CAMILLERI PREZIOSI
ADVOCATES



Camilleri Preziosi
Level 3, Valletta Buildings
South Street
Valletta, VLT 1103
Malta

(+356) 2123 8989
www.camilleripreziosi.com

28 October 2026

The Secretary
Public Contracts Review Board
Notre Dame Ditch
Floriana

Reasoned Letter of Reply

Re: CT3026/2024 – Works Tender for the Design and Build of Two Utility Scale Battery Energy Storage Systems (BESS) at the A-Station Tunnel in Marsa and at Delimara Power Station in an Environmentally Friendly Manner (the "Tender Procedure")

Dear Sir, Madam,

1. INTRODUCTION

1.1 We, the undersigned, are instructed by Interconnect Malta Ltd (C 86480) (the **"Contracting Authority"**) and the Department of Contracts (as the authority responsible for the tendering process) (the **"DoC"**), to file this joint written reply in accordance with the provisions of regulation 276(c) of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the **"PPR"**).

1.2 This reply is in relation to the objection filed on 19 October 2026 by BESSUI JV (the **"Complainant"**) before the Public Contracts Review Board (this **"Board"**) in connection with the decision communicated by the DoC on 9 October 2026, following the fresh evaluation of all offers in the Tender Procedure ordered pursuant to the decision of this Board in Case No. 2143 of 1 September 2025, as confirmed and varied on appeal by the Court of Appeal (App. Ċiv. 379/2025/1) on 15 January 2026 (the **"Second Objection"**).

1.3 The Contracting Authority notes, at the outset, that this is the second objection filed by the Complainant in connection with the Tender Procedure. The first objection, filed on 23 June 2025 (the **"First Objection"**), was upheld by the Board, resulting in the cancellation of the earlier award decision, the reinstatement of the Complainant's own offer, the setting up of a new evaluation committee, composed of new members (the **"Evaluation Committee"**) and a full re-evaluation of all offers. That decision was confirmed by the Court of Appeal, save that the Court set aside, in its entirety, the Board's decision relating to the grievance on insider trading and also set aside the Board's finding that the then-recommended bidder's offer had to be disqualified outright without first being afforded an opportunity to rectify.

1.4 It is against this background, and in full compliance with the Court of Appeal Judgment, that the Complainant's offer was evaluated by the Evaluation Committee and subsequently found non-compliant.

1.5 Before entering the merits of the Second Objection, we feel the need to address the allegations made, and tone used, by the Complainant both in the First Objection and the Second Objection. The evaluation committee (both in the first instance and in the second instance) was composed of duly qualified professionals and the decision of the Evaluation Committee to disqualify the Complainant was fully justified in terms of (a) the documentation regulating the Tender Procedure (the **"Tender Document"**), (b) the decision of this Board relating to the First Objection, and (c) the judgment of the Court of Appeal relating to the appeal of that same decision (which judgment is a *res judicata* and therefore binding on all parties, including the Contracting Authority and this Board).

1.6 In addition, the Complainant makes an entirely flawed and superfluous argument relating to the strategic direction of the Government of Malta and (impliedly) the blackouts experienced in some localities during the summer months, wherein it appears to be arguing that the Evaluation Committee should have ignored its obligations to comply with the Tender Document, the decision of this Board (where confirmed by the Court), the judgment of the Court of Appeal and the PPR, and proceeded to award the contract to the Complainant (rather than delay this project further).

1.7 Government strategy is not a basis for the Evaluation Committee to disregard a clear and unequivocal mandatory requirement.

1.8 It is unacceptable that the Complainant attacks the Evaluation Committee (including by using statements such as *"bi traskuraġni u b'evalwazzjoni ħorrox borrox"*) when it is the Complainant which is now arguing in a completely different manner (because, of course, it suits it) from that in which it argued so strongly in the First Objection – that is, whereas before it argued that the failure to submit a copy of the relevant standard rendered the then-recommended tenderer's offer non-compliant, it is now arguing that the same failure does not render its offer non-compliant and instead claims *"l-offerta tal-konsorzju appellant hi waħda teknikament konformi"*, and in addition harshly criticizes the Contracting Authority for not being as inconsistent and illogical as the Complainant.

2. FACTS

2.1 The Tender Document was published in November 2024, and includes, in Section 3, Clause 3.7, the following requirement:

> *"Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards, brands or*

*labels they quoted are equivalent to the standards requested by the Contracting Authority. In **all cases** the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, **except in the case** of ISO, IEC, EN, BS and HD." [emphasis added]*

2.2 Following the decisions of the Board in Case No. 2143 and of the Court of Appeal referred to above, the Evaluation Committee was reconstituted and a fresh evaluation of all offers, including that of the Complainant, was carried out, with all prior clarification and rectification requests and responses discarded.

2.3 During that fresh evaluation, the Evaluation Committee issued a rectification request (the **"Rectification Request"**), with Technical Rectification Note #4 dealing with the applicable standards, to the Complainant. The Rectification Request explained that

"i. a relevant standard for that component being one of ISO, IEC, EN, BS and HD as listed in the table in Section 3. Specifications/Terms of Reference, 3.7 Standards and Regulations, - A copy of the relevant standard is not required to be submitted.

ii. a relevant standard for that component not being one of ISO, IEC, EN, BS and HD but being one of the other standards as listed in the table in Section 3. Specifications/Terms of Reference, 3.7 Standards and Regulations, - A copy of the relevant standard must be submitted.

iii. a standard not being one of the relevant standards listed in the table in Section 3. Specifications/Terms of Reference, 3.7 Standards and Regulations, - A copy of the relevant standard must be submitted (except in the case of ISO, IEC, EN, BS and HD), and the tenderer must prove equivalency.

Each copy of the submitted relevant standard must be a full copy of the latest version, complete and in the English language." [emphasis added]

2.4 The Rectification Request also included an example to avoid any misunderstandings, as follows:

> If, by way of example, in relation to the batteries the technical literature you submit refers to the "safety" being compliant with IEC 62619, IEC 62620 and UL 9540, you need to submit a copy of the UL 9540 standard.
> Similarly, for the "safety thermal runaway", if the technical literature you submitted stated compliance with UL 9540A, you must submit a copy of the UL9540A standard. If the technical literature states it complies with another standard, you must prove that such internationally acceptable standard ensures equivalent or higher quality as compared to UL9540A and submit a copy of that standard in the English language.

2.5 This was again reiterated on pages 7, 9, 10, 11, 13, 14, 16 and 18:

> *"In any case you are required to submit a copy of the full and latest version of the standards in the English language, other than ISO, IEC, EN, BS and HD, together with proof of equivalency (in the case of scenario (iii) as specified under the 'Applicable Standards Requirements' above)."*

2.6 In addition to the generic explanation provided relating to standards as set out above, the Rectification Request dealt specifically with what the Complainant submitted for the Marsa and Delimara sites. Specifically, the Contracting Authority:

2.6.1 under sub-notes 4(A) and 4(B), identified that the literature submitted by the Complainant made no reference to the standards listed in Clause 3.7 applicable to the Battery Units, including IEC 62620 and UL 9540, and requested supporting documentation and/or new literature corroborating compliance, or, in the alternative, a copy of any equivalent standard together with proof of equivalency;

2.6.2 under sub-notes 4(C) and 4(D), identified a corresponding gap in relation to the standards applicable to the PCS/s, and made the same request;

2.6.3 under sub-note 4(G), identified that the literature submitted in respect of the proposed ABB ZX2 main 33kV Medium Voltage System Control Gear made no reference to IEC 61439 and IEC 60376, and requested supporting documentation and/or new literature specifying compliance of the proposed ABB ZX2 33kV Switchgear with the standards listed in Clause 3.7, or, in the alternative, identification and substantiation of an equivalent standard.

2.7 The Complainant was given five (5) working days from notification to rectify and clarify its position and was expressly informed that:

> *"Tenderers who fail to rectify and clarify the shortcomings identified in this communication shall be deemed to be non-compliant".*

2.8 The Complainant filed its written response to the Rectification Request on 28 July 2026 (the **"Rectification Response"**).

2.9 On 9 October 2026, the Complainant was notified that its offer had been found technically non-compliant on three (3) grounds, each expressly tied to its response (or lack of response) to Technical Rectification Notes #4(A)/(B), #4(C)/(D) and #4(G):

> *"In response to Technical Rectification Requests **Notes# 4A and 4B**, the bidder failed to submit a full copy of the latest edition, complete and in the English language for standards **UL 9540, UL 9540A and UN 38.3**, as required under Section 3.7 of the Tender Document, and specifically requested in the rectification process.*

Consequently, the Evaluation Committee was unable to verify compliance with the requirements of Section 3.7 of the Tender Document."

AND:

*"In response to Technical Rectification Requests **Notes# 4C and 4D**, the bidder cited **GB/T 29332-2012** as an equivalent standard to **IEC 60747**.*

*However, a copy of the latest version of **GB/T 29332-2012** in the English language, as required under Section 3.7 of the Tender Document, and specifically requested in the rectification process was not provided.*

Accordingly, the Evaluation Committee was unable to validate the claimed equivalency between the two standards and therefore could not confirm compliance with the requirements of Section 3.7 of the Tender Document."

AND:

*"In response to Technical Rectification Request **Notes# 4G**, the bidder failed to submit supporting documentation corroborating compliance of the **ABB ZX2 main 33kV (Medium Voltage System Control Gear)** being proposed with **IEC 61439** and **IEC 60376**, as required under Section 3.7 of the Tender Document, and specifically requested in the rectification process. Additionally, it failed to identify and substantiate any alternative internationally recognised standard that could be considered equivalent to, or better than, the requirements stipulated in the Tender Document."*

2.10 The procurement was accordingly recommended for cancellation, since no offer satisfying the administrative and technical criteria had been received.

2.11 The Complainant felt aggrieved by this decision and filed the Second Objection on 19 October 2026, disputing the finding of non-compliance on each of the three (3) grounds and requesting that the Board revoke the finding of non-compliance, revoke the cancellation of the Tender Procedure, and order the reinstatement of the Complainant's offer in the evaluation process.

3. GENERAL

3.1 The Tender Document, in the Notes to Clause 5 found on page 13, expressly provides:

"Requests for Clarifications and/or Rectifications concerning a previous request dealing with the same shortcoming shall not be entertained."

3.2 In addition, Procurement Policy Note No. 40, issued by the Department of Contracts on 1 June 2023 and still in force, refers to the said note and adds:

> *"Therefore, it shall not be possible to re-send a Clarification / Rectification Request to attain the originally requested Clarification Information and / or Rectification Information / Documentation."*

3.3 The Contracting Authority could not therefore request, a third time the same copies of standards requested in the Tender Document and the Rectification Request.

3.4 The argument made by the Complainant in the last paragraph of page 3 of the Second Objection is therefore unsustainable – no clarification could result in the submission of missing documentation, which documentation was requested multiple times and the Complainant failed to provide same each time.

3.5 Similarly, the argument made by the Complainant in the last paragraph of page 1 of the Second Objection, is also unsustainable in this case. The Evaluation Committee, in line with its obligations under the Tender Document – as also confirmed by this Board and the Court of Appeal in relation to the copies of the standards – requested tenderers to rectify matters falling under Note 2, including the submission of documentation which was expressly required at offer stage. Specifically, with respect to copies of the standards, the failure of a tenderer to submit same was deemed, in line with the principles of equal treatment and self-limitation, sufficient to justify the disqualification of the relevant tenderer (even where this was the only failure).

3.6 The principle of proportionality requires the Contracting Authority to not exceed the limits of what is appropriate and necessary to attain the objectives pursued and, where there is a **choice between several appropriate measures**, it should choose the least onerous.

3.7 In this case, there is no choice between several appropriate measures. The tenders received were non-compliant and the Contracting Authority allowed the tenderers the opportunity to rectify same, but they failed to do so. The only decision available to it was therefore to proceed with rejection of the tenders and cancellation of the process.

3.8 **It is submitted with respect that these arguments ought to be rejected.**

4. THE FIRST GRIEVANCE: UL 9540, UL 9540A AND UN 38.3

4.1 *Introduction*

4.1.1 The Complainant does not dispute that it failed to submit full copies of the required standards in response to Technical Rectification Notes #4(A) and #4(B). This, in and of itself, ought to be sufficient for this Board to reject the Second Objection.

4.1.2 The Complainant also does not dispute the fact that Clause 3.7 of the Tender Document requires submission of the relevant standards at offer stage.

4.1.3 Therefore, by the Complainant's own admission, the non-submission of copies of the relevant standards renders its offer technically non-compliant.

4.1.4 In its Rectification Response, the Complainant instead submitted third-party test certifications and test summaries confirming that its offered battery units had been tested and certified against these standards, and now (contrary to what it argued in the First Objection) argues that this constitutes the best guarantee of compliance reasonably obtainable at this stage, such that the Evaluation Committee ought, at most, to have sought further clarification rather than finding non-compliance.

4.1.5 This argument cannot be reconciled with the clear and binding construction given to Clause 3.7 of the Tender Document by the Complainant itself in the First Objection, this Board in its decision on the First Objection and finally the Court of Appeal in its judgment of 15 January 2026.

4.1.6 The Court held that Clause 3.7 of the Tender Document is **very clear and without any ambiguity**, that the phrase ***"in all cases"*** in its final paragraph is not confined to equivalent-standard scenarios, and that the Economic Operator must, **in every case**, submit copies of the relevant standard specifications, except for standards issued by ISO, IEC, EN, BS and HD. Therefore, the rule in the Tender Document (as confirmed by the Court of Appeal) was that copies of the relevant standards had to be submitted. The exception to this rule was that, for ISO, IEC, EN, BS and HD, there was no need to submit the standards. UL and UN standards do not fall within the limited exception to the general rule and therefore copies of the relevant standards had to be submitted. The following are some of the statements made by the Court of Appeal in this respect:

> *"68. Ġaladarba l-awtorità kontraenti talbet li l-kopji tal-istandards kellhom jiġu sottomessi fl-istadju tat-tfigħ tal-offerti, **la l-kumpanija** appellanti u wisq iktar l-awtorità kontraenti **ma jistgħu issa jargumentaw li l-kopji msemmija ma kinux meħtieġa**.*
>
> *69: Din il-Qorti kważi xebgħet tgħid li meta **r-regolamenti tas-sejħa jitolbu b'mod espress ċertu tip ta' dokumentazzjoni, dik id-dokumentazzjoni għandha tingħata bil-mod ta' kif ikun mitlub**, u dan*

Irrispettivament minn jekk l-offerent ilqhirlux li dik id-dokumentazzjoni tkunx ta' siwi ghall-kumitat tal-ghażla jew le *(ara All Clean Services Limited v. Ministeru ghall-Edukazzjon, l-Isport, iż-Żgħażagħ, ir-Riċerka u l-Innovazzjoni et mogħtija mill-Qorti tal-Appell fl-10 ta' Jannar, 2023). Tassew, ir-regoli tas-sejħa jsiru biex jitħarsu u mhux biex kulħadd jagħmel kif ifettillul (ara Legacy Ventures Limited v. Direttur Ġenerali tal-Kuntratti et mogħtija mill-Qorti tal-Appell fit-30 ta' Lulju, 2024).*

Para 70: Taqa' għalhekk fir-responsabbiltà ta' kull offerent li jobdi l-kundizzjonijiet tas-sejħa bħala «a reasonable well informed and normally diligent tenderer», u għaldaqstant, ġaladarba r-regoli tas-sejħa in kwistjoni kienu jimponu fuq l-offerenti li jressqu kopja tal-istandards rilevanti, ***il-kumpanija appellanti kienet obbligata li tressaq dik id-dokumentazzjoni****, u mhux tippretendi li setgħet tgħaddi mingħajrha (ara* ***Vassallo Builders Ltd v. Wasteserv Malta Ltd et*** *mogħtija mill-Qorti tal-Appell fis-6 ta' Mejju, 2025 u* ***Trackwell FIMS noe v. Id-Direttur Ġenerali tal-Kuntratti et*** *mogħtija mill-Qorti tal-Appell fit-13 ta' Marzu, 2025).*

71. Bl-istess mod, il-kumitat ta' evalwazzjoni ma setax jagħlaq għajnejh għan-nuqqas tal-għotja ta' tali dokumentazzjoni, u dan billi daqskemm l-offerenti għandhom joqogħdu attenti li jippreżentaw dak kollu li jkun intalab minnhom fid-dokumenti tas-sejħa, daqshekk ieħor li dawk mgħobbija bir-responsabbiltà li jgħarblu l-offerti għandhom jiżguraw li jimxu bir-reqqa mal-kundizzjonijiet li jitniżżlu fid-dokument tas-sejħa (ara Signal 8 Security Services Malta Limited v. Environment and Resources Authority mogħtija mill-Qorti tal-Appell fit-3 ta' Settembru, 2024).

72. Dan għaliex, meta fil-kuntest ta' proċedura ta' sejħa għall-offerti, l-awtorità kontraenti tfassal il-kundizzjonijiet li bi ħsiebha timponi fuq l-offerenti, hija tkun qiegħda tillimita l-eżerċizzju tas-setgħa diskrezzjonali tagħha bil-quddiem – b'dana li hija ma tkunx tistax tmur lura mill-kundizzjonijiet tas-sejħa, mingħajr ma tikser il-prinċipju tat-trattament indaqs bejn l-offerenti (ara Polaris Marine Services Co Ltd v. Direttur Ġenerali tal-Kuntratti et mogħtija mill-Qorti tal-Appell fit-29 ta' Awwissu, 2023, u Quattro Labs Limited pro et noe v. Malta College of Art, Science and Technology mogħtija mill-Qorti tal-Appell fit-13 ta' April, 2018).

73. Ġaladarba l-awtorità kontraenti talbet lill-offerenti biex jispeċifikaw l-istandards li għalihom l-impjanti tal-enerġija kienu sejrin ikunu konformi magħhom, ***kif ukoll jippreżentaw kopja ta' dawk l-istandards rilevanti (bħlief fil-każ tal-istandards ISO, IEC, EN, BS u HD), il-kumitat ta' evalwazzjoni kien għalhekk obbligat iżgura li l-offerenti jkunu ssottomettew dik l-informazzjoni u d-dokumentazzjoni****, u mhux jiddeċiedi minn rajh li joqgħod biss fuq id-dikjarazzjonijiet*

magħmula mill-offerenti fil-formola dwar l-offerta teknika." [emphasis added]

4.1.7 The Court of Appeal made express reference to the failure of the then-recommended tenderer to submit the relevant standards for UL9450 (para. 74), which is indeed one of the same standards the Complainant failed to submit a copy of in its Rectification Response.

4.1.8 In fact, in relation to Clause 3.7 of the Tender Document, the Court did not disturb this Board's finding that:

> *"To this effect, the Board has carefully examined the tender dossier, in particular Section 3.7, and the evidence given by the members of the Technical Evaluation Committee.*
>
> *The final paragraph of Section 3.7 provides in unequivocal terms:*
>
> > *"In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS and HD."*
>
> *The use of the word "shall" denotes a **mandatory obligation** rather than a discretionary or optional requirement. This Board cannot accept the proposition that such an express obligation can be diluted into a mere self-declaration. The clause imposes, indeed, a **dual requirement**, i.e. first, a statement of the standards, and second, **the submission of the relevant specifications** (save where the standard is ISO, IEC, EN, BS or HD).*
>
> *The evidence tendered before this Board shows that the Recommended Bidder did not provide the relevant documentation at bidding stage. This is confirmed even by the members of the TEC themselves whilst testifying under oath, who, while unanimous in their interpretation, nonetheless, admitted that they read the last paragraph in conjunction with the rest of Section 3.7 and chose to accept a self-declaration.*
>
> *With respect, such an approach amounts to a re-drafting of the tender requirement. The Evaluation Committee cannot disregard clear and unequivocal wording in favour of an interpretation more convenient to the Recommended Bidder. **Self-limitation requires that the Contracting Authority applies the tender rules as written**, not as it would wish them to be. **The fact that the tender expressly required supporting specifications, and only created an exception for certain international standards, removes any possible ambiguity**." [emphasis added]*

4.1.9 Therefore, both this Board and subsequently the Court of Appeal concluded that Clause 3.7 of the Tender Document required the submission by the tenderers of copies of all standards referred to in their tender, in the English language, save for ISO, IEC, EN, BS and HD and that tenderers could not choose not to submit same, irrespective of whether they believed the relevant standards were needed by the Contracting Authority.

4.1.10 This construction is fully consistent with the principle of self-limitation applied by this Board and the Court of Appeal. It is equally consistent with the case-law of the Court of Justice of the European Union (the "**CJEU**"), which has held that the principle of equal treatment requires tenderers to be afforded equality of opportunity when formulating their bids, so that all bids are subject to the same conditions, and that a contracting authority must comply strictly with the criteria which it has itself laid down, including the obligation on tenderers to produce documents required by the contract documentation on pain of exclusion (Case C-42/13 *Cartiera dell'Adda SpA v CEM Ambiente SpA*, judgment of 6 November 2014, EU:C:2014:2345, paragraph 44; Case C-336/12 Manova A/S, judgment of 10 October 2013, EU:C:2013:647, paragraph 40).

4.1.11 The Complainant is now asking this Board to go against the decision this Board gave in relation to the First Objection (wherein it was the Complainant itself which requested that exact decision) and against the judgment of the Court of Appeal, essentially requesting that a different set of rules apply to the Complainant compared to the rules that were applied to all the other tenderers.

4.1.12 In a weak attempt to confuse this Board, the Complainant argues that not only did the Complainant comply with what was required, but it went beyond that because it understood the strategic importance of this project and therefore wanted to put the Contracting Authority's mind at rest that it is a serious tenderer which not only declares it can comply, but actually shows it is compliant.

4.1.13 This argument does not hold water - the Complainant was requested, in clear and unambiguous terms, both in the Tender Document and in the Rectification Request (and, the Complainant also actively participated (and argued that this was a mandatory requirement) in both the proceedings relating to the First Objection before this Board and those before the Court of Appeal which confirmed that copies of the relevant standards specifications needed to be submitted) to submit copies of all standards, in full and in English, other than ISO, IEC, EN, BS and HD. If it understood the terms of the Tender Document and the strategic importance of the project, it should have submitted copies of the standards as requested.

4.1.14 It failed to do so.

4.2 *Compliance Cannot be Substituted by Alternative Proof*

4.2.1 The obligation under Clause 3.7 is a specific, freestanding documentary obligation: to supply, at offer stage, a copy of the full and latest version of the named standard itself, in English.

4.2.2 Test reports, test summaries, and third-party certifications of product compliance, however genuine, are not substitutes for the standard specification itself. They answer a different question – whether the product performs to a given specification – not the question the Tender Document poses, which is whether the bidder has supplied, for the Contracting Authority's own verification, the relevant standards specifications against which that performance is to be assessed.

4.2.3 The Complainant did not submit something better: it submitted something different which does not provide the Contracting Authority with the documentation is requested. In addition, the Complainant's statement that the standards "*jemergu minn din id-dokumentazzjoni nniffisha*" is entirely false.

4.2.4 The Complainant was expressly told, through the Rectification Request, what was missing and was given a further opportunity, consistent with the terms of the Tender Document and the Court of Appeal's judgment, to supply copies of the relevant standard specification.

4.2.5 **By its own admission, it did not do so**. Also, by its own argument in the First Objection, that failure makes its tender non-compliant (see 6.3 below).

4.3 *The Rectification Opportunity has Already Been Given and Exhausted*

4.3.1 The Court of Appeal's judgment did not hold that a Clause 3.7 documentary deficiency can never result in disqualification. It held only that disqualification cannot occur immediately (which is what the Complainant had argued before this Board), without the tenderer first being given an opportunity to rectify the missing documentation, since such documentation falls within the rectifiable "Note 2" category under the General Rules Governing Tenders, rather than the unamendable "Note 3" category.

4.3.2 That safeguard has already been afforded to the tenderers, including the Complainant, in full. The Complainant was specifically and individually notified, by Technical Rectification Notes #4(A) and #4(B), exactly which standards were missing, was given five (5) working days to supply them, and was warned in clear terms that failure to do so would result in rejection.

4.3.3 The Complainant does not contend that this notice was unclear, untimely, or otherwise defective; it simply did not supply the missing standards.

4.3.4 In these circumstances, the Evaluation Committee had no discretion to seek a further clarification or to search for the missing documentation itself. As the Court of Appeal held in *NQUAYMT v. Aġenzija għall-Infrastruttura Malta et* (22 June 2022):

> *"Jekk oblatur ikun ingħata opportunita` ta' rettifika imma xorta waħda jibqa' administratively non-compliant, **il-bord ta' evalwazzjoni ma jistax isalva dik l-offerta billi joqgħod jiġri wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu**. F'dan il-każ, il-konsorzju appellat ingħata kull ċans jissottometti ruħu għat-talbiet tal-awtorita` kontraenti, u imputet sibi jekk baqa' jitraskura dak li kellu jagħmel. L-eċċess fil-manjaminita` u fit-tfittix sabiex jiġu salvati offerti akkost ta' kollox mhux espressjoni ta' proporzjonalita` imma huwa sproporzjon kontra min kien "compliant" mill-bidu nett. Din il-Qorti mhux l-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorożimament dak li trid issejħa għall-offerti u m'għandux jippretendi li jiġi mitlub "jirranġa" l-offerta biex ikun kompatibbli ma' dak mitlub."*

4.3.5 The Board had reiterated that position in Case No. 2127 (SPD4/2024/056), and further held, in that same case, that neither the evaluation committee nor this Board should of its own motion search for, obtain or rely on documents which were required at tendering stage, were not submitted with the original bid, were requested by means of a rectification request, and were again not supplied. This Board, with reference to case-law of the Court of Appeal, held as follows:

> *"This Board concurs with the reasoning of the Court of Appeal in its Superior Jurisdiction in the above-quoted judgments, and hereby holds that the Appellant is wholly incorrect to imply that the Tender Evaluation Committee at evaluation stage, and this Board now at appellate stage, should itself on its own steam search for, obtain and rely on documents the Appellant alleges are available in the public domain - **the same documents which were required at tendering stage, the same documents which were not submitted in the original bid, the same documents which were requested by means of the request for rectification, and the same documents which there again the Appellant failed to supply**.*
>
> *The **Appellant's argument in this respect is not only illogical but is an argument which if upheld also stands to breach the principle of self-limitation, the principle of equal treatment of economic operators** and would effectively mean that the Tender Evaluation Committee and/or this Board are to rely on a document which does not emerge neither from the bid submitted by the Appellant as evaluated by the Tender Evaluation Committee, nor from the acts of this Board.*

*Therefore, in view of the foregoing, this Board firmly believes that the **Tender Evaluation Committee was correct in its findings, and rightly so, its hands were tied in considering the Appellant as non-compliant thereby excluding him**, thus, this second grievance as brought forward by the Appellant is also being rejected by this Board." [emphasis added]*

4.3.6 No further clarification or rectification could have rectified this deficiency, since the submission of copies of the relevant standards had already been requested multiple times and the Complainant failed to provide them.

4.3.7 **We therefore respectfully request this Board to reject the first grievance, since the Complainant, even after having been afforded the rectification opportunity contemplated in the Tender Document and required by the Court of Appeal's judgment of 15 January 2026, failed to discharge the documentary obligation under Clause 3.7 notwithstanding that opportunity.**

5. THE SECOND GRIEVANCE: EQUIVALENCY CLAIM FOR GB/T 29332-2012

5.1 *Introduction*

5.1.1 In its Rectification Response, the Complainant stated that its modules "*meet the requirements of GB/T 29332-2012 standard*", that "*This standard is equivalent to IEC 60747-9:2007 standard*" and referred to a supporting document described as "*IEC 60747 equivalent: GBT 29332-2012.pdf*".

5.1.2 The Complainant argues in the Second Objection that this was the best proof of equivalency reasonably available to it, such that the Evaluation Committee had no basis to require any further or different documentary proof.

5.1.3 The arguments se tout above, as applicable to this grievance as well, are deemed incorporated by reference in this section.

5.2 *Clause 3.7 Places the Burden of Proof Squarely on the Complainant*

5.2.1 Clause 3.7 is explicit that "*it will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority*", and that, in all cases other than ISO, IEC, EN, BS and HD standards, the Economic Operator "*shall supply copies of these relevant standards specifications*". GB/T 29332-2012 being a standard the Complainant itself introduced as an alternative to IEC 60747 (which is a listed standard), falls squarely within the scenario in which both a copy of the standard and proof of equivalency are required.

5.2.2 This was not a novel or undisclosed requirement improvised at the rectification stage. Technical Rectification Notes #4(C) and #4(D) specifically and individually informed the Complainant, by reference to the applicable Clause 3.7 tables, that

supporting documentation or literature corroborating compliance with the listed standards, including IEC 60747, was missing, and that, if an alternative standard was relied upon, a copy of it together with proof of equivalency was required.

5.2.3 The document the Complainant did submit in response, described in its own Rectification Response as "*IEC 60747 equivalent: GBT 29332-2012.pdf*", does not consist of a copy of the GB/T 29332-2012 standard specification itself; it is, at best, a statement of equivalence, and does not allow the Contracting Authority review a copy of the standard and verify the claimed equivalency, as Clause 3.7 requires.

5.3 *A Bare Supplier Assertion of Equivalence Does Not Discharge the Burden of Proof*

5.3.1 A supplier's one-line assertion that its own product standard "*is equivalent to*" the standard requested by the Contracting Authority is not proof of equivalency; it is, at most, the starting point for an exercise which Clause 3.7 requires the Economic Operator itself to carry out and evidence that the two standards are equivalent.

5.3.2 The statement by the Complainant that this does not mean that a copy of the latest version of GB/T 29332-2012 was required is difficult to comprehend.

5.3.3 The Complainant itself, as explained below, has argued that Clause 3.7 requires the submission of copies of the relevant standards. This Board and the Court of Appeal have confirmed that copies of the relevant standards specifications are required.

5.3.4 The Complainant therefore knew very well that it was required to submit copies of all standards, except for ISO, IEC, EN, BS and HD standards. GB/T 29332-2012 is not such standard falling within the exception, and the Complainant was therefore required to submit a copy of the standard, in full and in English, as required by the Tender Document and the Rectification Request.

5.3.5 The proof of equivalency is a separate requirement, beyond the requirement to submit a copy of the relevant standard (as also explained in the Rectification Request, including in the extract reproduced in section 2.3 above).

5.3.6 It is well established that a tenderer may not discharge a documentary burden placed on it in a Tender Document by reference to generic or unsubstantiated assertions where the tender conditions call for verifiable documentary proof. Here, the Contracting Authority did not refuse to consider the Complainant's equivalency claim; it gave the Complainant a further, specific opportunity, through Technical Rectification Notes #4(C) and #4(D), to substantiate it by producing the standard itself. The Complainant simply did not do so.

5.3.7 **We therefore respectfully request this Board to reject the second grievance, since the Complainant bore the burden of proving equivalency and of submitting a copy of the standards quoted, was given a specific opportunity to discharge that burden and submit such copy, and failed to do so.**

6. THE THIRD GRIEVANCE: ABB ZX2 MAIN 33KV SWITCHGEAR

6.1 *Introduction*

6.1.1 In its Rectification Response, the Complainant's sole documentary answer to Technical Rectification Note #4(G), in respect of both IEC 61439 and IEC 60376, was a reference to the "*DECLARATION OF COMMITMEN-ABB.pdf*", together with the "*Safe SF6 36kV Catalogue IEC 62271-200).pdf*" and the "*Technical Catalogue TK502-22 - ZX2.pdf*".

6.1.2 The Complainant submits that even a cursory review of this documentation would have confirmed full compliance, and that disqualification on this ground was accordingly unwarranted.

6.2 *None of the Documents Relied Upon Evidence Compliance, let alone Equivalency, of the ZX2*

6.2.1 It is evident from even a cursory review of the documents that none of these three documents corroborates compliance of the ABB ZX2 with IEC 61439 or IEC 60376, still less substantiates an alternative standard as equivalent to them, as Clause 3.7 and Technical Rectification Note #4(G) required. In addition, no declaration evidencing equivalency for the ZX2, in respect of either standard, was ever submitted.

6.2.2 We shall take the three (3) documents referred to by the Complainant in turn.

6.2.3 First, the declaration relied upon by the Complainant (Declaration of Commitmen-ABB) is a single, one-page, generic letter addressed to the Complainant relating to the medium-voltage ring main units (RMUs) and not ZX2, which the Complainant's own Rectification Response cites, indiscriminately, as its supporting document for no fewer than ten separate and materially different standards under Technical Rectification Note #4(G) alone, including IEC 62271-200, IEC 61243, IEC 60044, IEC 61439, EN 50181, IEC 60480, IEC 60376, IEC 62586-1/2, IEC 61000-4-30 and IEC 62053-22.

6.2.4 It does not support the argument that ABB ZX2 main 33kV product was compliant with the relevant standards.

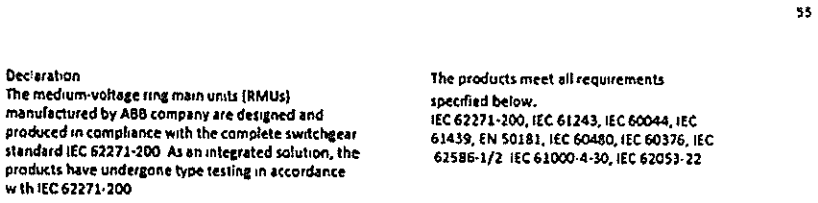
6.2.5 The Declaration of Commitmen-ABB relates to "*the medium-voltage ring main units (RMUs)*"; it does not identify, name, or refer anywhere to the ABB ZX2, which is the product in fact proposed by the Complainant for the Marsa and Delimara sites.

6.2.6 The ZX2 is a different product to the "*medium-voltage ring main unit*". In fact, the ZX2 and the Ring Main Unit, even if both are considered as switchgear, have distinct features and functions which are not interchangeable.

6.2.7 It is therefore entirely irrelevant for the purposes of determining whether ZX2, a different product, complies with equivalent standards.

6.2.8 The second document referred to by the Complainant is "*Safe SF6 36kV Catalogue (IEC 62271-200).pdf*", a document which relates to an entirely different product from the ABB ZX2 and is therefore irrelevant. However, the Complainant seeks to confuse the two to rely on a declaration found therein, by also only reproducing part thereof.

6.2.9 On page 55 of the "*Safe SF6 36kV Catalogue (IEC 62271-200).pdf*", the following declaration was included:



55

Declaration
The medium-voltage ring main units (RMUs) manufactured by ABB company are designed and produced in compliance with the complete switchgear standard IEC 62271-200. As an integrated solution, the products have undergone type testing in accordance with IEC 62271-200

The products meet all requirements specified below.
IEC 62271-200, IEC 61243, IEC 60044, IEC 61439, EN 50181, IEC 60480, IEC 60376, IEC 62586-1/2, IEC 61000-4-30, IEC 62053-22

6.2.10 This is reproduced, but only in part, on page 6 of the Second Objection, right above the words "*Kull kumment ieħor hu superfluwu*".

6.2.11 As evidenced from the above (and, of course, this Board will have access to the relevant document), the Complainant has conveniently omitted the left side of the declaration – that is, the actual declaration. The declaration in question was made only in relation to the "*medium-voltage ring main units (RMUs)*" and was indeed found in the "*Safe SF6 36kV Catalogue (IEC 62271-200).pdf*" (the "**ABB Declaration**").

6.2.12 On its face, the ABB Declaration describes "*the medium-voltage ring main unit*" as meeting these standards; it does not identify, name, or refer anywhere to the ABB ZX2, which is the product in fact proposed by the Complainant for the Marsa and Delimara sites.

6.2.13 The ABB Declaration therefore relates to a product which is different from ABB ZX2 and cannot therefore be relied upon for ABB ZX2.

6.2.14 It is in fact entirely irrelevant for the purposes of determining whether ZX2, a different product, complies with equivalent standards.

6.2.15 In addition, and without prejudice to the above, the ABB Declaration recites each standard in the same standard, list-form manner as the Clause 3.7 tables themselves, without any analysis, test data, cross-reference, or evidentiary basis capable of substantiating that recitation for any product, let alone the ZX2 specifically. The ZX2 is a different product to the "*medium-voltage ring main unit*"

for which the ABB Declaration was submitted. As explained above, although both the ZX2 and the Ring Main unit are switchgear, they have distinct features and functions which are not interchangeable.

6.2.16 The last document referred to by the Complainant is the ABB Technical Catalogue for the ZX2; a general product brochure describing the ZX2 range's technical characteristics, dimensions, and components. It contains no reference, anywhere, to IEC 61439 or IEC 60376, and no statement of compliance or equivalency of any kind.

6.2.17 The ABB product catalogue for the SafeRing 36/SafePlus 36 range concerns an entirely different switchgear product line to the ZX2 that was in fact offered and is accordingly incapable of evidencing the ZX2's compliance with anything.

6.2.18 In short, and contrary to the Complainant's submission that "*a cursory look*" at these documents is sufficient to confirm compliance, none of the three (3) documents the Complainant now relies upon, whether read individually or together, contains any declaration evidencing equivalency, still less compliance, of the ZX2 with the standards specifically identified as missing in Technical Rectification Note #4(G).

6.3 *The Rectification Opportunity has Already Been Given and Exhausted*

6.3.1 As with the first and second grievances, the Complainant was specifically and individually notified, by Technical Rectification Note #4(G), that the literature submitted for the ABB ZX2 made no reference to IEC 61439 or IEC 60376, and was given the opportunity either to submit documentation corroborating compliance with those standards, or to identify and substantiate an equivalent standard. The Complainant did neither.

6.3.2 It is settled that, once a bidder has been given the opportunity to rectify and fails to do so, the evaluation committee cannot salvage that offer by further pursuing the bidder (see *NQUAYMT v. Aġenzija għall-Infrastruttura Malta et, Court of Appeal, 22 June 2022*; Case No. 2127 referred to above). Any further documentation that the Complainant may now seek to produce before this Board cannot retroactively cure the omission in the offer as evaluated, since the Contracting Authority is bound by the principle of self-limitation to evaluate only what was submitted within the prescribed deadlines.

6.3.3 In addition, as with the other grievances, the Complainant failed to submit copies of the relevant standards relied upon.

6.3.4 **We therefore respectfully request this Board to reject the third grievance, since none of the documentation relied upon by the Complainant evidence compliance or equivalency of the ABB ZX2 with the standards identified in Technical Rectification Note #4(G) and the Complainant also failed to**

submit copies of the relevant standards. The Complainant therefore failed to discharge its obligations (both of proving equivalency and of submitting copies of the relevant standards) under Clause 3.7 notwithstanding the rectification opportunity afforded to it.

7. THE COMPLAINANT'S OWN PRIOR SUBMISSIONS CONFIRM THE CORRECTNESS OF THE CONTRACTING AUTHORITY'S APPROACH

7.1 Without prejudice to the foregoing, the Contracting Authority draws the Board's attention to the fact that the position now taken by the Complainant – in some cases that copies of the standards were not required and in other cases that supplier assertions, test reports, and general product literature may substitute for the standard specifications required by Clause 3.7 – directly contradicts the position the Complainant itself has consistently and successfully adopted, as appellant, before this Board and the Court of Appeal in connection with this very Tender Procedure.

7.2 In its First Objection, the Complainant in fact argued that Clause 3.7 required submission of the actual copies of the standards, and that this was a mandatory requirement.

7.3 The Complainant argued, in its First Objection:

> *"Id-dokument tas-sejha specifikatament talab illi f'dan l-istadju, u allura pre-award, offerent prospettiv jiddikjara li s-soluzzjoni offerta hi konformi mal-i"standards specifications" kollha elenkati fid-dokument tas-sejha u* ***lipprovdi minn issa, kopja tal-istess. Fin- nuqqas, hu minn ewl id-dinja li l-offerta titqies bhala teknikament mhux konformi.*** *" [emphasis added]*

7.4 That is precisely the position the Contracting Authority takes in relation to the Complainant's own tender (as rectified) in the Second Objection.

7.5 This Board, in assessing and deciding the First Objection, agreed with the Complainant's position and decided that the recommended tenderer in that case ought to have been disqualified due to its failure to submit copies of the relevant standard.

7.6 The Complainant is now asking this Board to decide the same exact matter in a completely different way, simply because the deficiency is now that of the Complainant.

7.7 The Complainant cannot credibly now argue, in relation to its own documentary shortcomings, that it should not be disqualified for its failure to submit the required copies of the standards it quoted (amongst other things, as explained above), or that (in relation to some of the grievances) supplier declarations of future or general compliance, or certifications procured from a manufacturer, satisfy an obligation

which the Complaint itself has characterised – as confirmed by this Board and the Court of Appeal – as requiring a tenderer to furnish, pre-award, a copy of the standard specification itself.

8. THE COURT OF APPEAL'S REASONING

8.1 The Court of Appeal, in considering the equivalent Clause 3.7 shortfall which arose in relation to the then-recommended bidder, confirmed that tender rules requiring specific documentation must be given as required, irrespective of whether the bidder considers the documentation useful, and that it is for each reasonably well-informed and normally diligent tenderer to comply with the conditions the contracting authority has set, which the contracting authority cannot vary after the fact without breaching equal treatment between bidders. This reflects the settled case-law of the CJEU, according to which the principle of equal treatment requires that all bids be subject to the same conditions, while the obligation of transparency precludes any risk of favouritism or arbitrariness on the part of the contracting authority (Case C-42/13 Cartiera dell'Adda, paragraph 44; Case C-538/13 eVigilo, EU:C:2015:166, paragraphs 33 and 34).

8.2 The Court's ruling that a Clause 3.7 deficiency is rectifiable, rather than an automatic ground for disqualification, exists precisely to ensure that a bidder is given a fair opportunity to supply what is missing before any adverse finding is made – not to excuse a bidder, once given that opportunity in clear and specific terms, from the documentary obligation altogether.

8.3 To accept the Complainant's position in this Second Objection would go contrary to the decision of this Board in the First Objection, and the judgment of the Court of Appeal, which is a *res judicata* and binds all parties to those proceedings and this Board.

9. DEPOSIT

9.1 The Contracting Authority defers to this Board on whether to refund the deposit, as part of its final decision on the matter.

9.2 However, the Contracting Authority would not object to the refund of the deposit if the Second Objection is withdrawn.

9.3 The Complainant, through this detailed response, ought to have no doubt that the Contracting Authority's decision was not only justified, but mandated by the Tender Document, this Board and the Court of Appeal.

10. CONCLUSION

10.1 In view of the above, we respectfully request the Board to find against the Complainant and reject the Second Objection, in its entirety.

10.2 This reply is without prejudice to any further submissions that we may be allowed to make during the proceedings relating to the appeal forming the subject-matter of the Second Objection.

Yours faithfully,

Steve Decesare | Stefan Cutajar | Audrey Marlene Buttigieg Vella