DR JOHN L GAUCI
& ASSOCIATES



15th October 2026

The Secretary
Public Contracts Review Board
Notre Dame Ditch
Floriana

Re: SPD1/2025/092 – Tender for Research on Gen Z and Gen Alpha in the Context of the Future of Work in Malta and Gozo

Reasoned reply of EMCS Advisory Ltd (hereinafter the "Recommended Bidder");

Respectfully submits:

INTRODUCTION

By means of the present, the Recommended Bidder submits its reasoned reply to the objection filed by PricewaterhouseCoopers (hereinafter the "Appellant") on 7 October 2026, in connection with the above-captioned tender and the recommendation for award published on 21 August 2026.

1. PRELIMINARY PLEA – OBJECTION FILED *FUORI TERMINE*

Regulation 271 of the Public Procurement Regulations, S.L. 601.03, provides for an objection to be filed within ten calendar days following the date on which the responsible authority sends its proposed award decision, rejection or cancellation by fax or other electronic means. Regulation 272 requires that communication to include the relevant reasons and a precise statement of the standstill period. These provisions are to be read together with regulation 270, which identifies the decisions that may be challenged and requires the grounds of complaint to be stated clearly.

Indeed, the Appellant itself acknowledges, in paragraph 2.5 of its objection, that the award notice was dated 21 August 2026 and that the deadline indicated therein was 31 August 2026 at noon. The objection was filed on 7 October 2026. It is therefore for the Appellant to establish the basis upon which it contends that the stated period did not run against it. The subsequent notification to EMCS of the objection cannot alter the date of the award notice or determine whether the objection was filed in time.

The absence of an email alert does not, of itself, establish that the decision was not communicated through ePPS.

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The relevant question is what was sent through the system, to whom it was sent, and whether it could be accessed through the Appellant's account. This must be established from the electronic record and the evidence of those responsible for the platform.

On its own account, the Appellant submitted the tender through Ms Laura Cybulskiene's account, which its administrator deactivated on 20 February 2026 whilst evaluation was still pending. No alternative contact was assigned to receive communications concerning this tender. These facts are admitted in paragraphs 2.1 and 2.4 of the objection. The alleged absence of a prompt to appoint a replacement does not, in itself, make the contracting authority responsible for the Appellant's internal arrangements. Nor does the receipt of general notifications by other administrators establish that they had become the designated recipients for this tender.

The prescribed Tenderer's Declaration in the electronic Tender Structure expressly acknowledges that communications concerning this call are to be forwarded to the users within the tenderer's organisation who have associated themselves with it. It further confirms: 'Particularly, the email address provided is active and its inbox constantly monitored.'

The Appellant alleges that, following the deactivation, the result could not be accessed through any live account. That allegation requires examination of the system's access and reassignment facilities and of the actual effect of the deactivation. The Board must also consider the steps which the Appellant itself took to maintain a functioning contact while its tender remained under evaluation.

Reference is made to the judgment of the Court of Appeal (Inferior Jurisdiction), delivered on 8 January 2010 in the names *Dr Francis B. Vassallo noe v Direttur tal-Kuntratti*, Appeal 19/2009, upon which the Appellant relies in paragraph 3.3. The relevant passage was reproduced by the Court of Appeal in *Capece Construction Limited v Bord ta' Reviżjoni dwar il-Kuntratti Pubbliċi et*, Appeal 282/15, decided on 15 December 2015, at page 8:

"r-Regolament innifsu ma jahsebx ukoll ghal xi forma sagramentali ghal kif l-avviz ghandu jkun komunikat"

In *Vassallo noe*, receipt at the tenderer's nominated email address had been acknowledged.

In *Capece*, the Court rejected the complaint concerning notice of a hearing because the emails had reached the designated address and the failure concerned their internal handling (pages 8–9). These judgments support communication through the designated channel without an additional formal act of service. They do not decide the effect of communication to an inaccessible account. In the present case, if the decision and reasons were available through the designated channel, a failure within the Appellant's organisation to attend to them cannot simply be attributed to the authority. Whether that was so must be established from the ePPS evidence. The applicable period remains that prescribed by regulation 271.

There is a further difficulty with the Appellant's chronology. It acknowledges the reminder received on 30 August 2026, its request of 31 August, the Directorate's response of 1 September, its lawyers' request of 7 September and the further response of 12 September. Yet paragraph 3.8 does not identify when it actually obtained the information necessary to appeal. In particular, it does not state when it received the award schedule, the non-compliance letter and the evaluation grid which it describes in its objection.

Once the decision and relevant reasons had been communicated sufficiently to enable the Appellant to identify the alleged infringement, a subsequent request for further supporting material did not, merely by being made, suspend or restart the appeal period. The correspondence and attachments must be examined to establish when that information was communicated to the Appellant.

Reference is also made to *Uniplex (UK) Ltd v NHS Business Services Authority*, C-406/08, judgment of 28 January 2010, ECLI:EU:C:2010:45, paragraphs 30–35. The Court related the commencement of time to when the claimant 'knew, or ought to have known, of the alleged infringement'. The Appellant's assertion in paragraph 3.8 that it acted 'without undue delay' therefore does not answer when the necessary decision and reasons were communicated to it.

If effective dispatch in accordance with regulations 271 and 272 took place on 21 August 2026, the objection is plainly late. Even if that dispatch were found ineffective, the Board must still consider the later communications. If the complete decision and relevant reasons were effectively communicated on 1 September or 12 September, the corresponding ten-calendar-day periods would have expired on 11 September or 22 September respectively. These dates are relied upon conditionally, since the contents and service of the communications must be established. The objection of 7 October would fall outside either period. On the latter hypothesis, it was filed twenty-five days after the communication and fifteen days after expiry of the statutory period.

2. THE SECOND GRIEVANCE

Without prejudice to the above, the second grievance must be examined by reference to the tender provisions which the Appellant accepted when submitting its offer. Section 1, clause 5(C)(i), places the Organisation and Methodology submission under Note 3. Clause 6.2, at page 8, requires technical conformity and expressly allows an elimination threshold for an individual criterion or sub-criterion, in addition to the overall minimum technical score of 80%. The technical and financial weightings do not dispense with these requirements.

The preamble to the evaluation grid, at page 9, requires compliance with all minimum requirements in the Terms of Reference, the BPQR table and the Organisation and Methodology requirements. It provides for a zero score where the requested documentation is absent or its content fails to meet those requirements. It then states expressly:

> ***'If a score of '0' shall be allotted the bid shall be disqualified.'***

Strategy Point 4, at page 10, requires a minimum of three different mock-ups showing how an occupation would be presented in the web-based tool. It is marked mandatory and carries a maximum of nine marks, at three marks for each mock-up. Item 4 of the Contractor's Tasks, at page 24, specifies one occupation presented in three distinct design options, together with

the corresponding information. The requirement is repeated in Strategy Point 4 of the Organisation and Methodology requirements, at page 31. The electronic Tender Structure for Cycle 1 likewise requires a minimum of three different mock-ups.

Clarification Note No. 1 of 4 December 2025 did not amend this requirement or remove the consequence of non-compliance. Its concluding provision preserves requirements which it does not supersede. The mock-ups remained mandatory and the express disqualification rule continued to apply.

The Appellant does not dispute what was required. In paragraph 4.4 it acknowledges that three distinct designs of one occupation were requested, whereas its five mock-ups depicted different occupations. It expressly describes its grievance as:

> *'confined to the proportionality of the consequence attached to that shortcoming, rather than to the clarity of the requirement itself.'*

The Appellant has therefore admitted the very deficiency for which it was excluded. It is respectfully submitted that it cannot avoid the published consequence by asking that the same failure be treated merely as a deduction of marks. The committee was required to apply the evaluation grid as published, including the provision governing a failure to satisfy a minimum requirement.

3. ACCEPTANCE OF THE TENDER CONDITIONS AND REGULATION 262

Article 9.4 of the General Rules Governing Tenders, version 4.10 of August 2024, provides that submission of an offer constitutes acceptance of the tender document and subsequent clarifications in their entirety. Articles 5.2 and 5.3 require the tenderer to examine the dossier carefully and comply with its documentary requirements. These General Rules are incorporated through Section 4 of the tender.

The prescribed Tender Structure contains the corresponding declaration that the tenderer has examined and accepted the tender document, the clarifications and the General Rules in full, without reservation or restriction. It also warns of the consequences of a deviation. The Appellant submitted its offer on that basis and now expressly accepts that the mock-up requirement was clear. It cannot suggest that the committee introduced an undisclosed condition during evaluation.

If the Appellant considered that failure to provide the required mock-ups should attract a deduction of marks rather than disqualification, its complaint concerned the published evaluation grid. Regulation 262(1) provides a remedy for unlawful clauses, discriminatory specifications and ambiguities during the first two-thirds of the period allocated for submission. Such an objection should have been raised through that procedure. The Appellant cannot wait for the result and then seek a different rule because application of the published rule led to its exclusion.

Reference is made to the judgment of the Court of Appeal delivered on 30 June 2021 in the names *Truevo Payments Limited v Direttur tal-Kuntratti et*, Appeal 95/21/1. At paragraphs 7–9 the Court held that complaints concerning the choice and design of the negotiated

procedure related to matters existing from the outset and fell within regulation 262. At paragraph 7 it stated:

> *"Dawn l-ilmenti kellhom jitressqu qabel id-data tal-għeluq ta' sejħa għall-kompetizzjoni"*

The Court reversed the Board's preliminary decision and declared the objection inadmissible. The same distinction applies here to a challenge directed at the published requirement or exclusion rule, as opposed to a complaint about its later unlawful application.

The same point was made by the Court of Appeal in *All Clean Services Limited v Ministeru għall-Edukazzjoni, l-iSport, iż-Żgħażagħ, ir-Riċerka u l-Innovazzjoni et*, Appeal 340/22/1, decided on 10 January 2023. At paragraph 7 the Court stated:

"Mhux leċitu li l-oblatur iħalli l-proċess għaddej, u wara, jekk jitlef il-kuntratt, jallega li kundizzjoni fis-sejħa ma kellhiex tkun hemm għax "kompletament irrilevanti"."

The Court confirmed the Board's decision. In the present case, the Appellant knew both the requirement and the stated consequence before submitting its offer. Its express acceptance that the requirement was clear makes it all the more difficult to justify an attack on the disclosed rule only after exclusion.

Insofar as the Appellant disputes the exclusion rule as such, it challenges a rule disclosed before submission and which ought to have been challenged under regulation 262. Insofar as it disputes the application of that rule, its own admission places the offer within the provision requiring a zero score and disqualification. Without prejudice, its proportionality argument is also unfounded for the reasons which follow.

4. PARTIAL MARKS AND PROPORTIONALITY

The allocation of three marks per mock-up, up to a maximum of nine, must be read together with the minimum requirements. With respect, the Appellant's argument overlooks this. The tender may require a compliant submission as a condition of further participation and then award marks according to its quality. The availability of marks does not make the requirement optional or entitle a bidder to proceed despite an express ground of disqualification.

In *All Clean Services Limited v Ministeru għall-Edukazzjoni et*, cited above, the Court also confirmed at paragraph 9 that points could not be claimed for a criterion which the bidder had not satisfied. That part of the judgment concerned an add-on criterion. In the present case, the further consequence of disqualification follows from the express rule in the evaluation grid.

Indeed, the grid distinguishes mandatory requirements from add-on requirements and provides different minimum scoring treatment for the latter. Strategy Point 4 is expressly mandatory. The Appellant's interpretation would deprive that distinction of effect and give the committee a discretion to overlook a minimum deficiency for which the tender expressly requires exclusion.

Nor is the deficiency answered by saying that five mock-ups were submitted when only three were requested. What was required was a comparison of three designs for the same occupation. Five depictions of different occupations do not provide that comparison. It is

submitted that keeping the occupation constant allows the authority to compare different ways of presenting the same information, which is directly related to the occupational web-based tool being procured.

On the Appellant's own admission, the illustrations submitted did not provide the exercise requested. The same requirement applied to every bidder. The effort expended, the quality of other parts of the offer and the Appellant's general competence cannot replace the particular submission which it accepts it failed to provide.

The reported technical score of 90 out of 100 does not alter this position. The overall threshold and the individual mandatory requirements apply cumulatively. Likewise, the calculation that nine technical marks amount to 7.2 under an 80% weighting does not remove the mandatory requirement. The dossier provides for exclusion before financial evaluation and for relative normalisation of the technical scores of offers which remain in the competition. A favourable aggregate technical score does not, on its own, confer a right to proceed to the financial stage.

Reference is made to *Montte SL v Musikene*, C-546/16, judgment of 20 September 2018, ECLI:EU:C:2018:752. At paragraph 27 the Court stated that 'that directive allows contracting authorities to lay down, in the context of such procedures, minimum requirements in relation to the technical evaluation.' Paragraphs 32–39 confirm that a published technical threshold may exclude an offer before the combined technical and price evaluation, subject to equality, transparency and proportionality. The use of a price-quality award method therefore does not require every technical deficiency to be dealt with only through the final score.

Regulation 39(1) requires equal, transparent and proportionate treatment, whilst regulation 61(2)(a) makes compliance with the procurement requirements, conditions and criteria a condition of award. Regulation 62(1) requires the stipulated requirements to be possessed by the submission deadline. These provisions must be applied together. Proportionality does not give the committee an unrestricted power to replace a published minimum requirement after the offers have been submitted.

On the obligation to comply with express tender requirements, reference is made to the judgment of the Court of Appeal delivered on 13 March 2025 in the names *Trackwell FiMS v Id-Direttur Ġenerali tal-Kuntratti et*, Appeal 609/24/1. At paragraph 44 the Court stated:

> *"ir-regoli tas-sejħa għalhekk qegħdin hemm, u sewwasew sabiex jiġu mħarsa u mhux biex jiġu mwarrba"*

The Court distinguished a signature issue which could be clarified from the failure to submit a separately required financial document for which the dossier stipulated automatic disqualification. Paragraphs 41–50 explain why information elsewhere in the offer and clarification did not remove that obligation. Although the document in question was different, the judgment is relevant to the effect of an express requirement carrying an express consequence.

In the present case, the committee applied the minimum requirement and the consequence already stipulated in the tender. To award partial marks sufficient to keep the Appellant in the competition would allow it to avoid that consequence despite its admitted failure. Equal treatment must also be respected in relation to the bidders who prepared their offers in

accordance with the requirement and were entitled to expect that it would be applied to everyone.

Moreover, the requested exercise was limited to one occupation presented in three design options, with the corresponding information. It did not require completion of the whole occupational tool at tender stage. It concerned a component of the service being procured, and both its mandatory status and the consequence of failure were disclosed in advance. The Appellant's performance on other criteria and the number of marks allotted to this item do not establish that the requirement was unrelated to the contract or disproportionate.

It is therefore submitted that disqualification was justified by the terms of this tender and the admitted deficiency. The requirement's purpose, its limited scope and the obligation to apply it equally provide no basis for the lesser consequence which the Appellant now seeks.

5. CLARIFICATION AND RECTIFICATION

The Appellant principally seeks partial marks. Nevertheless, insofar as it may suggest that the deficiency could have been remedied by clarification, reference is made to Note 3, at page 7 of the tender. This prohibits rectification and permits clarification of information already submitted. The Organisation and Methodology submission expressly falls under Note 3. Article 16.3 of the General Rules Governing Tenders likewise distinguishes clarification from rectification of a technical offer and addresses cases where the submitted offer is undoubtedly non-compliant.

Regulation 62(2) permits requests to supplement, clarify or complete information in terms of the procurement document and consistently with equal treatment and transparency. It does not entitle a bidder to alter its technical offer contrary to the tender conditions. Identifying compliant material already submitted would be a clarification. Supplying missing designs or changing the samples to create the required comparison would introduce new technical content. Paragraph 4.4 does not allege that the committee overlooked a compliant set of mock-ups already contained in the offer.

In *Archus and Gama*, C-131/16, judgment of 11 May 2017, ECLI:EU:C:2017:358, paragraph 31, the Court stated that a clarification request 'may not lead to the submission by a tenderer of what would appear in reality to be a new tender'. Paragraphs 33–36 apply that restriction to required documents and a proposed replacement sample. It is the introduction of a new offer, in substance, which is prohibited. The Appellant cannot use clarification to change the mock-ups and thereby cure the admitted failure.

The position must also be distinguished from *BESSUI JV v Dipartiment tal-Kuntratti et*, Appeal 379/2025/1, decided by the Court of Appeal on 15 January 2026, particularly paragraphs 77–84. The Court treated the supporting literature there in issue as falling under Note 2 and noted the absence of an express provision requiring immediate exclusion. At paragraph 83 it stated:

> *"l-iskwalifika tal-offerti għandha ssir biss għar-raġunijiet li jissemmew fid-dokumenti tas-sejħa"*

The Court reversed the Board's conclusion requiring immediate disqualification, whilst maintaining the requirement for re-evaluation. That outcome must be read with the

treatment of the document under Note 2 and the absence of an express immediate-exclusion provision.

Here, the mock-ups form part of the Organisation and Methodology submission under Note 3. They are the designs which the bidder had to prepare for evaluation, rather than supporting literature for an otherwise compliant technical declaration. There is also an express rule requiring disqualification for failure to satisfy a minimum requirement. The Appellant admits that its designs did not meet the requirement. *BESSUI* therefore provides no basis for applying the treatment of Note 2 literature to the present deficiency.

CONCLUSION

In view of the above and other submissions to be made at the hearing of this Objection, the Recommended Bidder respectfully requests this Honourable Board to uphold the preliminary plea of *fuori termine*. Without prejudice, it requests the Board to reject the second grievance and the requests for re-evaluation, annulment and reissue; to confirm the Appellant's exclusion as technically non-compliant; and to uphold the recommendation for award in favour of EMCS Advisory Ltd.

Finally, the Recommended Bidder reserves the right to present evidence and make further submissions.

Dr. John L. Gauci LL.D