

PUBLIC CONTRACTS REVIEW BOARD

Case 1756 – CT2139/2022 – Service Tender for Household Waste Collection using Low Emission Vehicles in Gozo Region

22nd July 2022

The Board,

Having noted the call for remedies filed by Dr Jonathan Mintoff acting for and on behalf of Koperattiva Ghawdxija tal-Indafa Pubblika Limited, (hereinafter referred to as the appellant) filed on the 9th June 2022;

Having also noted the letter of reply filed by Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Gozo Regional Council (hereinafter referred to as the Contracting Authority) filed on the 14th June 2022;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Director General of Contract) as summoned by Dr Jonathan Mintoff acting for the Appellant;

Having heard and evaluated the testimony of the witness Mr George Refalo (Executive Secretary of the Gozo Regional Council) as summoned by Dr Jonathan Mintoff acting for the Appellant;

Having heard and evaluated the testimony of the witness Mr Mario Borg (Chief Executive Officer of the Gozo Regional Development Authority) as summoned by Dr Jonathan Mintoff acting for the Appellant;

Having heard and evaluated the testimony of the witness Mr Charles Deguara (Auditor General) as summoned by Dr Jonathan Mintoff acting for the Appellant;

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

Having noted and evaluated the minutes of the Board sitting of the 30th June 2022 hereunder-reproduced.

Minutes

Case 1756 – CT 2139/2022 – Service Tender for Household Waste Collection using Low Emission Vehicles in Gozo Region

Remedies before Closing Date of a Call for Competition

The tender was issued on the 19th May 2022 and the closing date was the 21st June 2022. The value of the tender, excluding VAT, was € 6,245,179.

On the 9th June 2022 Koperattiva Ghawdxija tal-Indafa Pubblika Limitata filed an appeal against the Gozo Regional Council as the Contracting Authority in terms of Regulation 262 of the PPR.

A deposit of € 31,227 was paid.

On the 30th June 2022 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Mr Lawrence Ancilleri and Ms Stephanie Scicluna Laiviera as members convened a virtual public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Koperattiva Ghawdxija tal-Indafa Pubblika Limitata

Dr Jonathan Mintoff	Legal Representative
Dr Larry Formosa	Legal Representative

Contracting Authority – Gozo Regional Council

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Natalino Attard	Representative
Mr Christopher Galea	Representative
Mr Vincent Vella	Representative
Mr Kristian Sultana	Representative
Mr George Refalo	Representative
Dr Samuel Azzopardi	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Jonathan Mintoff Legal Representative for Koperattiva Ghawdxija tal-Indafa Pubblika Limitata (KIP) requested permission to examine witness before making submission.

Dr Clement Mifsud Bonnici Legal Representative for the Gozo Regional Council (GRC) thanked the Board for hearing this case with urgency and said that the highlight of this appeal relates to what the GRC did. It declares that the tender was written with the assistance of the Local Government Division which co-ordinated the Waste Collection Regional Policy covering another five regions. It is clear that once the tender was submitted to the Department of Contracts (DoC) approval was there.

Mr Anthony Cachia (142658M) called as a witness by the Appellant testified on oath that he was the Director General of Contracts and had responsibility to oversee Government contracts. Faced with a string of questions witness stated that he would need to refer to his files before replying. His testimony was therefore suspended to give him time to refer.

Mr George Refalo (2975G) called as a witness by Appellant testified on oath that he is the Executive Secretary of the GRC. He stated that there was a meeting of the GRC on the 9th May 2022 which discussed in detail and agreed the draft tender although the Minutes of the meeting had not yet been approved as no further meetings had been held since. There were some reservations on the proposed schedule of collections of waste as it was different to the present one. The vehicle types were discussed; what is stated in the tender is the minimum requirements. The GRC was collecting information on routes and times as part of the workplan to be discussed with the successful bidder.

Witness stated that what was requested in the tender is the minimum requirement to be provided and there were no issues on the tender documents itself and no changes had been proposed at the 9th May meeting – meaning the tender has been approved. There was no communication with the Gozo Regional Development Authority (GDRA) not even after the publication of the tender as this was

not their remit. The Regional Impact Assessment Study was not the responsibility of the GRC, according to the witness. The Procurement Originators Form (POF) was presented by Dr Christopher Galea. As at present, payment for the service will come from the individual Local Councils so there was no need to have a separate budget. The tender was the result of a team effort covering the whole of the Maltese Islands involving related inter-communication and feedback between all the parties concerned. The tender dealt only with domestic waste since commercial waste is an altogether different matter outside the GRC authority – this was according to Policy Note submitted as GRC 7 in the Authority’s submissions.

At this stage Dr Mintoff asked the witness to refer to extracts from the Minutes of the meeting of the 18th February 2022. Dr Mifsud Bonnici objected to this as he stated these should have been presented in the time set by the Board. Dr Mintoff said he had, timeously sent a list of questions he intended to ask to be sent to witnesses.

The Chairman advised Dr Mintoff that it is not the normal practice of PCRB to send questions which lawyers intend to ask witnesses. The Board will however allow screen sharing of documents.

Dr Mintoff referring to the screenshare directed Mr George Refalo’s attention to Minute 107.9.3 of the 18th February 2022 Minutes of the GRC. Witness said that this referred to a meeting of the panel held at a hotel in Malta and several local councillors attended. He went on to state that the draft of the tender was received on the 6th May and sent on from the tender team on the 9th May 2022 through Dr Christopher Galea. According to the witness additional information was sent, but not published, on the 9th June (according to the table set out in the tender documents) but he was not aware of the reason as that decision was taken by the tender team, the composition of which was detailed by name. That team had started working on the project over two years prior and consisted of departmental officials.

At this stage the testimony of Mr Refalo was suspended and the testimony of Mr Anthony Cachia resumed.

Mr Cachia continuing his testimony stated that the draft of the tender was approved on the 25th April 2022 following a request by Dr Christopher Galea. The Tender Originators Form (POF) was received on the 14th and the Commitment Form on the 15th April. The Local Government Division submitted all documents direct. The approval of funds could only emanate from the Ministry of Finance and this was received on the 14th April. The Department of Contracts corresponded only with the Local Government Division.

At this stage Dr Mintoff requested the further suspension of Mr Refalo’s testimony and the introduction of a different witness. Dr Mifsud Bonnici objected to this irregular procedure. The Board directed Dr Mintoff not to introduce fresh witnesses before he had concluded the testimony of Mr Refalo.

Dr Mintoff asked that it be recorded that:

‘The Legal Counsel for the applicant hereby registers his formal objection to the fact that the examination in chief of witness Mr George Refalo needs to be suspended until further evidence is produced by the relevant witnesses duly summoned by the applicant.

Furthermore the appellant is still presenting and producing witnesses.’

Dr Mifsud Bonnici requested that it be recorded that:

'Legal Counsel for the Contracting Authority notes that applicant's request is contrary to customary procedure on evidence adopted by the Board.

In addition the applicant is in the driving seat when it comes to the evidentiary phase and should have summoned Mr Borg earlier during the hearing.'

The Board directed that the testimony of Mr Refalo should resume.

Witness was referred to an extract from the Minutes mentioned earlier regarding the urgency of the case. The Recovery and Resilience Plan was approved in 2021, in February 2022 the use of a PMC was discussed; everything needed it's time to be discussed and the witness said that he could not state if the tender could commence prior to a Waste Recovery Plan.

Mr Mario Borg (18075G) called as a witness by the Appellant stated on oath that he is the Chief Executive officer of GRDA which requested only details of the tender. The national Waste Policy was issued in December 2021 after the GRDA came into being. According to the witness this Authority asked Dr Azzopardi how the collection of waste would work. This was done both verbally and followed up by an e-mail on 3rd June. The requested meeting, to find out more information, was not held since they did not receive a reply to the e-mail. The GRDA was certainly not seeking a consultation or a screening exercise on the tender.

Witness further said that the Impact Assessment was only one of the services of major national importance – the procedure for initiating such an assessment was only if it was requested or if the Authority assesses the need for it. The GRDA did not do an Impact Assessment as the proposed new waste collection service was not changing the dynamics of the system.

Mr Charles Deguara (259059M) called as a witness by the Appellant testified on oath that he has occupied the position of Auditor General for 6 years and 8 years as Deputy. He was referred to the audit report, dated December 2021, referring to the concession awarded to Vitals Global Healthcare (VGH), listed as Doc. KIP1 in the Appellant's submissions. Witness explained that an audit was carried out either on its own decision or at the request of the Public Accounts Committee.

Referred to the tender document in question witness stated that he had not seen such document and went on to say that one cannot compare cases as all are different and one cannot use the findings in one case and use them to interpret other cases. Dr Mintoff pointed out to witness that all he was trying to do was to see if general principles also applied in this case to which witness replied "Nothing is general in Auditor's work".

Dr Mifsud Bonnici said that the Auditor General has never heard of or seen this tender document and any questions put to him are inadmissible and irrelevant. He would be objecting to every question put to this witness.

The Chairman said that the Board wants to make it clear from the outset that, under his Chairmanship, it will not accept fishing expeditions. Having said that Mr Deguara has been called as a witness by Appellant, as is his right. However, questions to him must be relevant to the role he occupies as Auditor General of the Republic of Malta – no more, no less.

When Dr Mintoff started to further question witness Dr Mifsud Bonnici objected and the Chairman directed that this was not the forum to discuss reports prepared by the Auditor General on a totally different matter. Dr Mintoff insisted that there was a need to establish if capital funding was available

which appears to be a parallel case. Dr Mifsud Bonnici pointed out that it was irregular to make legal submissions in the presence of witnesses and to ask questions thereon.

This concluded the testimonies.

Dr Mintoff submitted that the Appellant had four grievances. Firstly that the tender document was not written by the Contracting Authority; secondly the tender was not issued by the correct authority, thirdly a Regional Impact Assessment was lacking and lastly there were several unclear requisites and ambiguities in the tender document. Further the Authority failed to stick to stipulated dates of 9th June as detailed in the table. On this point there was no procrastination on the part of the Appellant as it was the Authority that failed with the limit on the time given to appeal putting the said Appellant with its back to the wall. As regard the need for urgency imposed by the Recovery and Resilience Fund one notes that this was approved in September 2021 – in February the Authority was still discussing the use of a PMC so it is obvious where the procrastination was.

Dealing specifically with the grievances, Dr Mintoff claimed that the tender was drafted by others but the Contracting Authority – there is nothing wrong with this practice but the other parties involved needed to have the necessary delegation which was not done. The Local Government Circular (filed as GRC7) stipulates that the Contracting Authority shall prepare the tender together with all necessary documents. The Director of Contracts, in his testimony, confirmed that the source of documents reaching him was not from the Contracting Authority. The Executive Secretary also testified that the approval of the document was sought from the DoC before the draft was approved by the Contracting Authority which admitted that they had reservations on the documents. Further, the Minutes of the appropriate meeting have not yet been approved as no further meetings have been held. The different time frames mentioned do not match.

Appellant's submission is that the tender document should have been drafted by the Contracting Authority, the procurement estimated value has not yet been established and no proof was provided that any market research has been done.

It was affirmed and confirmed by the Contracting Authority that no enquiry was made as to whether a regional Impact Assessment was needed. It is claimed that this matter is not within the parameter of a Government entity but the law states that it applies in all cases where an entity is accountable to a Government Ministry. In a decision in the First Hall of the Civil Court (28.1.2019) it was held that every organ established by law is a Government entity. Reference was also made to parliamentary debates which established the needs of consultation on matters referring to Gozo. Violation, actual or likely, of any particular law is enough to cancel a tender. The tender document has to avoid the principles outlined in page 12 of the Audit Report referred to, to avoid the significant problems that arose through shortcomings at the tender stage. The situation in this case is identical.

Appellant has concerns about the requirement for a fleet of vehicles in the unrealistic short space of time available. The width limitation of certain streets has not been addressed and the turnover must be related to the specific tender subject. There is divergence in the requirements specified in the tender and the whole document should go back to the drawing board.

Dr Mifsud Bonnici stated that the rule on deposits that costs follow the result must be followed since it is important in this case as the motive for the appeal is to cancel the tender not to improve it. No substantive claim has been made with tenuous points raised on capital expenditure and streets width restrictions. The fact is that some points have already been improved. Appellant is hoping for cancellation at all costs.

It is very rare, continued Dr Mifsud Bonnici for a Contracting Authority to write a tender – this is usually done by a team of consultants so that there is uniformity and consistency. This does not mean that it is not an open process. The tender was clearly approved. The PPR do not demand that there is no outsourcing in the writing of a tender and this is allowed. The law states that it is the DoC which issues the tender and in substance it is them which provide the penultimate safeguard. Subsidiary legislation established local councils or regional councils but the PPR is supreme. GRDA involvement does not apply in this case and does not make sense as the local government law pre-empts the setting up of the GRDA Act in 2019. The obligation for an Impact Assessment is not within the competence of the PCRB.

The substance of an appeal is to interpret and make functional Regulation 262 but the gist of the grievances of Appellant is to try to lay down more stringent rules for others noting meanwhile that Appellant is the present incumbent of this service for nearly the whole of Gozo which puts it in pole position. This is restricting the principle of proportionality and competition when the tender is founded on the principle of opening the market to more competition. The Report by the Auditor General has absolutely no relevance in this case.

Dr Mintoff concluded by saying that the fact that the Contracting Authority was not entirely involved makes any discussion superfluous and confirms that they never approved the document.

The Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 30th June 2022.

Having noted the call for remedies filed by Koperattiva Ghawdxija tal-Indafa Pubblika Limitata (hereinafter referred to as the Appellant) on 9th June 2022, refers to the claims made by the same Appellant with regard to the tender of reference CT2139/2022 listed as case No. 1756 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Jonathan Mintoff & Dr Larry Formosa

Appearing for the Contracting Authority:

Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Whereby, the Appellant contends that:

a) **First Grievance – The Tender Documentation was not drafted by the appropriate authority**

It must be pointed out that this tender procedure (pre and post publication) is effectively being managed by the Department for Local Government (DLG). This came to light, when at the clarification meeting (held as per the tender dossier) only representatives of the Department for Local Government were present, without any representative of the same Region Council being present. Moreover, the same clarification meetings were held in the premises of the same Department. Furthermore, contextually with the captioned tender, another five (5) tenders were published - i.e. one for each Region-, which in the most part are indistinguishable, bar a limited number of requirements with respect to the number vehicles required amongst others. In terms of law, and as better outlined above, the Department for Local Government has no locus standi in this procurement exercise and has acted ultra vires and arbitrarily assumed a role which it was not endowed with.

The Department for Local Government can only act within the powers given to it by the law. Any action which is not so authorised to carry out or which is the responsibility of a different public body, is ultra vires - beyond its powers. Ultimately, the involvement of the DLG is ultra vires and beyond the powers of the same is void in law and is deprived of any legal effects, The DLG's actions/ conduct shall be replaced by a lawful one. The Public Procurement Regulations cannot be derogated from at whim.

These actions of the DLG and the inaction of the Regional Council, apart from being ultra vires as above-described, undermines the autonomy of the Gozo Regional Council and goes against the system of checks and balances prescribed by law. Ultimately, it was the legislator's intention for the Regional Council to carry out such role - vide Article 37B(a) of the Local Government Act (Chapter 363 of the laws of Malta).

b) **Second Grievance – The Tender was not issued by the correct Contracting Authority**

It must be stated that whilst Regulation 18 of the Public Procurement Regulations states “*Where a contracting authority or body governed by public law is not listed under any schedule it shall have the same obligations of an authority listed under Schedule 16.*”, one must also refer to Article 37B of the Local Government Act - Chapter 363 of the Laws of Malta which enlists the functions of the Regional Councils. Article 37B reads as follows: “*37B. The functions of Regional Councils shall be the following. (a) the issuance of a call for tenders for the service to local councils within them for waste management and this shall come into effect from the year 2022, and this without prejudice to the functions of the local councils in terms of article 33(1) (b);*”

On the one hand, by application of the Public Procurement Regulations Contracting Authorities listed under Schedule 16 the procurement procedure needs to involve the Director of Contracts

for procurement processes which exceed seven hundred and fifty thousand euro (€750,000) which have to be issued by the Director of Contracts on behalf of the contracting authority. On the other hand, Article 37B of the Local Government Act - Chapter 363 clearly stipulates that the Regional Council shall issue the call for tenders for the waste management. In this situation, the latin(sic) maxim *Lex specialis derogat legi generali* (Special law repeals general laws) applies i.e. on this point the ad hoc Local Government Act setting up the Gozo Regional prevails over the Public Procurement Regulations, Furthermore, Regulation 18 of the PPR is a general article/statement, whereas Article 37B of the Local Government is a specific one. Thus, the Legal Maxim *Generalia Specialibus non derogant* (General provisions do not derogate from special provisions). Thus, in the circumstances it should have been the Regional Council that published the said Call for Tenders and not the Director of Contracts on behalf of the Gozo Regional council. In view of the above, and the fact that the Director of Contracts issued this captioned call for tenders on behalf of the Gozo Regional Council renders the entire tendering publication null and void. In this respect the principle *Quod Nullum Est Nullum Producit Effectum* applies (That which is a null, produces no effect).

c) **Third Grievance: A Regional Impact Assessment - Study was not carried out**

Article 8(1)(f) of Chapter 600, outlines one of the mandatory key functions of the Authority, that is to ensure that a regional impact assessment study, as laid down in Schedule II of the same Act, is carried out, with respect to matters of National Strategy (such as the national waste strategy /Long-Term Waste Management Plan) National Policy, National Action Plan, major new services (such as the Regional bundling of the waste collection) and regulatory and legislative provisions, which will affect Gozo.

Furthermore, Schedule II of the same Act, imposes the obligation on Ministries, departments, authorities, agencies and other form of government entities is to undertake any one of the initiatives referred to in article 8(1)f) of the Act, the responsible Permanent Secretary, Executive Chairman or Chairman of the government department or entity to ensure that such work is complemented by a Regional Impact Assessment Study.

The tender subject to these proceedings is identical to that of the other regions that were contextually published, this without addressing the specific requirements and needs of Gozo, such as the size of vehicles required, logistical and practical issues that are not addressed in the National Waste Policy and in the Tender Document. Thus, it is evident that the Gozo Regional Development Authority was not even consulted and a 'Regional Impact Assessment Study' was not carried out. This renders the entire tendering procedure in breach of the law.

The process of a Regional Impact Assessment Study is not in vain, but a meticulous exercise with the purpose of ensuring that (a) Gozo's significant economic, social and environment characteristics are factored; (b) the impacts of proposed policies and actions are assessed within

the context of the regional development strategy for Gozo; (c) Gozo is incorporated within the implementation targets and actions of such national strategy, policy design and planning.

d) **Fourth Grievance – a number of issues are Unclear and/or Ambiguous in the Tender – Critical for a compliant bidder, effective evaluation and effective contract execution**

In certain respects the tender documentation -as is- is unclear/ unambiguous whether tenderer are required to supply proof of that(sic) they shall abide by the award criteria (i.e. The Eligibility Criteria, Specifications, and Financial Offer), this as will be explained further below. This is being said that for certain issues, the Contracting Authority / Evaluation Board will not be in a position to assess and verify the accuracy of the information contained in the submissions.

I. Selection – Criteria for qualitative selection (Section 5)

The tender dossier lists a number of criterias (sic) under this criterion namely: *“Average Yearly Turnover - The Average Yearly Turnover during the years 2018 - 2020 (being 1 January 2018 - end December 2020) shall be not less than €500,000 excluding VAT per year meaning that in total the turnover for the three (3) year period must be a minimum of €1,500,000 Excluding VAT in total. Bidder to provide the yearly turnovers for the years 2018, 2019, 2020. It is important that the bidders submit the respective annual turnovers for each one of the years indicated above. [...] Evidence that the economic operator has, at its disposal, a minimum credit facility of €300,000 to finance the project for the duration of the contract. The economic operator must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities.”*

On the outset, the Turnover that is being requested by the bidders is unclear i.e. whether such has to be related to the subject matter i.e. kerbside door-to-door waste collection or general turnover. In line with the recommendations of the National Audit Office it is apt that such is clarified that turnover is to be related to the subject matter.

With respect to the financing requested, the applicant submits that this is not sufficiently verified. Section 4.2.8 of the Terms of Reference it states that: *“Contractors will be responsible for provision of any required funding to enable any proposed fleet and/or infrastructure establishment”* while the Tender Document recognises that funding is required, on the other hand it fails to verify such at bidding stage.

II. Technical and Professional Ability

The tender dossier lists out a number of criterias(sic) under this heading namely:

“1. Performance of Services of the Specified Type: Provide a list of services performed of a similar nature, which must consist of collection of waste. The list must include at least two (2) years' experience (locally or abroad) in the household waste collection from 2019 onwards. In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them any information on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed.”

The legal basis of such a requirement stems from Regulation 232 of the PPR. However, the provision as drafted in the tender document does not fully embrace the contents of Regulation 232.

Therefore, it is critical that this clause is clarified, in the sense that the Economic Operators have to provide the details as requested in Regulation quoted above.

III. Specifications

This section forming part of the Selection and Award Criteria in the tender dossier reads as follows:

“(i) Tenderer's Technical Offer in response to specifications to be submitted online through the prescribed Tender Response Format and by using the Tender Preparation Tool Provided (Note 3)

Tenderer's Technical Offer shall Constitute of the Following (Note 3) a) Technical Offer. b) Minimum number required of RCVs and Waste collectors (runners) and Actual number to be used by the Contractor. c) Calculation of Distances Travelled to Execute the Service.”

The Technical Offer Questionnaire leaves much to be desired, being only a self-declaration, namely, because the Evaluation Board will be *“... relying on the information and proof provided by the tenderers, being able to verify effectively whether the tenders submitted by those tenderers meet the award criteria [...] it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure.”*

As a general remark, whilst the said technical self declaration is being requested, the Evaluation Board will not be in a position to verify and evaluate the same. The reason being that in the tendering process the relative documentation relating to the same is not being requested. This infringes the basic principles of public procurement namely that of equal treatment.

IV. Reliance / Subcontracting

That in line with the PPR and the Directive it is possible that a bidder relies on the capacity of a third party. However, with the tender dossier as it is the Evaluation Board will not be in a position to effectively evaluate whether a bidder is going to rely on the capacity of third parties and to ensure that a bidder has correctly declared such. Furthermore, in situations where a bidder will rely on the capacity of a third party and/ or subcontract part of a service to a third party, such third party shall also be evaluated as outlined in the PPR.

V. Financial Offer

A) Glass Collection

As per page 22 of the Tender Dossier, the following household waste streams shall be part of this contract:

- a. Mixed waste (black bag)
- b. Organic waste (White Bag)
- c. Recyclable waste (with only plastic, metal, and paper)*
- d. Glass (in a reusable container)

The collections for each of the above shall take place as per the Schedules contained in the Tender Document (Page 26). However, the financial bid fails to take into account the fees in connection with the collection of Glass. Thus, an economic operator is not being requested to provide the fee for such collection.

B) Minimum hourly rates

The financial bid and the tender dossier outlines(sic) that this tender is subject to precarious work conditions as per Contract Circular 21/2021 and the bidder is to ensure that the price quoted factors such conditions. Whilst such is commendable, the Applicant points out that; i) with the current financial bid the Contracting Authority will be unable to determine that such are observed; ii) the fee requested is per collection only and no hourly rates are requested; and iii) given that the contract term exceeds the yearly rates outlined in the Contract Circular 21/2021, it will not be possible for the Contracting Authority to determine the annual increase due to the contractor with respect to the minimum hourly rates. Ultimately, in line with the same Circular, Contracting Authorities will have to issue, an Addendum to the Contract reflecting the new relevant 'Total Rate Payable to Contractor' rates, without such rates being singled out from the remainder part of the fee due to the contractor.

C) Rates for Year 6 onwards:

The Applicant (sic) to Article 18.2 of the Special Conditions. In the event of any extension of the contract the fee/ price for each subsequent year from the 6th year onwards will be the price fixed on the 5th year. Furthermore, the Financial bid form for this tender only requests the rates for the first 5 years. This will result in a situation whereby bidders will allocate most of their fees in the 5th year, so in the event of an extension they will get better rates, and at face value the said bids will seem cheaper, whilst on closer inspection of such bids over a 10year period will be more expensive. However, from the tender documentation it is unclear as to whether the evaluation of such offers will only take into account the rates for the first 5 years i.e. of the financial bid form.

VI. General issues in the Terms of Reference:

A) Waste Collection Timings:

The Applicant refers to section 4.2.2 of The Terms of reference i.e. those of the Waste Collection Timings. The manner in which the tender is drafted is unclear as to whether the timings will remain

as is or be subject to change post award of the captioned tender. Ultimately, the Technical specifications should mainly be oriented towards ensuring a reasonable degree of technical precision.

B) Service Vehicles Specifications:

The Applicant refers to the Terms of reference with respect to the service vehicles leaves much to be desired with scant verification. As per the tender documentation no technical data sheets / literature on the vehicles proposed are provided. Additionally, there will be no verification by the Contracting Authority on such pertinent information at the evaluation stage. Furthermore, more clarity is necessitated on such a point.

C) Depot

The Applicant refers to Section 4.2.8 point no 3 of the Terms of Reference, which reads as follows: *“Contractors will be required to provide suitable depot facilities for all vehicles associated with service delivery, to allow for year-round storage, inspection, maintenance, and cleaning.”* Moreover, such requirement also results from the law i.e. Subsidiary Legislation 65.08, regulation no. 12., which reads as follows; *“No person shall stop, whether temporarily or otherwise, and leave unattended, or shall park any motor tractor and/ or trailer or any heavy commercial vehicle or other commercial vehicle loaded with a container or leave a container in any road, yard, area or open place whether enclosed or otherwise other than in an authorised parking place or at an authorised container storage depot [...]”* The Applicant submits that the Tender as written does not address such points, and does not effectively verify whether a bidder either has such facilities in place and/ or has the resources available to have a depot at execution stage.

D) Uniform

Section 6.1.4 of the Terms of Reference outlines the mandatory requirements with respect to the proposed uniforms of a bidder. However, the bidders are not required to provide a specimen of the same uniform. Thus, the Evaluation Board will not be in a position to verify the same.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 14th June 2022 and its verbal submission during the virtual hearing held on 30th June 2022, in that:

a) **First Grievance –**

The PPR does not prohibit that contracting authorities, or even the central government bodies such as the Department of Contracts, to require the assistance of third parties, including private consultants, to draft procurement documents, but the ultimate responsibility of the procurement documents lies with the contracting authority issuing that procurement procedure.

The Applicant is further alleging that this is in breach of Article 37B(a) of the Local Government Act (Chapter 363 of the Laws of Malta) which states that the function of regional councils is: *“the issuance of a call for tenders for the service to local councils within them for waste management and this shall come into effect from the year 2022, and this without prejudice to the functions of the local councils in terms of article 33(1)(b). The Local Government Act empowers the Gozo Regional Council to issue a tender process, and this Tender was indeed issued by the latter qua Contracting Authority.”*

The Applicant argues that the Department for Local Government has acted *ultra vires* and further that the Contracting Authority's passive role has undermined its autonomy and the checks and balances prescribed by law. The Contracting Authority submits that this argument is inadmissible within the context of this present Application. This Application is an application for a pre-contractual remedy in terms of Regulation 262 of the PPR which allows prospective candidates to request one of five remedies, namely: a) setting aside of impossible-to-perform or unlawful clauses; b) determination of issues relating to offer submissions; c) removal of discriminatory specifications; d) correction of errors or removal of ambiguities; or e) cancellation due to any violation of the law.

Apart from being completely unfounded, the allegation that the tender documentation was not drafted by the appropriate authority leads to nowhere. It does not admit of nor fit within one of the foregoing five categories for the Honourable Board to provide a pre-contractual remedy.

b) **Second Grievance**

Article 37 of Directive 2014/24, which is transposed by the PPR, allows Member States to provide that contracting authorities may acquire services from a central purchasing body offering central purchasing activities. In line with Directive 2014/24, Regulation 21 of the PPR states that “contracting authorities listed in Schedule 4 are authorised to act as a central purchasing body.” Schedule 4 identifies the Department of Contracts as one of the only two central purchasing bodies.

In accordance with Regulation 9(1) (b) of the PPR, the procurement process of public contracts which exceeds the estimated value of EUR 139,000 is issued and administered by the Director of Contracts who heads the Department of Contracts (the 'Director'). The estimated value of this Tender is EUR 6,245,179. Clearly, the rules determining the instances in which the public procurement processes of contracting authorities should be run by the latter or by the Director on their behalf are established in the PPR. The fact that the Local Government Act (Chapter 363 of the Laws of Malta) states that regional councils have the authority to issue waste management tenders is neither here nor there. It is the Local Government Act that has to be read within the context of the PPR and not the other way around(!) The special law here is the latter and not the former, and this ground represents the Applicant's attempt to upset the appletart merely for its own sake.

c) **Third Grievance**

This allegation is unfounded in fact and in law. It is the Gozo Regional Development Authority itself which is under an obligation to ensure that a regional impact assessment is carried out in specific scenarios, that is, when “*government ministries intend presenting to Cabinet (i) a national strategy (ii) a national policy (iii) a national action plan (iv) major new projects or services and (v) regulatory and legislative provisions which affects or affect, as the case may be, Gozo [.....].*” None of the foregoing scenarios are applicable to this Tender.

The GRDA Act provides a specific remedy for the specific scenarios abovementioned: if a government entity fails to carry out the assessment if and when required by law, the Gozo Regional Development Authority is entitled “*after consultation with the Minister, to initiate the relative procedures itself for the carrying out of the regional impact assessment [...].*”

In light of the foregoing, a number of inevitable conclusions arise: a) the filing of a precontractual remedy is not the appropriate or specific remedy provided for at law with respect to the alleged failure to carry out a regional impact assessment; and b) the Applicant does not have the locus standi required at law to file an objection on this basis. Neither the right nor the remedy envisaged in terms of the GRDA Act belongs to the Applicant. It is the Gozo Regional Development Authority itself which may avail itself of the remedy provided under the GRDA Act, and the Applicant cannot invoke or seek the application of a remedy which belongs to a third party to these proceedings.

In addition, the GRDA Act does not lay down an obligation at the feet of local or regional councils to carry out regional impact assessments. Article 8 of this Act refers to government ministries and government entities. There is no question that the Gozo Regional Council is not a government ministry. Therefore, the question which remains to be answered is whether the Contracting Authority can be classified as a 'government entity'.

According to Article 3 of the Public Administration Act (Chapter 595 of the Laws of Malta), a 'government entity' is defined as: “*an organisation, not being a government department, specialised unit, a government agency or a commercial partnership, in which Government has a controlling interest, whether or not such organisation is established by law.*”

The very raison d'être of the Gozo Regional Council is to function as a decentralised organisation having a distinct legal personality and which is autonomous from national government. These two tiers of government are enshrined in the highest law of the land. According to Article 115A of the Constitution (Chapter 0 of the Laws of Malta): “*The State shall adopt a system of local government Local Councils. whereby the territory of Malta shall be divided into such number of localities as may by law be from time to time determined, each locality to be administered by a Local Council elected by the residents of the locality and established and operating in terms of such law as may from time to time be in force.*”

In view of the foregoing, the Contracting Authority humbly submits that it was not obliged to carry out a regional impact assessment.

d) **Fourth Grievance**

I. Selection – Criteria for qualitative selection (Section 5) – Economic and Financial Standing Requirements

The Contracting Authority submits that this selection criterion clearly and unambiguously refers to turnover in general and without reference to a specific subject-matter. This is fully compatible with Regulations 218 and 219 of the PPR on financial and economic standing which provide that: a) *"For that purpose, contracting authorities may require, in particular, that economic operators have a certain minimum yearly turnover, including a certain minimum turnover in the area covered by the contract."* The operative word here is "including" which permits a margin of discretion to a contracting authority as to whether it wishes to limit the yearly turnover to "the area covered by the contract" or more generally so. b) This requirement shall not, except in duly justified cases, exceed 2 times the estimated contract value. This is certainly not the case here. The Applicant's suggestion that the turnover is related to the subject-matter of the Tender is one which artificially narrows competition and which the Contracting Authority has, in its discretion, decided to avoid. The Contracting Authority has, on this specific point, exercised its discretion reasonably and lawfully.

The Applicant is further aggrieved by the fact that Clause 4.2.8 of the terms of Reference does not enable the evaluation committee to "sufficiently verify" that *"the contractor will be responsible for provision of any required funding to enable any proposed fleet and/ or infrastructure establishment."* On this point, and others made in the Application, it does appear that the Applicant is confusing "SELECTION & ELIGIBILITY CRITERIA" which need to be satisfied by bidders at evaluation stage, such as the Economic & Financial Standing and Technical & Professional Standing, with "PERFORMANCE CONDITIONS" which will bind the successful bidder (hence the use of the word "contractor") in case of an award. These are also governed by SEPARATE provisions in the PPR. The former are governed by Regulation 217 et seq., while the latter are governed by Regulation 245 of the PPR. The Applicant's contention that the evaluation committee needs to "sufficiently verify" this funding obligation is unfounded.

In any case, the Contracting Authority has provided for a specific selection criterion which require bidders, at tender submission, to produce evidence of funding. This is the following: *"Other economic or financial requirements - Evidence that the economic operator has, at its disposal, a minimum credit facility of €300,000 to finance the project for the duration of the contract. The economic operator must submit a statement by a recognised bank or any licensed credit institution certifying such credit facilities. In case of a consortium or joint venture, these criteria may be met by the respective members in aggregate."*

II. Technical and Professional Ability.

The Applicant is aggrieved by the following tender specification:

“1. Performance of Services of the Specified Type: Provide a list of services performed of a similar nature, which must consist of collection of waste. The list must include at least two (2) years' experience (locally or abroad) in the household waste collection from 2019 onwards. In so listing the end clients, the tenderer is giving his consent to the Evaluation Committee, so that the latter may, if it deems necessary, contact the relevant clients, with a view to obtain from them any information on the works provided to them, by the tenderer. The Evaluation Committee reserves the right to request additional documentation in respect of the deliveries listed.”

The Applicant laments by the fact that the list of main services to be provided by bidders does not contain the information indicated in Regulation 232(a) (ii) of the PPR.

First, the Applicant, perhaps by way of oversight, gives the impression that Regulation 232 (a)(ii) of the PPR imposes an exhaustive description of how such a selection criterion is to be drafted. This is not correct. Regulation 232 (a)(ii) of the PPR provides that *“Evidence of the economic operators' technical abilities may be provided by one or more of the following means [...]”*

Secondly, and in any case, the bidders ARE required to provide full details on the services performed by including the "sums, dates and recipients" and this is required by the European Single Procurement Document.

Thirdly, the Contracting Authority was again guided by the general principles of public procurement law, in particular, proportionality and promotion of genuine competition, in the design of this selection criterion. The selection criterion is drafted clearly and unambiguously in such a way that competition on this tender is not artificially narrowed and such that bidders are not disproportionately and unduly excluded/restricted.

The Applicant is further aggrieved that this selection criterion refers to “services performance of a similar nature which must consist of collection of waste” and argues that it should refer expressly to “kerbside door-to-door household waste collection”. The Applicant's suggestion is one which, yet again, artificially narrows competition and which the Contracting Authority has, in its discretion, decided to avoid. The Contracting Authority has, on this specific point, exercised its discretion reasonably and lawfully.

III. Specifications.

The Applicant laments of the fact that the Technical Offer Questionnaire bases the evaluation of bidders based on self-declarations and further oddly claims that this breaches the principle of equal treatment. The Applicant's grievance under this indent is poorly motivated. There is nothing contrary to the PPR or against the general principles of public procurement in requesting self-declarations on matters of technical compliance, and in fact, as this Honourable Board is very much aware, it is common practice to do so. Naturally, the successful bidder's acceptance of the Terms

of Reference by the submission of the bid and by the submission of the Technical Offer will bind that successful bidder qua contractor to abide by the same after award and during the performance of the contract.

In the case that the contractor is in default of the Special Conditions, Terms of Reference and its Technical Offer, then the Contracting Authority has an array of tools at its disposal, including, the imposition of pre-liquidated damages, imposition of penalties, the invocation of an event of default and also the termination of the contract and the compensation of damages. These tools are further secured by the performance guarantee provided by the contractor. There is absolutely nothing illegal or contrary to the general principle of equal treatment in the Contracting Authority's decision to design the tender specifications in this fashion and the Applicant's suggestion to request documentation to "verify" each and every self-declaration is disproportionate and burdensome on bidders.

IV. Reliance/ Subcontracting.

The Applicant's grievance under this indent is simply incoherent and perhaps based on a misreading of the Tender and lack of familiarity with the system of public procurement in Malta. The principle is that bidders may rely on the capacity of third parties through a sub-contracting arrangement. The PPR, the general Rules Governing Tenders, the ESPD, and most times the Tender, provide how this can be done.

The General Rules Governing Tenders V4.4, which applies to the Tender, clearly provides that: *"2.5 An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational and professional qualifications, or to relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect."*

The Tender is also very specific that a bidder may rely on third-parties through sub- contracting with respect to the selection criteria: *"(b) Economic and Financial Standing (Note 2) [...] If the economic operator relies on the capacity of a sub-contractor to satisfy the criteria on Economic and Financial Standing, then the Contracting Authority requires that the sub-contractor is jointly and severally liable with the tenderer for the execution of the contract in terms of Regulation 235(3) of the Public Procurement Regulations. A written declaration in favour of the Contracting Authority, confirming that the sub-contractor will, in such a case only, be jointly and severally with the tenderer for the execution of this contract, is to be executed by the sub-contractor and addressed to the Contracting Authority is to be uploaded through the tender response format by the tenderer. (Note 2)*

Technical and Professional Ability (Note 2) [...] 2. Subcontracting Proportion - Provide data concerning subcontractors and the percentage of works to be subcontracted. This information shall be included in the online ESPD form in Part /V: Selection criteria - Technical and professional ability. Any subcontractor proposed and disclosed shall be evaluated in line with the Exclusion and Blacklisting Criteria as per these Instructions to Tenderers. Furthermore, if the sub-contractor is relied upon by the Contractor to meet the standards established in the selection criteria, apart from submitting the relevant commitments in writing, such reliance will be evaluated to verify its correctness and whether in effect these criteria are satisfied. It is being understood that if the information being requested regarding sub-contracting is left empty, it will be assumed that no sub-contracting will take place (0% subcontracting).”

V. Financial Offer.

Under this indent, the Applicant raises 3 grievances.

The first grievance relating to Glass Collection is well-founded, and in fact, the Contracting Authority will, by way of a clarification note, address this.

The Applicant's second grievance relates to the Minimum Hourly Rates. The Applicant argues that the fact that the Contracting Authority is asking for a fee per waste collection rather than an hourly rate will not enable the Contracting Authority to determine the annual increase due to the contractor with respect o (sic) minimum hourly rates. This grievance appears to be misguided. The duty to pay employees, at the very least, the minimum salary according to law is one which vests SOLELY in the contractor. This is the contractors' responsibility and so is the duty to pay the minimum salary in accordance with any annual increases at law. This is clear and unambiguous from the Tender and it is a deliberate decision of the Contracting Authority as part of its financial modelling of the contract. It is for the bidder to factor, as part of its financial offer, any prospective statutory increases in wages. The Contracting Authority has, on the other hand, decided to make a provision for potential compensation to the contractor in case of increase in fuel prices as per Section 9 (Tendered Price, Fuel Costs and Indexation) of the Terms of Reference. On a concluding note, all bids submitted by bidders will be monitored by the evaluation committee for abnormally low tenders as required by law.

The Applicant's third grievance relates to the fact that the price to be used by the parties in case of an extension of the duration of the contract shall be fixed on the basis of the price quoted by the contractor in its financial bid form for the 5th year. The Applicant's grievance is unfounded. The Tender is very clear that bidders will be evaluated, on a like with like basis and transparently, on the basis of the GRAND TOTAL of the Financial Bid Form, including, the price quoted by bidders for the 5th year. In fact, it reads as follows: “(D) Financial Offer - A financial offer calculated on the basis of Delivered Duty Paid (DDP) (Grand Total) for the services tendered as per Tender Response Format. (Note 3)”

On this basis, the Contracting Authority finds that the Tender is sufficiently clear and unambiguous and no clarification is necessary.

VI. General Issues in the Terms of Reference.

The Applicant, under this indent, laments that the Tender "lack critical details".

Firstly, the Applicant argues that Section 4.2.2 of the Terms of Reference is unclear as to whether the time schedule for collection provided in Annex 1 of the Tender will remain as-is or be subject to change post award. The Contracting Authority can clarify that the default position is that the time schedule for waste collection is that provided in Annex 1 of the Tender. This time schedule is to be used by bidders in the compilation of the financial bid form and for evaluation purposes. The contractor and the Regional Council may, by mutual consent, agree to change the time of a waste collection, that is, whether it is in the morning, afternoon or evening--the waste collection in a given day will still be required. The Contracting Authority will, by way of a clarification note, address this.

Secondly, the Applicant argues that the tender specifications on the matters of: (i) RCV's standard, whether it is Euro V or Euro VI; (ii) waste depot; and (iii) uniforms; does not enable the evaluation committee to sufficiently verify on the bidders' bids, On this point, the Contracting Authority has deliberated opted for the imposition of a "performance condition" on the eventual successful bidder qua contractor with respect to the resources it will deploy to perform the contract and this in order to promote genuine competition and to act proportionately.

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 consider Appellant's grievances as follows:

a) ***First Grievance – The Tender Documentation was not drafted by the appropriate authority***

This Board will from the outset make its opinion clear, in that, the Public Procurement Regulations ("PPR") nowhere prohibit contracting authorities the possibility to require, seek and engage third parties and / or consultants to assist in the drafting of the tender dossier. It is also understood that it is then the contracting authority which assumes the final responsibility for such tender document issued. It is, after all, quite a normal practice to outsource the drafting of the tender dossier. This has never been an issue!

In this specific case, with a number of similar tenders issued, one for each region, it was even more important to have one entity / consultant involved in the management of drafting the tender dossiers, in order to achieve a level of uniformity and consistency across the board.

In fact, paragraph 3.1 of Section 1 of the Tender dossier states *“This regionalisation is intended to achieve harmonisation of waste collection services across Malta and Gozo with respect to: (i) waste streams collected; (ii) frequency of collections, (iii) service levels; (iv) performance management; and (v) customer care.”*

How is the Appellant expecting this ‘harmonisation’ to be achieved if each region went on to draft their respective tender document on its own accord without any sort of communication between regions?

This Board strongly advocates that proper efficient management techniques will aid in the better utilization of public funds, hence resulting in better value for money. Such techniques will also lead to achieving wider competition whilst also aiding in having a more transparent procurement process. These are all important for good governance.

Hence, this Board does not uphold the Appellant’s first grievance.

b) **Second Grievance – The Tender was not issued by the correct Contracting Authority**

This Board opines that by having the tender document issued through the Department of Contracts, there is an ulterior safety check / safeguard in place. Obviously, this is done if the thresholds as per regulation 9(1)(b) of the PPR are exceeded. Since the Estimate Procurement Value of this tendering procedure by far exceeds such threshold, it is this Board’s opinion that good procedure was observed when such a tender was issued through the Department of Contracts.

It is also a well-established principle in the law that regional and local councils have to manage their procurement needs in accordance with the Public Procurement Regulations. Therefore, it is this Board’s opinion that the ‘overriding’ law in this case is the Public Procurement Regulations S.L.601.03 and not the Local Government Act (Chapter 363 of the Laws of Malta)

Hence, this Board does not uphold the Appellant’s second grievance.

c) **Third Grievance: A Regional Impact Assessment - Study was not carried out**

Article 8(1)(f) of the Gozo Regional Development Authority Act (Chapter 600 of the Laws of Malta) states *“Subject to the provisions of articles 4 to 7, both inclusive, the functions of the Authority **shall be to ensure** that a regional impact assessment, as established in Schedule II, is carried out when government ministries intend presenting to Cabinet*” (bold & underline emphasis added)

This Board opines that an application under regulation 262 of the PPR by the Appellant and in front of this Board is certainly not the appropriate tool provided for in the law to argue a case of alleged failure to perform a regional impact assessment.

Therefore, this Board, without going into further merits of this specific grievance, does not uphold the Appellant’s third grievance.

d) **Fourth Grievance – a number of issues are Unclear and/or Ambiguous in the Tender – Critical for a compliant bidder, effective evaluation and effective contract execution**

I. Selection – Criteria for qualitative selection (Section 5) – Economic and Financial Standing Requirements

This Board cannot but fully agree with the arguments as brought forward by the Contracting Authority. With reference to the ‘Turnover – Average Turnover’ issue, this Board notes that regulation 218 of the PPR uses the word “may” and not “shall” and is therefore allowing a certain element of judgment and discretion in favour of Contracting Authorities. This judgement and discretion is always to be applied in the best interests of the main principles governing public procurement.

With regards to the ‘credit facility / financing requested’ issue, this Board notes that ‘Selection & Eligibility Criteria’ are to be treated and considered differently to ‘Performance Conditions’. This Board, after thorough analysis, finds nothing ambiguous and / or unclear in such criteria and therefore deems the arguments of the appellant to be irrelevant.

In conclusion this Board notes that since i) this section of tender document is not contravening any regulations of the PPR as drafted, and ii) the amendments as requested by the Appellant are more stringent on competition, it will not uphold the grievance of the Appellant. Upholding such would mean going against the promotion of genuine competition.

II. Technical and Professional Ability.

Again, this Board fully concurs with the arguments of the Contracting Authority. Regulation 232 uses the word “may” when it states “Evidence of the economic operators’ technical abilities may be provided by one or more of the following means.....” i.e. not an exhaustive list. Arguments by the Appellant to restrict genuine competition are and will not be accepted by this Board.

This Board does not uphold Appellant’s grievance.

III. Specifications.

This Board notes that Technical Offer Questionnaires are very much common practice and widely used in tender documents. They are certainly not contravening any regulations of the PPR! Safeguards are in place in the tender document should the eventual recommended bidder / economic operator awarded the tender, defaults.

This Board does not uphold Appellant’s grievance.

IV. Reliance/ Subcontracting.

The Board notes that the Appellant did not provide a clear enough reason for this specific grievance. By just stating that “... The Evaluation Board will not be in a position to effectively evaluate whether a bidder is going to rely on the capacity of third parties” and not providing valid reason to back the argument, this Board cannot but reject such grievance. This Board opines that the tender dossier, as drafted, is very clear on how economic operators should act in such circumstances.

V. Financial Offer.

- i) Glass collection – This Board notes that the Contracting Authority is acceding to the Appellant’s arguments and approves that such should be tackled by way of clarification.
- ii) Minimum hourly rates – The Contracting Authority is free to choose and implement the ‘financial model’ which it deems most appropriate to each circumstance. Nothing as is being proposed in this tender, goes against the PPR. It is the economic operator’s responsibility to adopt salary / wages structures which are in compliance with ‘Contract Circulars’ and tender provisions. Safeguards are in place to be adopted by the Evaluation Committee should the need arise. This Board does not uphold Appellant’s grievance.
- iii) Rates for Year 6 onwards – The Tender document is very clear when it states that economic operators will be evaluated on the basis of ‘Grand Total’. This term is found to be unambiguous. This Board does not uphold Appellant’s grievance.

VI. General Issues in the Terms of Reference.

- i) Waste Collection Timings – This Board notes that the Contracting Authority is acceding to the Appellant’s arguments and approves that such should be tackled by way of clarification.
- ii) Service Vehicles Specifications / Depot / Uniforms - the stance taken by the Contracting Authority to proceed with the ‘obligation’ of a performance condition on the economic operator eventually awarded the tender, is totally acceptable in the views of this Board. This Board does not uphold Appellant’s grievances.

The Board,

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

- a) Does not uphold all of appellant’s grievances except for:
 - i. 4th grievance – V – Financial Offer – Glass collection;
 - ii. 4th grievance – VI – General Issues in the Terms of Reference – Waste Collection Timings
- b) To order the contracting authority to clarify its position on points i. and ii. above;
- c) To amend the ‘Closing Date of the Call for Tenders’ to 2nd August 2022;
- d) after taking all due consideration of the circumstances and outcome of this Call for Remedies, directs that the deposit not be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Mr Lawrence Ancilleri
Member

Ms Stephanie Scicluna Laiviera
Member