

PUBLIC CONTRACTS REVIEW BOARD

Case 2112 – CFT009-3941/24 (CPSU0695/24) – Interim Contract for the Supply and Installation of Vinyl

26th May 2025

The Board,

Having noted the letter of objection filed by Dr Natalia Camilleri on behalf of Iuris acting for and on behalf of Mr Sean Schembri (exercising trade under the name SS United Projects), (hereinafter referred to as the appellant) filed on the 11th February 2025;

Having also noted the letter of reply filed by Dr Alexia Farrugia Zrinzo and Dr Leon Camilleri on behalf of 360 Legal acting for the Central Procurement and Supplies Unit (hereinafter referred to as the Contracting Authority) filed on the 17th February 2025;

Having heard and evaluated the testimony of the witness Mr. Joseph Gherxi (Member of the Tender Evaluation Committee) as summoned by Dr Peter Fenech acting for the appellant during the hearing on 20th May 2025;

Having heard and evaluated the testimony of the witness Mr Mark Schembri as summoned by Dr Peter Fenech acting for the appellant during the hearing on 20th May 2025;

Having heard and evaluated the testimony of the witness Mr Joseph Muscat (Member of the Tender Evaluation Committee) as summoned by Dr Leon Camilleri acting for the Contracting Authority during the hearing on 20th May 2025;

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 20th May 2025 hereunder-reproduced;

Minutes

Case 2112: Cft009-3941/24 (CPSU0695/24) – Interim Contract for the Supply and Installation of Vinyl.

The tender was issued on the 13th of September 2024, and the closing date was the 4th of October 2024.

The estimated value of the tender, excluding VAT, was € 100,000.00.

On 11th February 2025, SS United Project lodged an appeal against Central Procurement and Supplies Unit (CPSU) in accordance with Regulation 270 of the Public Procurement Regulations (PPR). The appellant objected for not being awarded the tender.

A deposit of €400.00 was paid.

There were two bids.

On the 20th of May 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Ing. Damien Gatt and Mr. Lawrence Ancilleri as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – SS United Projects. (MT3074-3318)

Dr Peter Fenech – Legal Representative

Dr Natalia Camilleri – Legal Representative

Mr. Mark Schembri -- Company representative

Contracting Authority – CPSU.

Dr Leon Camilleri – Legal Representative

Dr Alexia J Farrugia Zrinzo – Legal Representative

Ms. Marika Cutajar – Chairperson of the Evaluation Committee

Mr. Joseph Muscat – Evaluator

Mr. Patrick Borg Cardona – Evaluator

Mr. Joseph Gherxi – Evaluator

Ms. Branica Amato Gauci – Head of Procurement

Recommended Bidder – De Valier Co Ltd. (C16713)

Perit Maria Mckenna – Company Representative

Opening Statements

Mr. Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties and inquired with Dr Leon Camilleri, about the best way to proceed given the presence of several preliminary pleas. Dr Camilleri requested a decision from the board, regarding their first preliminary exception.

Dr Peter Fenech referred to a letter dated 17th February 2025, which neither the Board nor the Contracting Authority had a copy. A copy was distributed to all parties. Dr Fenech confirmed that both the deposit and the email (appeal) letter were sent on time, but the email resulted in an error and was resent on the 8th of February 2025.

Dr Leon Camilleri clarified that the email was sent to PCRB on February 8, 2025, after the deadline to submit an appeal expired on February 7, 2025. Dr Fenech highlighted that the payment was successfully processed on February 7, 2025, and the failed message delivery notification was discovered on the afternoon of February 8, 2025, prompting swift action to resend the email.

Submissions on the Preliminary Pleas

Submissions by the Contracting Authority.

Dr Leon Camilleri, legal representative for the Contracting Authority, commenced with the first preliminary plea, stating the appeal was submitted late and should be dismissed. The email was sent to the wrong address, so it did not reach PCRb on time. Despite good intentions, the delay renders the appeal unacceptable.

Regarding the second preliminary plea, the appeal was submitted against the Department of Contracts, when it should have been addressed to the CPSU. The Department of Contracts is not the Contracting Authority in this tender.

Regarding the third preliminary plea, the requirements of clause 270 of the PPR were not observed, as this clause states that one should indicate the reasons for their complaints. The two sentences written in the appeal were not clearly indicating the reasons. This is another reason why the appeal should not be accepted.

Submissions by the Appellant

Dr Peter Fenech, representing SS United Projects, argued that this Board is quasi-judicial and that the final scope is for procedures to be saved. He explained that the appeal and the deposit were sent by the due date. It was potentially an IT error, that we knew about on the next day. If the email delivery failure notice had been received on the same day, 7th of February 2025, the email would have been sent again. Since the deposit was received on the 7th of February 2025, the appeal should be accepted.

Regarding the second point, CPSU is under the Director of Contracts. In practice, CPSU are stating that SS United Projects should not have sent the appeal to the Department of Contracts. Since they presented an answer, and this was not the only exception, they gave exceptions on the merit, so this was accepted.

Regarding the third plea, where they stated that not enough information was given, this was subjective, the information was clear enough.

Dr Fenech emphasised that the three exceptions should not be accepted.

Reply by the Contracting Authority

Dr Camilleri sought to confirm the time the email was sent, which was at 11.32 AM. If sent to a non-existent address, a delivery failure notice should have appeared in the system. This issue was an SS United Projects mistake, not a PCRb fault. According to Article 271 of the PPR, the tender must be filed and registered within 10 days.

He referenced the Court of Appeals case number 476/17 dated 28th June 2019, and case number 71/2011 dated 14th November 2013 at the Court of Appeals, where it was determined that 'fuori termine' means fuori termine'.

Chairman Mr. Swain, intervened, by saying that the arguments of both parties were clear for the Board, and after hearing the whole case, the Board will decide on the three preliminary pleas.

Witness testimonies

Mr. Joseph Gherxi (ID 260569M)– Summoned by Dr Peter Fenech.

Mr. Joseph Gherxi identified himself as an evaluator for the tender “*Interim Contract for the Supply and Installation of Vinyl*”. He stated that in their specifications, they requested various types of vinyl for bathrooms walls and floors and corridor floors.

Dr Fenech asked Mr. Gherxi to identify the types, colours and quantities of vinyl requested, and on which page of the tender they were mentioned.

Mr. Gherxi answered that the specifications were in the general instructions. When asked why they needed a particular product, he answered that they needed the same existing tile used in the hospital with the same thickness, fire rating, material, and colour, however since they could not use the word “*identical*”, they chose the word “*similar*”.

The Chairman asked from which page of the tender document Mr. Gherxi was quoting. He replied that the information was from page 24 to 33.

Mr. Gherxi continued that they needed something very similar in colour, with the same specifications, and from the cheapest bidder.

Dr Fenech asked what the two bidders submitted as decorative materials. Mr. Gherxi answered that SS United Projects offered identical vinyl. Dr Fenech asked what the difference was between someone who offered identical vinyl versus someone who offered similar vinyl.

Mr. Gherxi explained that when a patch is needed, it would be much better to have an identical tile. Whereas, if a bigger area is needed and the vinyl does not match exactly, they would need to make a feature wall. The recommended bidder offered similar vinyl.

Regarding the samples, Dr Fenech inquired why only seven samples were asked for from a list of 36. Mr. Gherxi answered that the committee used their discretion as allowed by the tender document. SS United Projects offered the same existing borders, while De Valier offered alternative borders that match. Borders samples were not mentioned in the specifications but De Valier co Ltd provided samples.

Cross-Examination by Dr Leon Camilleri

Mr. Gherxi identified himself as an Operations Manager with the engineering department and is responsible for the maintenance of civil works around the hospital.

Dr Leon Camilleri emphasised that, according to the specifications, the tender requested coded colour vinyl, or something similar, and that anyone who satisfies this criterion and was the cheapest, had to be recommended.

Mr Mark Schembri (ID 424962M) – Summoned by Dr Peter Fenech.

Mr. Schembri stated that he was the father of the owner of SS United Projects. He exhibited several samples of vinyl used for the flooring in Mater Dei (MD), as their company had installed all the vinyl in the hospital previously. Out of the 36 samples listed in the specification list, only 6 samples were asked for. His company could furnish all the vinyl needed as they had it in stock.

Cross examination by Dr Leon Camilleri

Dr Camilleri sought to know the relation of the witness with Mr Shaun Schembri.

The witness, Mr. Mark Schembri, is the father of Mr. Shaun Schembri, who operates another company. He has been in this business for 41 years and eventually Shaun will take over. When asked whether he had any access to the bid of the recommended bidder, De Valier, Mr. Schembri answered in the negative.

Mr Joseph Muscat (ID 154470M) – Summoned by Dr Leon Camilleri

Mr. Joseph Muscat identified himself as an Operation Manager at MD and was acting as an evaluator. The required material requested in the tender is Tarkett, which is discontinued. In fact SS United Projects had some in stock. Knowing this, we asked for something similar. The reason for asking for 7 samples was that they requested the material that is mostly used.

Dr Camilleri asked what the base for the evaluation was. Both bidders offered the correct specifications. The argument was about the colour. De Valier was chosen because they provided the right specifications and offered Tarkett in a similar colour. Mr. Muscat exhibited all the samples given by both bidders. The ultimate reason for choosing De Valier was because the specifications were correct, and the bid was cheaper.

Cross-Examination by Dr Fenech.

Dr Fenech emphasised that when patching a wall, optimal results would not be achieved.

Mr. Muscat explained that a patch could be done in a bathroom but not in a shower as there could be leakages. However, he admitted that at times, instead of a patch, a whole feature wall would be needed. Regarding designs, the vinyl from De Valier is similar but not identical. There are certain places in the hospital where the vinyl used from De Valier was not available by SS United Projects, so if a patch is needed in the bathrooms completed by De Valier, they would need to change the whole bathroom, even if the number of bathrooms is minimum. However, SS United Projects has all the stock of the previously used vinyl.

Dr Fenech emphasised that nobody could provide the old stock like SS United Projects, while everybody can obtain what De Valier was offering.

Mr. Muscat emphasised that they requested specific samples for vinyl mostly needed.

Final Submissions

Final Submission by Dr Peter Fenech.

Dr Fenech started his final submissions by stating that the samples asked for were few because they knew that there weren't many bidders who could provide all the samples. Patch work would cost much less than changing a whole room. For the taxpayer, this would mean more money paid and the budget would be exhausted in a shorter time. He stated that the previous work, that has been there for 7 years, might need redoing more than the recent works. Since there is an alternative, which is exactly the same vinyl type as the one currently installed at MD, they should have considered it, and the appeal should be accepted.

Final submissions by Dr Leon Camilleri.

Dr Camilleri argued that the appellant, who was the previous contractor for the vinyl supply in the hospital, presumes that it will remain the sole supplier. The laws of procurement provide for open competition to purchase the most economic advantageous product from every economic operator who could supply the product for the state and would be able to participate in this bid. In this case, the same colour or similar was asked for. He stated that the appeal was not based on clear grievances and that the decision of the Board must be based on the preliminary exceptions. He quotes from the letter of appeal:

'Firstly, the contracting authority's decision was flawed, as it was based on incorrect assumptions. Specifically, the said contracting authority erroneously determined the selected bidder met the technical requirements and complied with the stipulated criteria which is being objected by the appellant and this as will be substantiated by evidence and submissions during this appeal'.

The appellant is stating that the recommended bidder was not compliant. However, there was no proof of their products, and no witness was summoned to demonstrate what materials they were offering.

Regarding the second grievance he quoted from the letter of appeal:

'Secondly, and without prejudice to the above, the contracting authority, as a result of this award, will factually be receiving less services and materials than projected and this as a result of their erroneous calculation of the offer put forward by the selected bidder'.

Referring to the submission, the tender award criteria was not Best Price quality Ratio (BPQR), and there was no system of points. All the specifications were met, and the evaluation committee had no other option than to give the tender to the cheapest offer. The cheapest offer was that of De Valier. The appellant could have objected before the final closing date and requested for the specifications to be modified in a way to be more economically advantageous and remove the 'or similar' from the specifications. However, it accepted all the specifications published, and the committee chose the cheapest.

Regarding samples and referring to tender document page 31, he quoted:

'Samples from various random vinyl materials may be requested during evaluation'.

The tender had every right to request random samples and had every right not to request samples as the tender stated the word 'may'. The number of samples requested is not important, since this was in the discretion of the evaluation board. He referred to case 793 of this Board, where it was recognised that one can ask for the most needed samples. Since, there was an offer that was compliant with all the specifications, with that same colour or similar, without preference, the evaluation committee was fair to award the tender to the recommended bidder. The appellant should be disqualified, and the committee should maintain its preliminary decision.

Final remarks by Dr Fenech

Dr Fenech stated that Mr. Schembri of SS United Projects was wise enough to stock the material. He questioned whether awarding the tender to the recommended bidder was the best choice for MD. The point was that the equivalent was not compliant. Regarding the samples, he argued about the phrase 'most commonly needed samples'. This should not be used as an escape clause. It appears as

if one is requesting something, knowing that the other part cannot supply it and will not be able to bid. These are public funds that are being used.

Final remarks by Dr Camilleri

Dr Camilleri referred to the colours and designs and emphasised that no proof was provided to this Board of the recommended bidder's offer. If the appellant had an objection about the similarities of the colours, or, if the tender clauses were open to the full extent, they could have remedied before the closing date. Once the tender was accepted, the evaluation committee performed its work with diligence and made its recommendations. The colours were similar and therefore compliant. The appeal should be rejected.

Conclusion of the Hearing

With no further arguments presented, Chairman Mr Kenneth Swain thanked the parties and formally concluded the session.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 20th May 2025.

Having noted the objection filed by Mr Sean Schembri (hereinafter referred to as the Appellant) on 11th February 2025, refers to the claims made by the same Appellant with regards to the tender of reference CFT009-3941/24 (CPSU 0695/24) listed as case No. 2112 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Peter Fenech & Dr Natalia Camilleri

Appearing for the Contracting Authority: Dr Alexia Farrugia Zrinzo & Dr Leon Camilleri

Whereby, the Appellant contends that:

- a) Firstly, the Contracting Authority's decision was flawed, as it was based on incorrect assumptions. Specifically, the said Contracting Authority erroneously determined the selected bidder met the technical requirements and complied with the stipulated criteria which is being objected by the appellant and this as will be substantiated by evidence and submissions during this appeal.
- b) Secondly, and without prejudice to the above, the Contracting Authority, as a result of this award, will factually be receiving less services and materials than projected and this as a result of their erroneous calculation of the offer put forward by the selected bidder.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 17th February 2025 and its verbal submission during the hearing held on 20th May 2025, in that:

a) ***First Preliminary Plea - Fuori Termine***

Whilst the appeal period has lapsed on the 7th of February 2025, the stamp on the applications reads 11th of February 2025. The application was thus filed fuori termine and is therefore not admissible.

b) ***Second Preliminary Plea - The Department of Contracts is not the Proper Defendant and thus the requests are unsustainable***

In its requests, the objector requests this Honourable Board to order Department of Contracts to 're-evaluate' and 'to cancel the decision of the Department of Contracts'. The tender in question was not issued by the Department of Contracts but was issued by the Central Procurement and Supplies Unit as a contracting authority thus the Department of Contracts is not the proper defendant and the requests made are unsustainable.

c) ***Third Preliminary Plea - Breach of Regulation 270 of the Public Procurement Regulations***

The Regulation 270 of the Public Procurement Regulations state that the objection letter "shall contain in a very clear manner the reasons for their complaints". The objector fails to indicate in the clear manner stipulated at law the reason for its objection. The objector does not state that the recommended bidder is not technically compliant and it is unclear whether the objector it is attacking the tender or the evaluation. Such lack of clarity is evident from the words "as will be substantiated by evidence and submissions during the appeal" meaning that the arguments are not substantiated in the letter of objection. For these reasons this Board is to declare the application as not valid at law and abstain from giving a decision.

d) ***On the First Ground of Appeal -***

The evaluation committee submits that the evaluation process was conducted in line with the provisions of the Public Procurement Regulations, the general principles of public procurement laws including that of equal treatment and self-limitation. The evaluation committee evaluated both bids in accordance with the published specifications and both the objector and the recommend bidder were found to be compliant. The recommendation was made in favour of the cheaper compliant offer.

e) ***On the Second Ground of Appeal -***

This second grievance as already submitted is vague and ambiguous and CPSU reserved the right to present additional submissions on this grievance. CPSU submits that the quantities are established on the established quantities and all bidders presented their financial offer in the same financial bid form and thus it could not be possible that a bidder will be providing less or more than the other bidders.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider the Contracting Authority's Preliminary pleas and the Appellant's grievances.

Contracting Authority's Preliminary Pleas

First Preliminary Plea - Fuori Termine

- The Board notes that Regulation 271 of the Public Procurement Regulations stipulates that an objection **must** be filed within ten calendar days following the date on which the contracting authority sent its decision.
- The Board observes that the rejection letter dated 28th January 2025 clearly stated that the official objection must be "*lodged by noon of Friday 7th February 2025*".
- The Board acknowledges that the Appellant sent the appeal to an incorrect email address, which prevented submission on 7th February 2025. Although payment was made on that day, the appeal was only correctly resent on 8th February 2025 after the Appellant received the email notification error.
- The Board emphasises that the responsibility for the correct and timely submission of the appeal lies entirely with the Appellant. The failure to file the objection within the prescribed period was solely due to the Appellant's own error and not attributable to any fault or omission on the part of the Board or the Contracting Authority.
- The Board concurs with the Contracting Authority's reference to established jurisprudence that 'fuori termine means fuori termine'.
- Therefore, the Board upholds the Contracting Authority's first preliminary plea.

Second Preliminary Plea - The Department of Contracts is not the Proper Defendant

- The Board notes that the tender in question was issued by the Central Procurement and Supplies Unit (CPSU) as the Contracting Authority, and not the Department of Contracts.
- The Board observes that while the Appellant's letter of objection was addressed to both entities, the formal requests within the appeal were erroneously directed to the Department of Contracts.
- The Board notes that this error did not prevent the CPSU, the actual Contracting Authority, from being fully aware of the appeal and participating in these proceedings.
- The Board finds that the CPSU, by engaging fully with the substance of the appeal, was not prejudiced by any misdirection of certain requests.
- Therefore, the Board does not uphold the Contracting Authority's second preliminary plea.

Third Preliminary Plea - Breach of Regulation 270 of the Public Procurement Regulations

- The Board notes that Regulation 270 of the Public Procurement Regulations (PPR) is unambiguous when it states that an appeal "*shall contain in a very clear manner the reasons for their complaints*".
- The Board refers to recent PCRB jurisprudence, specifically Case 2093, where it was emphasised that Regulation 270 requires a clear articulation of complaints in the initial objection. In Case 2093, the Board found that generic statements and intentions to elaborate verbally during the hearing do not satisfy this requirement.
- The Board also notes that in Case 2076 – decided on 11th February 2025 – it was decreed that “*The Board is seized to treat the grievances as presented to it in the objection application in line with Regulation 270 of the Public Procurement Regulations*”.
- The Board finds that the letter of objection failed to clearly explain the reasons for the complaints, particularly concerning the alleged non-compliance of the recommended bidder's vinyl colour. The specific allegations concerning vinyl colour compliance were brought forward for the first time during the hearing rather than being articulated in the initial letter of objection.
- The Board concludes that the letter of objection consisted of mere generic statements without specific reference to items or arguments upon which the Board could properly review the Evaluation Committee's decision, akin to the situation in Case 2093.
- As highlighted during the hearing on 20th May 2025, the Appellant asserted that the evaluation of whether sufficient information was provided is "subjective." However, for the reasons detailed above, the Board disagrees with this claim and affirms that the complaints presented failed to meet the clarity requirements outlined in PPR Regulation 270. Moreover, it is the responsibility of the Appellant to ensure that their grievances are articulated in a clear and objective manner.
- Therefore, the Board upholds the Contracting Authority's third preliminary plea, noting that the Board can only address the *grievances as presented to it in the objection application* .

Appellant's Grievances

Notwithstanding that the first and third preliminary pleas were upheld; the Board will examine the grievances put forward by the Appellant.

Grievance 1: Flawed decision based on incorrect assumptions regarding technical compliance

- The Appellant contended that the Contracting Authority's decision was flawed because it erroneously determined that the selected bidder met the technical requirements and complied with stipulated criteria.

- The Board reiterates, as established in relation to the third preliminary plea, that the complaints regarding technical compliance were not detailed in a clear manner in the letter of objection.
- The Board agrees that the Contracting Authority included the term "*or equivalent*" in the tender specifications, as this ensured that the call is open to competition and not unduly restrictive, in line with public procurement principles.
- The Board finds that the Appellant did not bring forward substantive evidence during the hearing to demonstrate that the colour offered by the recommended bidder, De Valier Co Ltd., failed the equivalency test outlined in the tender. Witness Mr. Joseph Muscat confirmed that both bidders offered the correct specifications, and De Valier was chosen because they provided the right specifications at a cheaper price.
- Regarding the submission of samples, the Board refers to page 31 of the tender document which states, "*Samples from various random vinyl materials may be requested during evaluation*". This wording clearly grants the Evaluation Committee discretion in whether to request samples and how many. The Committee's decision to request (only) seven samples was within this discretionary power.
- Therefore, the Board does not uphold the Appellant's first grievance.

Grievance 2: Contracting Authority receiving fewer services and materials due to erroneous calculation

- The Appellant argued that the Contracting Authority, as a result of this award, will factually be receiving fewer services and materials than projected due to an erroneous calculation of the offer put forward by the selected bidder.
- The Board notes that the tender award criterion was based on the cheapest, technically compliant offer, and not on a Best Price Quality Ratio (BPQR) system. There was no points-based system for qualitative aspects beyond minimum compliance.
- The Board observes that all bidders submitted their financial offers using the same financial bid form provided by the Contracting Authority, which was based on pre-established quantities.
- The Board finds that the Appellant presented no evidence to substantiate the claim of an erroneous calculation that would result in the selected bidder providing fewer services or materials than specified in the tender and offered in their bid.
- Therefore, the Board does not uphold the Appellant's second grievance.

The Board,

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

- a) Upholds the Contracting Authority's first and third preliminary plea,
- b) Does not uphold the Contracting Authority's second preliminary plea,
- c) Does not uphold Appellant's Letter of Objection and contentions,
- d) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Dr Ing. Damien Gatt
Member

Mr Lawrence Ancilleri
Member