maximum financial score (representing forty per cent of the total BPQR score), and, taking VLP's technical score of ninety-eight points into account, concluded that VLP had submitted the offer with the best overall BPQR. The Award Decision of the 31<sup>st</sup> January, 2024 followed.

## **PART III – THE GROUND OF APPEAL AND THE SUBMISSIONS OF THE PARTIES**

### **A. The Ground of Appeal**

Katari advances a single ground of appeal, which may be stated in the following terms: the TEC acted unlawfully in treating the figure of €1,200,000 entered by VLP in the Grand Total field of its XML Tender Response Format as an arithmetically correctable error, and in subsequently evaluating VLP's financial offer on the basis of an aggregate figure of €78,000,000 derived through Clarification Request CA14. The Appellant contends that the correct figure for evaluation purposes, as mandated by the express and unambiguous terms of the RFP, was the figure recorded in VLP's XML Tender Response Format, namely €1,200,000 over the full concession term, and that that figure rendered VLP's offer not merely the weakest financially but also fundamentally non-compliant with the minimum financial threshold, such that VLP's offer was liable to disqualification.

More specifically, Katari advances the following contentions in support of this ground:

First, the RFP's prevalence clause is clear and unconditional in its terms: in the event of any discrepancy between the Financial Bid Form and the Grand Total in the XML Tender Response Format, the latter shall prevail. VLP's XML Grand Total was €1,200,000. That figure, applied over sixty-five years, yields an annual concession fee of less than €19,000, which falls catastrophically below the prescribed minimum of €302,000 per annum. On the RFP's own terms, VLP's offer was the most financially disadvantageous submitted and ought to have been disqualified as non-compliant with the minimum financial threshold.

Second, the TEC's recourse to what it characterised as an arithmetical correction was impermissible under Section 17 of the General Rules Governing Tenders (hereinafter 'GRT'). The error, if any, in VLP's submission was not an arithmetical error within the meaning of that provision. It was an error in the raw input data, i.e. the entry of the wrong class of figure into a prescribed field, rather than a miscalculation in the processing of correctly entered data. None of the specific categories of correctable arithmetical error enumerated in Clause 17.1 of the GRT was applicable to the circumstances.

Third, the Award Decision was incompatible with the principles of transparency, equal treatment and self-limitation as affirmed by the Maltese Court of Appeal and by this Board. Every other tenderer correctly entered the sixty-five year aggregate in the Grand Total field of the XML Tender Response Format. By permitting VLP to convert its annual figure into a sixty-five year aggregate through a selective post-submission process, whilst affording no equivalent facility to any other bidder, the Contracting Authority tilted the competitive process in VLP's favour and violated the foundational requirement that all tenderers be subjected to the same procedure.

Fourth, the Contracting Authority's anticipated reliance on Section 17 of the GRT is, in any event, legally unsustainable, because each of the specific sub-clauses of that provision is, on the particular facts, either inapplicable or, if applied, would produce a result further adverse to VLP rather than one rehabilitating its offer.

In relief, the Appellant sought: (i) the annulment and revocation of the Award Decision; (ii) an order disqualifying VLP's offer; (iii) an order reinstating Katari's offer in the evaluation process; (iv) an order directing that Katari's offer be accepted and the concession awarded to it; and (v) reimbursement of the appeal deposit. The admissibility of the fourth demand is addressed separately in Part V(C) below.

## **B. The Reply of the Contracting Authority**

The Contracting Authority advanced the following submissions in rebuttal.

The TEC correctly identified that VLP had committed a manifest clerical error in manually transcribing its annual concession fee figure into the ePPS field reserved for the sixty-five year aggregate Grand Total. The error was transparent, in the sense that the correct aggregate figure was ascertainable directly and without ambiguity from VLP's own submitted documentation, specifically from cell D10 of the Financial Bid Form, which already contained the arithmetically computed aggregate of €78,000,000, and from VLP's financial projections, which reflected €1,200,000 per annum throughout. The correction was thus based entirely on information present within VLP's own proposal and required no resort to extrapolation, conjecture, or information external to the submitted documents.

The Contracting Authority further submitted that the RFP's prevalence clause was, by the express terms of the immediately succeeding proviso, inapplicable in the circumstances. The proviso states that the prevalence clause shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected. That condition was plainly satisfied in that the aggregate of €78,000,000 was the product of a simple multiplication of the annual fee of €1,200,000 by the sixty-five year concession term, a calculation that had already been performed automatically by the Financial Bid Form itself. The TEC's request for confirmation of the arithmetical correction was accordingly consistent with both the RFP and with Clause 17.1(e) and 17.3 of the GRT.

The Contracting Authority further contended that to reject VLP's proposal on the basis of what was self-evidently a mechanical transcription error would have resulted in the State foregoing a concession fee of €1,200,000 per annum, which is a net loss of at least €37 million compared to the next highest offer, without any public benefit commensurate with that loss. Such a result would reduce contracting authorities to passive actors incapable of pursuing the public interest through the exercise of reasonable judgment, in direct contravention of the principle of good governance. The evaluation committee acted correctly,

prudently, and diligently, and consistently with the general principles of public procurement, in particular the principles of self-limitation and proportionality.

### **C. The Reply of the Recommended Bidder**

VLP, represented by Mamo TCV Advocates, associated itself with the Contracting Authority's submissions and added the following.

VLP acknowledged that the Grand Total field of the XML Tender Response Format contained €1,200,000, which was its annual rather than aggregate figure. It offered the explanation that the Tender Response Format was, in VLP's view, somewhat ambiguous, in that the field caption referenced 'year 0,' which VLP read as suggesting that the total related to the first year's payment; the expression 'Grand Total including Concession Fees covering the Contract Period' was not, in VLP's submission, entirely unequivocal; and the RFP's references elsewhere to 'Concession Period' rather than 'Contract Period' introduced a degree of definitional uncertainty. It was in these circumstances, VLP contended, that the entry of the annual rather than the aggregate figure was a genuine and understandable error rather than a deliberate choice.

VLP further submitted that the Appellant's reliance on the principle of self-limitation, as affirmed in the Court of Appeal's decision in *NQUAYMT v. Agenzija għal Infrastruttura Malta* (22<sup>nd</sup> June, 2022), was misplaced, as the factual circumstances of that case were materially distinct. In *NQUAYMT*, the tenderer had repeatedly failed to supply information that was expressly required, and had sought through successive rounds of clarification to introduce new information not previously present in its offer.

In the present case, by contrast, VLP's offer contained no substantive deficiency; the annual figure of €1,200,000 was clearly and unambiguously stated in the correct location within the Financial Bid Form, and the aggregate Grand Total of €78,000,000 was arithmetically derivable therefrom. The confirmation sought through CA14 was not an invitation to submit new information but a request to confirm a figure already implicit in the submitted documents.

VLP also invoked the principle of proportionality as applied in Maltese and European Union procurement law, including the decisions of the Court of Justice of the European Union, the decisions of the Maltese Court of Appeal in *Schembri Barbros Limited et v. Il-Korporazzjoni għas-Servizzi tal-Ilma and Pharma.MT Limited v. Direttur tal-Kuntratt*, and previous decisions of this Board, including Decision No. 1444 (Professional Services of a Contracts Manager for the L-Iklin Local Council) and Case No. 1689. VLP submitted that all of these authorities support the proposition that proportionality requires an offer not to be disqualified for a formal defect that does not affect the substance of the bid and that can be resolved through a measured and procedurally proper clarification process.

## **PART IV – LEGAL FRAMEWORK**

### **A. The Governing Instruments**

The present concession procedure is governed by the CCR. The general principles of public procurement, transparency, equal treatment, non-discrimination and proportionality, are embedded in the CCR and must inform both the conduct of contracting authorities throughout the evaluation process and the review of that conduct by this Board. This Board's review of decisions taken by contracting authorities is, in accordance with the well-established standard confirmed in *Net Company v. Director of Contracts* (Case 367/2025/1) and in *Bessui JV v. Director of Contracts* (Case 379/2025/1), conducted on the basis of manifest error in the exercise of technical or evaluative discretion, read together with a full merits review on questions of legal interpretation.

The evaluation process was further governed by the General Rules Governing Tenders (Version 4.10, hereinafter 'GRT'), which formed part of the contractual framework of the procedure by incorporation.

### **B. The Principle of Equal Treatment and the Integrity of the XML Submission**

The principle of equal treatment is the foundational principle of public procurement law. It requires that all tenderers be subjected to the same conditions throughout the procedure, and that no tenderer be afforded any advantage, whether procedural or substantive, that is not equally available to all competing tenderers on the same terms. The principle was affirmed by the Court of Justice of the European Union in Case C-599/10, *SAG ELV Slovensko*, and has been consistently applied by the Maltese Court of Appeal and by this Board in its own jurisprudence.

In the context of financial offers submitted through a prescribed electronic procurement platform, the principle of equal treatment has a specific and immediate application: it requires that the financial figure entered by each tenderer in the designated Grand Total field of the XML Tender Response Format be treated, for evaluation purposes, as that tenderer's Grand Total, unless a specific and generally applicable exception is properly engaged. A selective post-submission process by which one tenderer is invited to replace the figure in that field with a materially different figure, while all other tenderers who correctly completed the field are held to their submitted figures, departs from the principle of equal treatment and requires compelling legal justification.

### **C. The Prohibition on Post-Submission Amendments**

The prohibition on post-submission amendments to the substantive content of a tender is a necessary corollary of the principle of equal treatment and of the integrity of the sealed-bid process. It was articulated with precision by the Court of Justice of the European Union in Case C-336/12, *Ministeriet for Forskning, Innovation og Videregående Uddannelser v. Manova A/S*, where the Court drew a principled distinction between, on the one hand, a request for clarification addressed to a genuine and demonstrable clerical error that leaves the substance of the offer entirely unaffected and, on the other, an intervention that in substance results in a new or materially amended tender.

The Court confirmed in Case C-131/16, *Archus and Gama v. Gmina Tychy*, that the principle of equal treatment requires strict consistency in the treatment of tenderers and precludes any post-submission process that affords one tenderer a facility of amendment not equally available to others.

### **D. Arithmetical Correction under the General Rules Governing Tenders**

Clause 17.1 of the GRT provides that admissible tenders shall be checked for arithmetical errors by the Evaluation Committee and that specified categories of errors shall be corrected. The Clause 17.1 chapeau expressly preserves the capacity of the Evaluation Committee to address arithmetical errors beyond those specifically enumerated, by providing that corrections are to be made 'without prejudice to other arithmetical errors which may be identified.' Clause 17.1(e) specifically addresses errors of addition in the Grand Total. Clause 17.3 provides the procedural mechanism for communicating corrections and obtaining tenderer confirmation.

The scope of these provisions is, however, defined and constrained by the nature of the concept of an arithmetical error. An arithmetical error, in the context of public procurement, is a numerical discrepancy arising from the misapplication of a mathematical operation to figures that are themselves correctly stated and present within the bid document. It is an error in the computation of data, not an error in the nature or identity of the data entered. The correction of an arithmetical error does not change the substance of a financial commitment; it gives that commitment its accurate numerical expression by applying to the data as stated the mathematical operation that the tender documents require.

### **E. The Principle of Proportionality**

The principle of proportionality, recognised in Maltese and EU procurement law, requires that the measures adopted by contracting authorities during the evaluation process be appropriate and necessary to achieve the objectives pursued, and that when several measures are available, recourse be had to the least onerous. Applied in the context of tender evaluation, the principle militates against the automatic disqualification of

offers for formal or procedural defects that do not affect the substance or comparability of the offer, where the correct information is unambiguously available and no tenderer is thereby prejudiced.

The principle of proportionality does not, however, authorise contracting authorities to rehabilitate substantively defective offers. It operates as a discipline on excessive formalism in the assessment of procedural regularity; it does not operate as a dispensation from the requirements of equal treatment where those requirements are themselves substantive.

## **F. The Principle of Self-Limitation**

The principle of self-limitation, affirmed by the Maltese Court of Appeal in *NQUAYMT v. Aġenzija għal Infrastruttura Malta* (22 June 2022) and in the earlier decision in *David Wallbank and Antoine Galea, for and on behalf of SG Solutions Limited v. L-Onorabbli Prim Ministru* (First Hall, Civil Court, 27 November 2014), holds that tenderers are bound by the terms and content of their own submitted offers, and that contracting authorities are not entitled to rehabilitate deficient offers by supplementing, correcting, or reinterpreting their content beyond what the applicable rules expressly permit. As the Court of Appeal stated in *NQUAYMT*:

*"kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigoroż-iment dak li trid is-sejha għall-offerti u m'għandux jippretendi li jiġi mitlub 'jirraġa' l-offerta biex ikun kompatibbli ma' dak mitlub."*

(Every tenderer must, from the very outset of its offer, rigorously follow what the call for tenders requires, and should not expect to be asked to 'fix' the offer to render it compatible with what was requested.)

This principle applies with full force to the core financial elements of a tender and is not displaced by proportionality considerations where the defect in question is substantive in character.

## **PART V – ANALYSIS AND DETERMINATION**

### **A. The Character of the Error in VLP's XML Submission**

The Board begins its analysis with the character of the error that appears in VLP's XML Tender Response Format. The proper characterisation of that error is decisive of the legal questions that follow.

The Grand Total field of the XML Tender Response Format was explicitly designated for the aggregate financial consideration payable over the full Contract Period of sixty-five years. The field caption, 'Grand Total including Concession Fees covering the Contract Period,' is unambiguous in this regard. There is no reasonable construction of the words 'Grand Total' and 'covering the Contract Period' that permits the

entry of an annual figure. The field was designed to record a sixty-five year aggregate; it did not, on any reading, invite the entry of a one-year figure.

VLP entered the figure of €1,200,000 in that field. That figure corresponds, precisely and without arithmetical modification, to the annual concession fee stated in cell C9 of VLP's Financial Bid Form. It does not correspond to, and cannot be derived arithmetically from, any figure within the XML document itself. The XML Tender Response Format, considered as a self-contained document, contained only one financial figure in the Grand Total field: €1,200,000. There is no unit price within that document, no annual figure within that document, no multiplier within that document, and no computational workings within that document from which the aggregate of €78,000,000 could be derived by any arithmetic internal to that document.

The Board accordingly finds that the entry of €1,200,000 in VLP's XML Grand Total field was not an arithmetical error in any proper sense of that expression. It was an error of substitution. VLP entered a figure of a qualitatively different character, i.e. an annual figure, in a field that required an aggregate figure. The error lay in the nature of the data entered, not in the arithmetic applied to that data. This distinction is not merely formal but it is legally material, for the following reasons.

First, arithmetical errors are, by definition, errors in computation such as errors that arise when the application of a specified mathematical operation to correctly stated inputs produces a result that differs from the entered total. In such cases, the correct total is recoverable by internal arithmetic applied to the document itself, without resort to any external source. In the present case, no such recovery is possible from within the XML document alone. The derivation of €78,000,000 requires the importation of the annual figure from the Financial Bid Form and the application of the sixty-five year multiplier drawn from the contract terms. These are sources entirely external to the XML document. This is reconstruction from extrinsic material, a qualitatively different exercise from arithmetical correction.

Second, the Board notes the evidence of all other tenderers' conduct. Every other qualifying bidder correctly entered the sixty-five year aggregate in the Grand Total field of the XML Tender Response Format. The uniform and concurrent adoption of the same approach by all other participating bidders constitutes powerful contextual evidence that the field was clear and unambiguous in its requirements and that its correct completion was, for any diligent and informed tenderer, straightforward. VLP was the sole bidder to enter a figure of a different character in that field.

Third, the Board is unpersuaded by VLP's suggestion that the XML Tender Response Format was 'somewhat ambiguous.' The reference to 'year 0' in the form layout is, in context, a reference to the commencement year for the payment schedule and does not bear upon the nature of the figure required in the Grand Total field. The distinction between 'Contract Period' and 'Concession Period' as terms of art in the RFP is a purely formal textual matter that does not, in substance, create any genuine uncertainty as to

the duration over which the Grand Total was to be computed. The overwhelming and consistent practice of all other tenderers confirms that no genuine ambiguity existed in practice for a diligent reader of the document.

## **B. The Scope and Application of the “Prevalence Clause” and its Proviso**

The Board now turns to the RFP's prevalence clause and its proviso, the interpretation of which was the subject of detailed submissions by all parties.

The Appellant submits that the prevalence clause operates unequivocally and without qualification. In any case of discrepancy between the Financial Bid Form and the XML Grand Total, the XML prevails. Applied to the present case, this would mean that VLP's offer stands, for evaluation purposes, at €1,200,000 over sixty-five years, a figure rendering it not merely the least advantageous offer submitted but one fundamentally below the prescribed minimum Concession Fee. The Board accepts this as the *prima facie* effect of the prevalence clause.

The Contracting Authority and VLP submit that the proviso immediately following the prevalence clause, to the effect that it shall not apply where the total can be arithmetically worked out or corrected, was engaged in the present case, because the correct aggregate of €78,000,000 was derivable by multiplying the annual figure in the Financial Bid Form by sixty-five.

The Board does not accept the Contracting Authority's and VLP's submission on this point, and the Board's reasoning in this regard differs in important respects from the analysis presented by the Contracting Authority in its reply.

The proviso states that the prevalence clause 'shall not apply to financial bid forms where the total can be arithmetically worked out and/or corrected.' The natural and proper reading of this language is that it applies to situations where, within the Financial Bid Form itself, a computational error exists that can be identified and corrected by arithmetic internal to that form such as, **for instance, where the sub-totals correctly entered in the form do not sum to the Grand Total entered in the same form, and the correct Grand Total can be derived by adding the sub-totals.** In such a case, the Financial Bid Form itself contains all the information required to identify and correct the error, and the discrepancy between the form and the XML is attributable to an arithmetical error in the form rather than to the entry of a fundamentally different class of figure in the XML.

In the present case, the Financial Bid Form contained no error. It correctly showed €1,200,000 in cell C9 and €78,000,000 in cell D10. The discrepancy arose not from an arithmetical error in the Financial Bid Form, but from the entry of the annual figure, drawn from the Financial Bid Form but different in character from what the XML required, in the XML Grand Total field. The proviso was designed to ensure that

arithmetical errors within the Financial Bid Form do not result in the automatic prevalence of an XML figure that is itself the product of a transposition from a defective form calculation. It was not designed to override the primacy of the XML document in cases where the XML figure, though internally consistent, reflects a substantive departure from what the XML field required.

The Board therefore finds that the proviso was not engaged in the circumstances of the present case. The prevalence clause remained operative. VLP's XML Grand Total of €1,200,000 was, by the terms of the RFP itself, the controlling figure for evaluation purposes.

### **C. The Impermissibility of Clarification Request CA14**

The Board further finds, independently of the analysis set out in section B above, that Clarification Request CA14 constituted an impermissible post-submission amendment of the core financial element of VLP's offer, contrary to the principles established in Manova and Archus and to the principle of equal treatment as affirmed in SAG ELV Slovensko.

The aggregate financial consideration payable to the Contracting Authority over the full sixty-five year term of the concession is, without question, the most substantive single element of the financial offer in a transaction of this nature and value. It is the primary variable by reference to which bidders' financial offers are ranked, and the Contracting Authority's economic interest is assessed.

The sixty-five-fold multiplication of the stated annual consideration that CA14 invited VLP to confirm represents a transformation of VLP's stated financial commitment from €1,200,000 to €78,000,000, an increase by a factor of sixty-five. This is not a correction of an obvious clerical error that leaves the substance of the offer unaffected, but it is, rather, in the opinion of this Board, the substitution of one class of financial figure for another, representing a sixty-five-fold increase in the stated aggregate commitment. Whatever the merits of the proportionality argument advanced by VLP and the Contracting Authority in the abstract, there is no principled basis upon which a sixty-five-fold revision of the stated aggregate consideration can be characterised as a formal correction that leaves the substance of the offer unaffected.

Furthermore, and of decisive importance on the equal treatment dimension, no other qualifying bidder was afforded any opportunity following submission to revise, supplement, or restate any element of its XML financial offer. Every other qualifying bidder who correctly completed the XML Grand Total field was held, without exception and without any opportunity for review, to the figure it had entered.

The selective application to VLP of a post-submission confirmation mechanism that converted its annual figure into a sixty-five-year aggregate, a facility not offered to any other bidder and not required by any other bidder because all others had complied with the XML requirements, constitutes a material and unjustifiable departure from the principle of equal treatment.

The Board also notes the implications of the conduct of the other bidders for the severity of this departure. Every other qualifying bidder correctly computed and entered its sixty-five year aggregate in the XML Grand Total field. In doing so, each of those bidders faced the commercial discipline of committing, from the moment of submission, to a total aggregate financial offer calculated over the full concession term. VLP, by entering the annual rather than the aggregate figure, and by subsequently being invited to confirm an aggregate that it had not, as a matter of the submitted documentation, formally committed to, was in substance relieved of that discipline in a manner not available to its competitors. This is precisely the kind of asymmetry that the principle of equal treatment is designed to prevent.

#### **D. The Inapplicability of the General Rules Governing Tenders**

The Board has given careful consideration to the submissions of the Contracting Authority and VLP regarding Section 17 of the GRT, and in particular to the argument that Clause 17.1(e), which addresses errors of addition in the Grand Total, provides an independent basis for the correction applied through CA14.

The Board does not accept this argument. For the reasons set out in section A above, the error in VLP's XML submission was not an error of addition or arithmetic in the Grand Total. It was the entry of a qualitatively different figure, an annual sum rather than an aggregate, in the field designated for the aggregate. Clause 17.1(e) addresses situations where the Grand Total has been arithmetically miscalculated from correctly stated components. It does not address, and is not capable of addressing, a situation where the figure entered in the Grand Total field is of a fundamentally different character from what the field requires.

The Board acknowledges that Clause 17.1 is introduced by language preserving the capacity to address arithmetical errors beyond those specifically enumerated: 'without prejudice to other arithmetical errors which may be identified.' The Board accepts that this chapeau language signals a non-exhaustive list.

However, the concept of an 'arithmetical error', whether within the enumerated list or beyond it, necessarily refers to an error in the application of arithmetic to correctly stated data. It does not extend to errors in the nature or identity of the data entered, which are errors of substance rather than errors of computation. The error in VLP's XML submission falls outside the scope of Section 17 of the GRT on this analysis.

The Appellant's detailed analysis of each sub-clause of Clause 17.1, demonstrating that none of the specific enumerated categories is applicable to the circumstances and that sub-clause (c), if applied, would yield a result further adverse to VLP, is correct and is adopted by the Board as part of its reasoning.

The Board further agrees with the Appellant's submission that the error in the present case was one of raw data input rather than of arithmetic processing, a distinction that is both conceptually sound and legally material in the context of Section 17.

### **E. The Proportionality Argument**

The Board has carefully considered the proportionality argument advanced by VLP and the Contracting Authority, and the supporting jurisprudence on which they rely.

The principle of proportionality does not operate in isolation. It operates within, and is constrained by, the overarching requirement of equal treatment. Where the application of proportionality in favour of one tenderer would require the conferral upon that tenderer of a procedural advantage that was not available to, and was not required by, any other competing tenderer, and where that advantage relates to the most substantive single element of the financial offer, proportionality cannot be invoked to justify that course of action. Proportionality is a limiting principle on excessive formalism in the treatment of procedural irregularities that do not affect the substance of an offer. It is not an instrument by which the requirement of equal treatment is displaced in favour of a result that the contracting authority considers financially preferable.

The Board also notes that the Contracting Authority's submission, that to reject VLP's offer would result in a net loss to the State of at least €37 million, whilst economically accurate as a statement of comparative financial outcomes, does not and cannot constitute a legal justification for a departure from the principle of equal treatment.

The financial attractiveness of a particular tenderer's offer, or the financial consequences of its disqualification, are not among the considerations that can properly ground a departure from the equal treatment principle in the evaluation of that offer. To hold otherwise would be to permit contracting authorities to exempt financially attractive but procedurally non-compliant offers from the requirements of equal treatment whenever the financial advantage of doing so was sufficiently large, a proposition that would fundamentally undermine the integrity of the competitive procurement process.

The Board further distinguishes the present case from the previous decisions of this Board and of the courts cited by VLP. The decisions in Case No. 1444 and Case No. 1689, and the court decisions in *Schembri Barbros and Pharma.MT*, all involved formal or procedural irregularities in the presentation of otherwise substantively complete and compliant offers, situations where proportionality properly militates against the automatic disqualification of an offer on a technicality. In the present case, the irregularity is not a technicality in the presentation of a correctly computed offer, but it is the entry of a qualitatively different financial figure in the primary financial field of the primary electronic submission instrument.

This is a substantive departure from the requirements of the XML Tender Response Format, not a formal deficiency in the presentation of a correct value.

The NQUAYMT principle, properly understood, confirms rather than undermines this analysis. The Court of Appeal in that case was not merely concerned with tenderers that had failed to supply information repeatedly. It was affirming the broader principle that the obligations of a tenderer run from the moment of submission and that a tenderer cannot expect to be afforded opportunities to remedy substantive deficiencies in its offer through clarification processes that are not available to all participants on equal terms. That principle applies with full force to the facts of the present case.

#### **F. The Board's Conclusion on the Ground of Appeal**

For all of the reasons set out above, the Board upholds the ground of appeal. The TEC acted unlawfully in treating the discrepancy between VLP's XML Grand Total and the figure in its Financial Bid Form as a correctable arithmetical error. The prevalence clause in the RFP was operative and was not misapplied by the proviso in the circumstances of the present case.

Clarification Request CA14 and VLP's response thereto constituted an impermissible post-submission amendment of the core financial element of VLP's offer, contrary to the principles of equal treatment and the prohibition on post-submission amendments as affirmed in *Manova* and *Archus*. The Award Decision, predicated upon the unlawfully evaluated financial offer, cannot stand.

### **PART VI – THE RELATIONSHIP WITH CASE NO. 2131 AND ITS CONSEQUENCES**

#### **A. The Concurrent Decision in Case No. 2131**

As noted above, the Board is this day handing down its decision in Case No. 2131, being the appeal of European School of English Limited, acting as a member of the Iconic Hotel Malta – Nobu Consortium.

In that decision, the Board has reached identical findings on the lawfulness of the TEC's evaluation of VLP's financial offer through Clarification Request CA14. The reasoning in both decisions is mutually reinforcing and the legal conclusions are consistent throughout.

The concurrent decisions establish, authoritatively and definitively, that the evaluation of VLP's financial offer in procedure MSPP/02/2022 was conducted in a manner that was unlawful by reason of the impermissible post-submission amendment of VLP's XML Grand Total through Clarification Request CA14, and that the Award Decision predicated thereon cannot stand.

## **B. The Position of the Iconic Hotel Malta – Nobu Consortium**

The Board considers it necessary, in the interest of clarity and in fulfilment of its obligation to define the scope of the consequential relief available in the present proceedings, to set out the position of the Consortium in precise terms, and to explain why the Consortium cannot benefit from the re-evaluation directed by the Board as a consequence of the combined decisions in Cases No. 2131 and No. 2132.

In Case No. 2131, the Board found, firstly, that the appeal was formally inadmissible by reason of the absence of authority from Arrigo Group of Hotels Limited, the second member of the Consortium, authorising ESE to institute and prosecute the appeal on behalf of the Consortium as a whole. The Consortium, not ESE alone, was the bidding entity in the procedure, and the collective right of appeal conferred by Regulation 106 CCR could not be exercised by one member in the absence of the other member's participation or express authorisation.

Secondly, and of greater importance for present purposes, the Board found in Case No. 2131 that the Consortium's disqualification at the selection criteria stage, on the ground of non-compliance with the gearing ratio financial selection criterion, was fully lawful and is confirmed in its entirety. The Consortium's gearing ratio, calculated under the correct methodology (the arithmetic mean of the three individual annual ratios, Method 2), was 3.88, materially exceeding the prescribed threshold of 3.0.

The Board rejected the Consortium's argument that the alternative pooled methodology (Method 1) was equally valid. Method 2 represents the ordinary, natural, and purposively coherent interpretation of the criterion, as confirmed by the concurrent and independent adoption of that methodology by five of the six other responding bidders. The Consortium's confirmed disqualification at the selection criteria stage is confirmed and is not affected, qualified, or revisited by any finding in the present proceedings.

The consequence is as follows. The right to participate in the financial evaluation of bids presupposes compliance with the selection criteria stage of the procedure. A bid that has been definitively and lawfully disqualified at the selection criteria stage cannot be readmitted to the evaluation process on the basis of a finding of unlawfulness relating to the treatment of another bidder's financial offer.

The upholding of the second grievance in Case No. 2131, and of the ground of appeal in the present proceedings, relates to the evaluation of VLP's offer, not to the Consortium's compliance with the selection criteria. The Consortium's confirmed disqualification is in no way predicated upon or connected with the unlawful evaluation of VLP's offer. The two matters are legally independent of one another.

The rehabilitation of the competitive process that flows from the Board's findings requires a fresh financial evaluation of the compliant and technically qualifying bidders, but it does not, and cannot, extend to a bidder whose non-compliance with a different and earlier stage of the procedure has been confirmed.

The Board therefore directs, in the most unambiguous terms, that the re-evaluation process consequential upon the decisions in Cases No. 2131 and No. 2132 shall not extend to, shall not encompass, and shall not in any manner revisit the offer or the position of the Iconic Hotel Malta – Nobu Consortium. The confirmed disqualification of the Consortium is binding upon the Contracting Authority, upon the newly constituted evaluation committee, and upon all participants in the procedure.

### **C. The Position of Katari**

The Board is satisfied that Katari possesses the unqualified standing to institute and prosecute the present appeal and that its juridical interest in the outcome is fully established. Katari was a compliant bidder that participated in all stages of the procedure, successfully satisfied the applicable selection criteria, and submitted a proposal that was admitted to and assessed in the technical and financial evaluation stages.

Its offer was rejected exclusively on the basis of the comparative BPQR ranking produced by an evaluation that the Board has found to have been unlawfully conducted. There is no finding in the present proceedings adverse to Katari's compliance at any stage of the procedure, and none was suggested by the Contracting Authority or by VLP.

Accordingly, Katari is among the compliant and technically qualifying bidders whose financial offers are to be re-evaluated in the fresh financial evaluation directed by this decision. The re-evaluation process will address all such bidders on an equal and non-discriminatory basis. The Board makes no finding as to the likely outcome of the re-evaluation and expresses no view on the comparative merits of the financial offers of the qualifying bidders. Those are matters entirely for the newly constituted evaluation committee to assess on the basis of the correct legal framework and in accordance with the directions set out in Part VII below.

## **PART VII – PROPORTIONALITY OF RELIEF AND CONSEQUENTIAL DIRECTIONS**

### **A. The Scope of the Board's Remedial Power**

The relief available to this Board upon a finding of unlawfulness is framed by Regulation 98(e) CCR, which empowers the Board to set aside decisions taken unlawfully, to order the contracting authority to conduct a fresh evaluation or to retender where appropriate, and to make such further orders as are necessary to give full effect to the finding of unlawfulness and to restore the integrity of the procurement procedure.

The exercise of this power is governed by the principle of proportionality. The remedy must be calibrated to the nature and extent of the infringement, to the consequences of the Board's other findings, and to the public interest in the lawful and effective completion of the procurement.

### **B. Cancellation of the Award Decision**

The Award Decision of the 31<sup>st</sup> January 2024 is vitiated by a material legal error in the financial evaluation that is central to the BPQR ranking upon which the recommendation was based. That error infected the entire financial evaluation as between the qualifying bidders and produced a distorted ranking that cannot be relied upon as the basis for an award. The Award Decision accordingly cannot stand and must be cancelled to the extent necessary to enable a lawful fresh financial evaluation to be conducted.

The Board, however, does not consider it proportionate to cancel the entire tender procedure. The procedure attracted twenty-one bids, was administered by a TEC of significant seniority and expertise, and resulted in a substantial body of technical evaluation material that is not affected by the financial evaluation error identified and that remains valid and capable of providing a sound foundation for the re-evaluation.

The illegality identified is confined to the financial evaluation component, and specifically to the treatment of VLP's XML Grand Total. Cancellation in its entirety would impose disproportionate costs, delay, and uncertainty on the Contracting Authority and on the public interest in the regeneration of a significant heritage asset, without any commensurate benefit.

### **C. Fresh Financial Evaluation**

The Contracting Authority is directed to constitute a new evaluation committee, composed of members who have not previously served on the TEC in procedure MSPP/02/2022, and to conduct a fresh evaluation of the financial offers of all bidders who were found compliant with all applicable financial and technical selection criteria and who successfully completed the technical evaluation stage.

The newly constituted committee shall conduct the evaluation *de novo*, without reference to the financial evaluation conclusions of the original TEC in respect of VLP's offer. It shall apply the interpretation of the XML Grand Total field requirement confirmed by this Board and by the Board in Case No. 2131, namely that the Grand Total field required the aggregate consideration payable over the full sixty-five year Contract Period and not the annual concession fee alone.

It shall treat the XML Grand Total as the controlling financial figure for each bidder, subject only to any arithmetic correction that is properly permissible under Section 17 of the GRT in accordance with the analysis set out in this decision. It shall apply the BPQR methodology set out in the RFP to produce a fresh ranking of the qualifying bidders and shall reach a fresh recommendation in accordance with that ranking.

For the avoidance of any doubt, the Iconic Hotel Malta – Nobu Consortium is not among the bidders whose financial offers are to be evaluated or considered in the re-evaluation process. Its disqualification at the selection criteria stage has been confirmed by this Board in Case No. 2131. Its financial offer shall not be admitted to, evaluated in, or considered as part of the re-evaluation process.

#### **D. The Fourth Demand of the Appellant**

The Appellant sought, as its fourth demand, an order directing the acceptance of its offer and the award of the concession to it. The Board finds this demand inadmissible. The Board's function under the CCR is that of a review board, empowered to assess the legality of decisions taken by contracting authorities and to direct corrective measures. It is not empowered to evaluate bids competitively, to declare a tenderer the winner of a procurement procedure, or to direct the award of a concession to a specific bidder. Those functions vest in the contracting authority and its evaluation committee, subject to the Board's power of legal review. The fourth demand accordingly exceeds the scope of this Board's jurisdiction and must be rejected as inadmissible, consistently with the Board's practice as affirmed in prior decisions.

#### **E. The Deposit**

The Appellant has succeeded in full on its ground of appeal. The deposit of €50,000 paid upon the filing of this appeal is accordingly ordered to be reimbursed to the Appellant.

### **PART VIII – OPERATIVE PROVISIONS**

For the reasons set out in this decision, and having regard to the concurrent findings in Case No. 2131, this Board makes the following orders:

**First:** The ground of appeal is upheld. The Tender Evaluation Committee acted unlawfully in treating the discrepancy between the figure of €1,200,000 entered in the Grand Total field of VLP's XML Tender Response Format and the figure of €78,000,000 produced by VLP's Financial Bid Form as a correctable arithmetical error, and in inviting VLP to confirm an amended Grand Total through Clarification Request CA14.

The prevalence clause in the RFP remained operative and was not misapplied by the proviso in the circumstances of the present case. Clarification Request CA14 and VLP's response thereto constituted an impermissible post-submission amendment of the core financial element of VLP's offer, contrary to the principle of equal treatment and the principles established in Manova and Archus. The Award Decision, in so far as it was predicated upon the financial evaluation conducted on the basis of the corrected figure of €78,000,000, cannot stand.

**Second:** The Award Decision and the Letters of Rejection dated 31<sup>st</sup> January, 2024 issued in connection with procedure MSPP/02/2022 are hereby cancelled, to the extent necessary to give effect to the Board's finding and to enable a fresh financial evaluation to be conducted in accordance with the directions in this decision and in Case No. 2131. This cancellation does not affect, and shall not be construed as affecting,

reversing, or qualifying in any manner, the confirmed disqualification of the Iconic Hotel Malta – Nobu Consortium at the selection criteria stage, which remains operative and binding in full.

**Third:** The Contracting Authority, Malta Strategic Partnership Projects Limited, is directed conduct a fresh evaluation of the financial offers of all bidders who were found compliant with all applicable financial and technical selection criteria and who successfully completed the technical evaluation stage of procedure MSPP/02/2022.

**Fourth:** For the avoidance of any doubt, the Iconic Hotel Malta – Nobu Consortium is not among the bidders whose financial offers are to be evaluated or considered in the re-evaluation process. Its disqualification at the selection criteria stage, as confirmed by this Board in Case No. 2131, is binding upon the Contracting Authority, the newly constituted evaluation committee, and all participants in the procedure.

**Fifth:** The fourth demand of the Appellant, seeking an order directing the award of the concession to Katari Hospitality JV, is declared inadmissible as falling outside this Board's jurisdiction.

**Sixth:** The deposit of €50,000 paid by the Appellant upon the filing of this appeal is ordered to be reimbursed in full.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Mr Lawrence Ancilleri**  
Member