

PUBLIC CONTRACTS REVIEW BOARD

Appeal Reference Number 2108
Tender Reference Number CT2188/2024
Tender Name Framework Contract for the leasing of various equipment to eligible persons in the Community Care – Active Ageing and Community Care (AACC)

The Public Contracts Review Board (hereinafter the ‘Board’ or the ‘PCRB’) convened a public hearing on the 16th May, 2025 to hear the appeal as filed by the appellant Jamesco Trading Limited (C-17196) (hereinafter the ‘Appellant’) on the 19th February, 2025, and after taking cognisance of:

The tender document for the ‘Framework Contract for the leasing of various equipment to eligible persons in the Community Care – Active Ageing and Community Care (AACC)’ (hereinafter referred to as the “Tender Document”);

The minutes of the proceedings dated 16th May, 2025 which are being reproduced hereunder:

“PUBLIC CONTRACTS REVIEW BOARD

Case 2108 Objection CT2188/2024 – Supplies – Framework Contract for the Leasing of Various Equipment to Eligible Persons in the Community Active Ageing and Community Care (AACC) – Lot 3.

The tender was issued on the 11th September 2024, and the closing date was the 23rd of October 2024.

The estimated value of the tender, excluding VAT, was €599,778.00 for Lot 3.

On 19th February 2025, Jamesco Trading Limited lodged an appeal against Active Ageing and Community Care the Contracting Authority in terms of Regulation 270 of the Public Procurement Regulations and a deposit of €2,999.00 was paid.

On the 16th of May 2025, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas as Chairperson, Mr Keith Victor Grech and Mr Lawrence Ancilleri as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Jamesco Trading Limited (C17196)

Dr Joseph Bugeja – Legal Representative.
Mr Wilfred Galea – Company Representative.
Mr. Milo Stanisavljevic – Company Representative.
Mr. Paul Mc Alister – Company Representative.
Ms. Mariella Mizzi – Company Representative.

Contracting Authority – Active Ageing and Community Care

Dr Noel Bezzina – Legal Representative.
Ms. Iris Zammit – Chairperson.
Ms. Marisa Cassar – Board Secretary.
Ms. Charmaine Mallia – Evaluator.
Ms. Ingrid Flores – Evaluator.
Ms. Josephine Cassar – Evaluator.

Recommended Bidder – OK Medical (C79739)

Dr Calvin Calleja – Legal representative.
Mr. Marcel Mifsud – Consultant.
Mr. Josef Cachia – COO.

Department of Contracts

Dr Mark Anthony Debono – Legal Representative.
Dr Audrey Buttigieg Vella – Legal Representative.

Opening Statements

Dr Ana Thomas, Chairperson of the Public Contracts Review Board, welcomed the parties and invited the parties to make their initial submissions.

Initial Submissions

Initial submissions by the Appellant

Dr Joseph Bugeja, legal representative for Jamesco Trading Limited, commenced his submissions by stating that his client submitted an offer for a hospital bed that exceeded the tender specifications in quality. While the tender stipulated a minimum height range of 40cm, Jamesco proposed a bed with a minimum height of 35cm, which, he argued, would be more beneficial for patients, particularly the elderly.

He referred to Article 42 par.4 of Directive 2014/24/EU, which provides:

“For all procurement intended for use by natural persons, whether by the general public or staff of the contracting authority, technical specifications shall, except in duly justified cases, be drawn up so as to take into account accessibility criteria for persons with disabilities or be designed for all users.”

Dr Bugeja argued that Jamesco was penalised for providing a better product, in contradiction of European procurement laws. He cited Article 42 par.2 of the same directive:

“Technical specifications shall afford equal access of economic operators to the procurement procedure and shall not have the effect of creating unjustified obstacles to the opening up of public procurement to competition.”

He emphasised that a public procurement process should not restrict market participation by enforcing technicalities that, paradoxically, exclude superior offerings.

Initial submissions by the Contracting Authority

Dr Noel Bezzina, representing the Active Ageing and Community Care Department, asserted that the key issue in this appeal was the interpretation of the term "minimum" in the tender's height specification. The tender clearly set a minimum height range of 40cm, which all bidders were required to observe. Allowing Jamesco's offer of 35cm would disadvantage other potential bidders who might have had similar products but refrained from bidding in order to comply with the specifications.

He argued that the appellant's interpretation wrongly assumes flexibility in a clause that clearly defines a non-negotiable minimum requirement. Clause J states a minimum height range that was not observed.

Initial submissions by the Recommended Bidder

Dr Calvin Calleja, counsel for the recommended bidder, emphasised that Article 42 of the directive does not permit technical specifications to act as barriers to entry. He argued that if Jamesco believed the requirement was flawed or restrictive, they could have sought clarification or initiated pre-contractual remedies under Regulation 262. Instead, they submitted a non-compliant offer. Accepting this offer now would undermine the integrity of the process and disadvantage other suppliers who complied.

He concluded by urging the Board to uphold the specifications issued on 11th September 2024 and ensure consistent application across all bids.

Counter Submissions by the Appellant

Dr Bugeja reiterated that Jamesco's offer did not contradict the stated minimum of 40cm but rather exceeded it by offering a more beneficial 35cm height, which was more accessible for elderly patients. He further noted that Jamesco's bid was €100,000 lower than the preferred bidder.

He drew attention to Lot 3A, Clause J, which refers to a "minimum height range of 40cm" suggesting flexibility, while Clause M stipulates a mandatory maximum height of 90cm. He said that there was no need of a clarification

request as they are not contradicting the minimum height range of 40cm but are offering a better bed.

Witnesses

Mr. Paul Mc Alister (ID 562288M)– Summoned by Dr Joseph Bugeja

Mr. Paul Mc Alister identified himself as the Head of Business Development with Jamesco Trading and he was the one who submitted and compiled the tender. Asked about the specifications of the bed, he answered that the bed minimum safe load was 120kg and their bed was 200kg, that the minimum height adjustable of the bed was 40cm and the maximum height was 90cm including the mattress. Logically if the bed is 50cm height with a mattress of 15cm, a 5ft elderly person would find it difficult to use this bed. He stated that a normal chair is 45cm height. However, if the bed is 35cm plus 15cm mattress, this would be more ideal for the elderly as it would be only 50cm high. He emphasised that these beds are for patients who are at home. The witness stated that they respected the 90cm height, but provided a slightly lower bed which is more beneficial. He reminded also that they were the cheapest bidders by €100.000.00. He referred to clause 5 of the tender document, selection, and awards requirements: 'In order to be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria'. This criterion was exceeded for the benefit of the patient and the carer.

Dr Bugeja asked if the bed reaches European or International criteria. He confirmed their bed complies with CE certification and Medical Device Regulation (MDR) standards. He cited EN ISO 14971:2012. 'Principles and a process for risk management of medical devices' and EN 60601-2-52:2010. 'Basic safety and essential performance of medical beds intended for adult use and height and full prevention mechanism'. There is a 17% chance that a patient hurts himself for every 5 cm that the bed is higher, and he stated that the trend in these beds is the lower the bed the better.

Cross-Examination by Dr Bezzina

Dr Bezzina questioned how Mr McAlister obtained such data without being a healthcare professional. McAlister responded that he had 12 years' experience working with suppliers and healthcare experts. He stated that they were not contesting the 40cm bed, however with the range of 35cm to 90cm, they have exceeded the minimum requirements.

Cross-Examination by Dr Calleja

Dr Calvin Calleja stressed that there were no characteristics mentioned in the tender. Mr. McAlister confirmed, but replied that in their bid they were

prepared for all eventualities. Dr Calleja asked what was submitted. Dr McAlister confirmed that the bid consisted of a technical offer a technical literature and documents from letter A to letter I, however he did not know if they were attached to the appeal. Dr Calleja wanted to know what was attached to the tender that shows that their bed exceeded the technical specifications. Mr. McAlister answered that there was a document marked H listing the high, low range. Asked again, whether the document F regarding the studies of Novis education, and document G about the journal study of clinical nurses, if these were attached with the tender. Mr. McAlister answered in the negative as these were not requested with the tender however he quoted doc E page 3, the technical offer. Regarding the requisite international standards mentioned before by Mr. McAlister, Dr Calleja stated that they were not in the tender and the latter confirmed.

Re-Examination by Dr Noel Bezzina

Dr Bezzina asked about the minimum height range. Mr. McAlister said that they met and exceeded as per specification 5. He agreed that the request in the tender was 40cm. In this stage the Chairperson intervened and asked a specific question: 'Do we agree that the minimum range is 40cm?' and Mr. McAlister confirmed. He explained that their product offered a bigger range that exceeds the criteria in the tender, however Dr Bezzina stressed that this was just their interpretation.

Dr Wilfred Galea (ID 799160M) – Summoned by Dr Bugeja

Dr Galea testified that he is a family doctor for 41 years, who deals with thousands of patients each year. He testified that beds with lower minimum heights are better for patients with limited mobility. He emphasised that to be able to vary the height of a bed is a luxury. He was referring to a document with notes written by himself which he had to exhibit.

Cross-Examination by Dr Bezzina

Dr Bezzina asked if he knew about the specifications of this tender. Dr Galea said no and that he was just giving an objective opinion. He stated that Jamesco was one of his suppliers. He did not know the offer submitted by the appellant. The same principle applies whether the bed is for a private home, a clinic, or a hospital. Dr Bezzina enquired if he knew that certain studies showed that the lower the bed, the hardest it would be for some patients to get up. Dr Galea stated that for one who lacks mobility, the hip must be higher than the knee level to get up and a variable bed would be of more assistance.

Dr Calleja raised a procedural point, where he insisted that the document exhibited was not cross examined and therefore should not be of any importance.

Chairperson Dr Thomas stated that the document which Dr Galea made reference to when testifying shall remain exhibited and this in line with the COCP. The Board showed the document to Dr Bezzina and Dr Calleja respectively and both lawyers found no objection for it to remain in the acts of the proceedings.

Mr Milo Stanisavljevic (ID 396820L) – Summoned by Dr Bugeja

Mr Stanisavljevic stated that he was a senior physiotherapist for 25 years. He said that it is very important for the bed to be adjustable for the safety of the patients. As for features and specifications, one looks at a bed that is flexible and approachable. There are beds which start from 0 level to 90cm.

Dr Noel Bezzina asked Mr. Stanisavljevic what is his specific field at work and if he had seen the offer of the appellant. Mr. Stanisavljevic worked in orthopaedics, and he said that he was aware of the submission.

Ms Ingrid Flores (ID 325372M) – Summoned by Dr Bezzina

Ms Flores a higher practitioner physiotherapist employed by active ageing and a member of the evaluation board. After being asked about the standard and the requirements, Ms Flores said that to set the standards they made research to know the requirements of the older people in the community. On average the beds needed to be range 40cm as this range helps the carers who are mostly family members. She insisted that 40cm is enough, if the bed is lower both the patient and the carer will find it more difficult to manoeuvre. Dr Bezzina asked about what risks were there if the bed was less than 40cm and what they meant when they asked for a minimum height range of 40cm. She answered difficulty more than risk, because when a bed is lower than 40cm the patient would find it difficult to get up.

Cross-Examination by Dr Bugeja

Dr Bugeja probed whether she was involved in drafting the tender. Ms Flores stated that she was consulted and gave her opinion in such tenders. The Chairperson intervened and insisted that Ms. Flores had to answer on this specific tender and not in a generic manner. Ms Flores said that in this particular tender she did not draft the tender, and she could not remember if she was consulted or not. Dr Bugeja wanted to know what she meant by the word 'on average'. Ms. Flores explained that the average was known through research and experience. Dr Bugeja asked what documents she consulted. Ms Flores stated that they read articles, from the knowledge of their studies, and from their professional experience. Low lying beds are usually used for dementia patients who keep waking up from their bed regularly in their homes. Dr Bugeja stressed that the bed offered by Jamesco exceeds the specification and is more beneficial. Ms Flores stated that once the specification in the tender is 40cm,

one had to stick with that regulation as it would be unfair on other bidders who did not bid to keep in line with the requisites.

Dr Bugeja emphasised that when they were referring to the mattress, in letter M the tender said, highest mattress position not more than 90cm which is mandatory, whereas, in letter J, the minimum height range of the bed is subject to flexibility. The word range means that Jamesco could have given a 5cm less which is more beneficial.

The Chairperson intervened and asked Ms. Flores if she understood anything about the letters M and J in the capacity of an evaluator, and what she understood by the word range. Ms. Flores answered that range meant that the bed goes down to 40cm.

Dr Bugeja asked whether they took in consideration that Jamesco was €100.000.00 less than the preferred bidder. Ms. Flores answered in the negative and said that even if the price was €200.000.00 less, it would not be considered, as it was not following the rules of the evaluation of the tender.

Cross-Examination by Dr Calleja

Dr Calleja asked whether 35cm posed a safety risk. Ms Flores emphasised that it is not risky but more difficult to climb in and out of bed. Dr Calleja asked if the patients would benefit from a fixed height bed especially the dementia patients. Ms. Flores emphasised that an adjustable bed would be more practical to feed and to bath the patients.

Cross examination by Dr Joseph Bugeja

Dr Bugeja asked if, the bed was a variable high motorised bed, what was the need of a minimum height range in the technical specification? The Chairperson asked Ms Flores, if she knew how to answer this question, if she was not involved. Ms Flores said that she could imagine, but the Chairperson intervened once again and said that she wanted a direct answer, to which Ms Flores answered in the negative.

Final Submissions

Final Submission by Dr Joseph Bugeja

Dr Bugeja started his final submissions by referring to Lot 3A letter J which specifies that there should be a minimum height range of 40cm. Jamesco offered a bed that exceeded this range as it went down to 35cm. He referred to the letter dated 11th February 2025, where Jamesco were disqualified, as the requisition asked for a 40cm bed. He mentioned that 35cm is within the range especially when these beds will be used by the community in their homes.

The flaw on the part of the contracting authority is in letter M, where it is mandatory to be 90cm, and in letter J, the minimum range was left flexible. According to the European laws, the specifications could not be restricted for the market, especially when the authority must pay €100,000.00 more. In fact, the price offered by Jamesco was €223.603.20 and the price of the preferred bidder was €323.851.20. Nobody mentioned the €100,000.00 extra in the price, that the government will have to pay, and more than that, Jamesco's bed exceeds the technical specifications.

Regarding the international standards, this was mentioned in article 40 clause 14.8 in general conditions. A CE declaration certification and a PS standard for equivalent was asked for. He believes that Ms Flores was involved in the draft and was also an evaluator. In terms of the European Union, the board should keep in mind that technical specifications could not be restrictive, because they would act as a barrier in the European market. He concluded that Jamesco offered a better bed for a better price.

Final submissions by Dr Noel Bezzina

Dr Bezzina started by mentioning the restrictive tender. The only restriction in the tender was in the appellant who isolated himself because he did not meet the technical and administrative criteria. The part of this restrictive law does not apply to this case, where the appellant is contending that there is a restriction, because he did not qualify, and does not meet the tender requirements. He clarified that price becomes relevant only after technical compliance has been confirmed. In fact, the tender does not say in clause 6.1 that the sole award criterion would be the price, but it says that the contract would be awarded to the tender submitting the cheapest price after satisfying the technical and administrative criteria. If you are not technically and administrative compliant you cannot award a contract for the simple reason that it was cheaper. If this had to happen, we would issue all the tenders without requirements, according to the price and give all the awards to the cheapest. Regarding clause J, minimum height range 40cm, the appellant is basing his arguments on the word range. The contracting authority is emphasising on minimum, in clause G minimum 3 section mattress support, not more than 90cm. If the tender was drafted with a range between 30cm to 40cm the appellant would have a reason to contest, but the tender says minimum height range of 40cm.

The Chairperson said that the board wanted to understand why range was written instead of minimum height.

Dr Bezzina explained that there would be a range if there were two numbers, example 30cm to 40cm, but in this case there is one minimum height of 40cm. The appellants are referring to the word range that can go lower than 40cm. Referring to Mr McAlister, Dr Bezzina said that he accepted the fact that the

minimum height was 40cm, but they were still offering a bed that exceeded the requirements. Both beds were of an acceptable standard but after studies were made, it was decided for a minimum height of 40cm. According to Mr. McAlister, they felt that their bed was better even though it was not as required in the tender document. He quoted section 5:

‘In order to be considered eligible, for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder’.

Dr Bezzina stressed that the quote mentioned above says exceed certain, not exceed all, so the adjudicating board was not legally obliged to accept this offer to be considered and finally be given the award. It would be highly inappropriate if the authority had to accept tenders who do not abide by the specifications in the tender document, the authority will be distorting competition.

Final submissions by Dr Calvin Calleja

Dr Calvin Calleja stated that it seems as if the appellant decided to isolate clause J, the minimum height of 40cm as if the bed was not height adjustable and as if the tender did not stipulate maximum height range of 90cm. The requirement of the bed should be height adjustable between 40cm and 90cm, with the same reasoning of the appellant, any bidder with a bed starting from 0cm could have bid. There are various clauses of the classic directive and public procurement regulations that the technical specifications should not suffocate the competition. This should have been raised at the beginning, and there are two remedies, either a clarification or pre contractual remedy. There was no explicit wording.

He quoted a sentence of the Court of Appeal ‘Truevo Payments Ltd v The Department of Contracts’ reference 95/21/1 paragraph 7 where the Courts found these three flaws where Credorax, based its appeal regarding topics that existed since the beginning of the procedure, and for these complaints there were remedies under regulation 262. These complaints had to be submitted before the closing date, and not, like in this present case, where the complaints were presented after the tender was awarded. Unlike what the appellant stated, there was no stifling of the competition, as the appellant made his bid. He referred to 9.4 of the general rules governing tenders:

‘In submitting a tender, the tenderer accepts in full entirety the content of this tender document whatever the economic operator zone corresponding conditions may be which true the submission of the tender is waived. Tenderers are expected to examine carefully and comply with all instructions and specifications contained in this procurement document’.

Once you submitted your bid, you have accepted all your reserves in requisite J, you have essentially and effectively forfeited your right to challenge them. The need to follow the requisitions of the tender, is not only for the bidders, but it is a two-way street. One, for the bidders to stay in line with the specifications requested, and the second, for the tender evaluation committee to ascertain that all bidders stay in line with the requisites. If this is not done, it goes against the rules, as there will be no transparency, no equality between the bidders, and the need that there will not be discrimination between offers. If a bidder is allowed to bid, and is not technically compliant with the tender document, based on the argument that his bid is superior, then tenders will be issued without specifications and ask to submit for their cheapest price. He quoted a Court of Appeal judgment with reference number 322/2023/1 in the names Reactilab Ltd. v Water Services Corporation. Paragraphs 19 to 22.

‘The bidder even if he offers better products, should be disqualified if the product offered is not as indicated in the tender document’.

He does not decide to choose what he thinks is the best bid, and the tender evaluation committee should stand firm with regulations communicated in the tender document. He mentioned document H, which states the technical literature and the specifications of their bid. Documents F and H were submitted with the appeal, so Dr Calleja pleaded with the board to take no notice of these two documents. He quoted Case Vassallo builders v Wasteserv 22/2025/1 paragraph 82:

‘The court said that the documents could not be considered because they were not submitted in the appropriate time and appeal was denied’.

This is a similar situation where the documents were submitted with the appeal, to overrule the decision of the contracting authority. He referred to document F which speaks on research done in Australia, where it specifies that the lower the bid the greater the risk. Document G mentions studies done in 2007, that is based on research on a small hospital of 32 beds in Michigan.

Concluding Remarks Dr Joseph Bugeja.

Dr Bugeja made a small analysis referring to Lot 3A.

Clause A says safe working load not less than 120kg. This was mandatory.

Clause G says minimum 3 section mattress support. No mention of range.

Clause M says not more than 90cm. This was mandatory.

Clause J says minimum height range of 40cm.

Jamesco did not ask for a clarification or a pre-contractual remedy, because of the word range, and the Board must decide its sentence on the word range. Our

bed is within that range. Jamesco would not have appealed had this term not been used.

Conclusion of the Hearing

With no further arguments presented, Chairperson Dr Ana Thomas thanked the parties and formally concluded the session."

The written pleadings as filed by Jamesco Trading Limited (C-17196) on the 19th February, 2025, together with proof of payment of a deposit in the amount of €2,999.00, wherein it held as follows:

'Facts of the Case

1. *The Department of Contracts published on behalf of the Active Ageing and Community Care' (*the Contracting Authority'") the Tender for the Supplies - Framework Contract for the Leasing of Various Equipment to Eligible Persons in The Community Active Ageing and Community Care (AACC) CT2188/2024 ("the Tender"), annexed as Document A:*
2. *The Tender was divided into 4 Lots for the supply of:*
 - a. *Lot 1 - Electric Patient Lifter;*
 - b. *Lot 2 - Sit to Stand Patient Transfer Aid;*
 - c. *Lot 3 - Variable Height Motorized Bed and Single Propad Mattress; and*
 - d. *Lot 4 - Bariatric Variable Height Motorized Bed and Propad Mattress.*
3. *The Department of Contracts by a letter dated 11 February 2025 ("the Decision") attached herewith as Document B, informed Jamesco Trading Limited ("the Appellant") that the Tender offer submitted with respect to Lot 3 - Variable Height Motorized Bed and Single Propad Mattress ("Lot 3"), was not technically compliant for the following reasons: "Lot 3 A -- Variable Motorized Bed- The main reason why your procurement proposal was non-compliant is as follows as per Section 3 of the Technical Specifications for i) Minimum height range 40cm, on the submitted Technical Offer Questionnaire your company wrote 35cm.", and awarded the Tender to Ok Medical Ltd:*
4. *It appears that the Appellant's bid has been rejected for not being technically compliant:*
5. *Furthermore. the Appellant's bid was cheaper than the recommended tenderer, as per attached bid list of Lot 3 attached herewith as Document C:*
6. *The Appellant contends that the Decision is unfounded both in fact and at law;*
7. *That in terms of Regulation 275 of S.L. 174.04. the award process shall be completely suspended if an appeal is eventually submitted.*

Objection

8. *Now therefore, the Appellant is availing itself of the right granted to it in ferns of the law and is filing this Objection given that it feels aggrieved by this Decision, and its grievances, which are clear and manifest, consist of the following*

A. TECHNICAL COMPLIANCE

9. *The Appellant contends that section "5. Selection and Award Requirements" of the Tender stipulates that for an economic operator to be considered eligible for the award of the contract, the economic operator must provide evidence that "they meet or exceed certain minimum criteria described hereunder. ", which the Appellant in submitting the Tender offer for Lot 3, relentlessly showed to comply with, and this as will be evidenced throughout this appeal procedure:*
10. *The Appellant asserts that in its submission of the Tender offer for Lot 3, the beds offered in its bid meets both the international standards and the specifications stipulated in the Technical Questionnaire attached herewith as Document D, including Lot 3A- Variable Motorized Bed of the Technical Specifications - "j. Minimum height range 40cm;*
11. *That the beds offered by the Appellant exceed the technical requirements of the Tender for Lot 3, as it can be adjusted to a lower height range of thirty-five centimetres (35cm), thereby offering an additional advantage in terms of accessibility, safety, and ease of use, particularly for patients with mobility challenges:*
12. *The Appellant respectfully brings forth the stark contrast in the language used in Lot 3(A): Variable Motorized Bed of the Technical Specifications j. and that in m. whereby whilst (i) stipulates that "Minimum Height range 40cm", section (m) uses the term "not more than 90cm". The absolute restriction in (m) contrasts with the more flexible phrasing of (j), which does not explicitly prohibit a lower minimum height range as the use of the term "range" implies flexibility, allowing for an adjustable height that may start at 40cm and go lower, rather than imposing a lower limit.*
13. *Furthermore, this stark contrast of the technical requirements can be further seen in the Clarification Note issued on 26 September 2024, hereby attached as Document E, which by virtue of the answer for question 2, clearly confirms that the bed must be height adjustable, with the highest mattress position not exceeding ninety centimetres (90cm), and stipulates that: "As per Section 3 - Specifications: Lot 3 (A) Specification for variable motorized bed, clause (m) Highest mattress position (floor to the top of uncompressed mattress and mattress protector underlay: not more than 90cm. The bed must be height adjustable and should be not more than 90cm including the uncompressed mattress." (emphasis added).*
14. *In view of this, the Appellant submits that the language used in section G) of the Technical Questionnaire does not establish an absolute minimum height of forty centimetres (40cm), but simply defines a minimum acceptable height range, without any explicit wording indicating that the height cannot go below this range, and as a result of which there is no legal or technical basis for the disqualification of the Appellant's submission:*
15. *The Evaluation Committee accepted other instances where the Appellant's submission exceeded minimum requirements, yet it applied a contradictory standard regarding bed height:*
 - *Subsection (g) which required a "minimum 3-section mattress support" while the Appellant provided a 4-section support, which was deemed compliant: and*

- *Subsection (a) which required a "safe working load of at least 120kg," whereas the Appellant's bed has a safe working load of 200kg, which was also accepted.*
16. *Applying a different standard to bed height is inconsistent and arbitrary. If exceeding the minimum was acceptable in other aspects, it should also be acceptable for bed height, particularly when it enhances patient safety.*
 17. *Furthermore, the Appellant respectfully submits that the safety benefits of a lower bed height are well-documented in a number of studies, namely the study published by Novis Australian, hereby attached as Document F, whereby on page 4, reference is made to the scientific method known as *Gravitational Potential Energy (GPE), which study shows the force recorded when a person weighing seventy kilograms (70kg) falls from a bed at different heights:*
 18. *This study confirms that for every five centimetres (5cm) increase in bed height, the risk of fall-related injury increases by seventeen percent (17%). It is to be noted that the study starts from a bed height measuring fifteen centimetres (15cm), which a mattress of another fifteen centimetres (15cm), which makes a total of thirty centimetres (30cm), and whilst the height levels continue to increase, so does the fall injury risk. with a total height of fifty centimetres (50cm). tantamount to sixty-seven percent (67%) high fall injury risk when compared to lower positions, whilst at fifty-five centimetres (55cm), the fall risk increases to eighty-four percent (84%), confirming that a lower bed height is safer for patients at risk of falls.*
 19. *Similarly, the Journal Clinic Nursing Study, hereby attached as Document G, recommends that the total height of a patient's bed should not exceed 49.53cm (19.5inches) to ensure optimal patient safety. which specification aligns exactly with the Appellant's submitted specifications. which ensure compliance with international patient safety standards and hence stipulates that "To prevent fall-related injuries effectively, it is suggested that the patient bed (frame and mattress) should be no higher than 19.5 inches in the low position. This specification is important for building a patient-centered care environment which puts patient safety first."*
 20. *The Appellant further submits that the beds offered for the Tender of Lot 3, conforms to IEC 60601-2-52:2009, as can be seen from the technical literature hereby attached as Document H. which is an internationally recognized safety standard for medical beds, which standard is accepted across Europe, including Malta, ensuring that the Appellant's product meets all necessary safety and regulatory requirements of the tender;*
 21. *Disqualifying a bed that exceeds patient safety standards contradicts the broader objectives of the Tender and compromises patient-centered care.*
 22. *The Appellant's submission fully complies with the broader objectives and functional specifications of the tender. The bed's ability to adjust its height provides additional benefits for patient care, going beyond the required minimums to offer superior flexibility. Therefore, the Appellant's product not only meets but exceeds the intent of the tender's specifications.*

B. THE PRICE

23. *That Department of Contracts' call for tenders sole award criterion has been the price, namely the cheapest priced offer satisfying the administrative and technical criteria:*

24. *The Appellant's quoted price has been the cheapest price amongst all bidders, whereby the Appellant's quoted price is €223,603.20, as can be seen in the financial bid hereby attached as Document I, whilst the proposed awarded bidder for the same quantity has quoted the price of €323,851.20, which price is by far higher than the price quoted by the Appellant;*
25. *Given the reason provided in rejecting Appellant's Tender for Lot 3, the Appellant is reserving the right to make further submissions, and present further evidence after having taken cognizance of the reply to be filed by the Department of Contracts and the Active Ageing and Community Care respectively:*
26. *Given that the Appellant submitted an administratively and technically compliant Tender, as Will be proved during these proceedings, which Tender was cheaper in price than that put forth by the recommended bidder, it ought to have been the Appellant who should have been awarded the Tender for Lot 3;*
27. *Therefore, in view of the above, and whilst reserving the right to make further submissions and present further evidence, the Appellant humbly requests this Respectable Board to:*
- i) Allow and Accedes to Appellant's appeal:*
 - ii) Declare that the offer of the appellant for the Tender bid for Lot 3 is technically compliant, and is the cheapest offer which meets the overall scope of the Tender for Lot 3;*
 - iii) Reject and Revokes the Decision of the Department of Contracts dated 11 February 2025 thereby cancelling and revoking the said Decision;*
 - iv) Consequently, Accedes to the Appellant's Objection, given that the Appellant is fully compliant with all specifications, including the technical specifications, and being the cheapest offer which meets the overall scope of the tender:*
 - v) Order the Department of Contracts to award the Tender to the Appellant:*
 - vi) Order the refund of the deposit of € 2.999.00 to the Appellant: and*
 - vii) That subordinately, in the event that the above requests are not acceded to. to cancel the tender, and give such orders and directives it may deem necessary in relation to the Tender.*

With costs."

The written reply as filed by the Active Ageing and Community Care on the 28th February, 2025 (hereinafter the 'Contracting Authority') wherein it held as follows:

"In essence, in its objection, the Appellant is raising two grounds of objection, namely:

- 1. Technical Compliance;*
- 2. The Price*

The Contracting Authority and the DoC are hereby rebutting these grounds of objection and the arguments stipulated therein will be addressed in this reply.

- 1. Technical Compliance*

In its first ground of appeal, the Appellant is essentially stating that his submission was technically compliant since the language used in section i) of the Technical Questionnaire does not establish an

absolute minimum height of forty centimeters (40cm) but simply defines a minimum acceptable height range without any explicit wording indicating that the height cannot go below this range. Resultantly, according to the Appellant, his submission of beds which can be lowered to thirty-five centimeters (35cm) should have been accepted.

Both the Contracting Authority and the DoC disagree with such position and this on the basis of the following considerations.

Notwithstanding the fact that the Appellant is stating the contrary (rather conveniently), the tender requirements, particularly as per Section 3 of the tender document - Technical Specifications; Lot 3(A) Variable Motorized Bed; clause (i) of the Technical Questionnaire, is clear and leaves no room for interpretation. It is evidently clear that, what was requested was a motorised bed with a minimum height range of 40cm, meaning that the motorised beds being offered are able to be lowered up to a minimum height of 40cm. Anything over the minimum height range is acceptable while anything lower than 40cm (as is the case of the Appellant) is deemed to be technically not compliant.

It is somewhat quite surprising that the Appellant is somehow interpreting clause J, and the use of the word 'range', as allowing a degree of flexibility for tenderers to offer motorised beds with an adjustable height of lower than 40cm. With all due respect, such interpretation is entirely fallacious and baseless.

As already stated, Clause J of the technical questionnaire is clear in that the motorised beds being offered must have a minimum height range of 40cm - the key word being minimum. Given that the Appellant submitted an offer for a motorised bed which goes lower than the required threshold and thus which is lower than the minimum height range being requested, then such offer was deemed not compliant with the tender requirements.

It is also pertinent to note that, at no stage did the Appellant request a clarification with respect to clause J, but opted to submit its offer nonetheless. This is being stated because, if the Appellant felt that this particular requirement was inconsistent when compared to other requirements, or was somehow misleading or ambiguous, the Appellant could have easily asked for a clarification or opted for a pre-contractual remedy - something which the Appellant failed to do.

Furthermore, it has to be stated that it is not up to the Appellant to interpret the tender requirements as it deems fit. Besides setting the parameters of what is being requested by a Contracting Authority, the tender requirements also serve the purpose of ensuring fair competition between prospective bidders by allowing them to know what is being requested of them in their offers. If such requirements are to be subjected to the unilateral and subjective interpretation of tenderers, then the whole scope of the procurement process and the establishment of tender requirements would be defeated.

Likewise, if the offer of the Appellant was to be accepted (as it is contending) by the evaluation committee, this would have meant that, besides accepting an offer which was not compliant to the requirements, the evaluation committee would be prejudicing the offers of tenderers which were in actual fact compliant with the requirements of clause J.

Thus, in view of the above, this ground of appeal should be rejected.

2. The Price

In this ground of appeal, the Appellant is contending that, in view of the fact that its offer was the cheapest, the tender should have been awarded to it. This ground of appeal should be rejected in its entirety and this for the following reasons.

Firstly, at no stage did the Contracting Authority state that the tender was not being awarded to the Appellant because it did not have the cheapest offer submitted. The Appellant is basically appealing the decision on the basis of the price, when the price (cheapest offer) was never an issue and was never referred to in the decision of the contracting authority.

Secondly, although the sole criterion of award was the price, the contract was to be awarded to the tenderer whose submission was administratively and technically compliant. Once the Appellant's offer was deemed not compliant, then such offer was excluded, irrespective of the price.

Thus, in view of the above, this ground of objection should be rejected too.

THEREFORE, in view of the above and for other reasons that may be adduced at law at the sitting to be set by this Board, the Respondent Contracting Authority and the DoC humbly request that this Board, save for any other declaration, order or decree it may deem fit:

- a. Declare the applicant's objection as unfounded both at law and in fact and consequently rejects the objection;*
- b. Confirms the decision recommending the award of the tender to the Recommended Bidder*
- c. Rejects the applicant's request to be refunded in full the deposit paid upon filing of the application.”*

The testimonies of Mr Paul McAlister, Dr Wilfred Galea, Mr Milo Stanisavljevic and Ms Ingrid Flores;

The opening and closing submissions of the Appellant, the Contracting Authority and the Recommended Bidder;

Considers;

The Board has before it an appeal concerning two main grievances, namely, that a) the Appellant feels that it was unjustly excluded when its' bid was determined to be technically non-compliant by the Tender Evaluation Committee when the Appellant, in its opinion, is not only technically compliant but offers a better product i.e. a wider range, and b) given the fact that in its opinion it is technically compliant, the Appellant contends that it offers a far lower price and should have been awarded the tender for Lot 3. The Board shall be tackling the latter grievance before moving onto the issue pertaining to technical compliance of the Appellant's bid *o meno*.

A. The Price

On this point, the Appellant contends that its price was in the region of one hundred thousand Euros cheaper than the Recommended Bidder's financial bid. The Appellant further submits in Paragraph 26 of its appeal, that given the fact that the Appellant's bid was technically compliant, "*it ought to be the Appellant who should have been awarded the Tender for Lot 3*". The Contracting Authority on the other hand contends that once the Appellant's offer was deemed to be technically non-compliant, the price

offered had no bearing whatsoever. The witness Ms Flores too testified that the financial bid of the Appellant could have been double the price it was, because once the Tender Evaluation Committee determined the Appellant to be technically non-compliant, they did not consider the bid further.

On this point the Contracting Authority is right, and the Appellant's 'grievance' on this point is premature. So long as the Tender Evaluation Committee arrived at its conclusion that the Appellant's offer is technically non-compliant, it could not have and should not have delved into whether the Appellant's *'technically non-compliant bid'* had a cheaper, more competitive price than other economic operators. The Appellant would have room to argue this point had the Tender Evaluation Committee considered the Appellant's bid as technically and administratively compliant and nonetheless award the tender to a bidder with a higher price. Whether the Tender Evaluation Committee's determination of the Appellant's bid to be technically non-compliant is flawed or otherwise, shall be determined in the next grievance.

B. The Appellant's Technical Compliance

In breve, the Appellant contends that the bed which the Appellant offered in its bid not only fulfilled the technical specifications as required in the tender document but the bed in particular goes over and above in that the Appellant is offering a more advantageous bed with a larger range in terms of height i.e. it can go as low as 35cm from the ground, up to a maximum 90cm from the floor to the top of the uncompressed mattress and mattress protector. The Appellant submitted before this Board that the tender document was restrictive when it wanted to be and allowed for flexibility when it wanted to. To make his point, the Appellant's legal counsel compares the wording in items j) and m) as found in the list of specifications for variable motorised bed 'Lot 3(A)' in Section 3 Page 20 of the Tender Document which state as follows:

"j. Minimum Height range 40cm"

"m. Highest mattress position (floor to the top of uncompressed mattress and mattress protector / underlay): not more than 90cm" (Added emphasis of the PCRB)

Legal counsel to the Recommended Bidder, OK Medical, submitted that the bed as offered by the Appellant falls foul of the tender specifications and that the Appellant should have resorted to utilising a pre-contractual remedy to eliminate any query it may have had in respect of the minimum height requirement. The Appellant rebutted that it never required any clarity, and that the Appellant simply offered more than the minimum required in the Tender Document.

The Board having read closely the tender specifications, determines that the Tender Document placed a requirement on economic operators to provide beds which can obtain a maximum height of 90cm from the floor, and at the same time imposed a minimum height range of 40cm. This in itself implies that any motorised bed which provides a range of 40cm between the highest point of 90cm downwards should be considered suitable, provided always that it also fulfils the full list of features as outlined in points a. to m. in the list of specifications for variable motorised bed 'Lot 3(A)' in Section 3 Page 20 of the Tender Document. This would therefore mean that any bed measuring 50cm from the floor (achieving the minimum range of 40cm between the highest point of 90cm), and lower (achieving a higher range than 40cm from the highest point of 90cm) fulfils the requirement j. The word *"range"* is key in the Tender Document, and the Appellant is right to distinguish between requirements which were mandatory and others which allowed for more flexibility such as the requirement in item j. i.e. the *"Minimum Height range"*.

This Board firmly believes that had the Contracting Authority wanted to exclude beds capable of higher height ranges i.e. the ability to go lower, it should have drafted the Tender Document in such a way so as to exclude this possibility as it in fact did in other requirements, and it should not have used the term “range”. The word ‘range’ in this context clearly means the difference between the set maximum of 90cm, and the minimum, the difference of which must be at a minimum of 40cm.

The added benefit of lower beds as submitted by the Appellant, as opposed to the added risk of lower beds as submitted by the Contracting Authority and the Recommended Bidder is wholly irrelevant in this context.

In view of the above considerations, this Board determines that the Tender Evaluation Committee was therefore incorrect in concluding that the Appellant’s bid is technically non-compliant because it offered a bed which is capable of being as low as 35cm from the floor i.e. respecting the minimum height range of 40cm and in fact reaching a height range of 55cm (the difference between the set maximum of 90cm and the minimum of 35cm).

As a result of this conclusion, this Board shall be ordering the re-instatement of the Appellant’s bid, and for the Tender Evaluation Committee to re-evaluate the bids after having taken into account this Board’s considerations as above.

In her testimony, Ingrid Flores started off by stating that she is usually the one to draft tender documents or be consulted regarding the tender dossier but during her testimony before this Board she fell short of declaring that she was definitely not involved in the drafting of the tender document or in its preparation in some way or another, although at the beginning of her testimony she hinted that she arrived at determining a minimum requirement of 40cm through research she made. Therefore, this Board has its doubts as to whether or not the witness was effectively involved in both the drafting the Tender Document and the eventual evaluation of the bids submitted, effectively being both judge and jury.

In view of this lingering doubt, this Board shall thus be ordering a re-evaluation of the bids **by a freshly appointed Tender Evaluation Committee.**

DECIDE

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to limitedly accept the Jamesco Trading Limited (C-17196)'s appeal and to:

- i) Dispose of the Appellant's first, second, third and fourth requests by revoking the decision dated 11th February, 2025 to reject the Appellant's bid, as well as the award notice also dated 11th February, 2025, and consequently, orders Active Ageing and Community Care *qua* Contracting Authority to re-integrate the bid received by Jamesco Trading Limited (C-17196) and orders a newly composed Tender Evaluation Committee to re-evaluate the bids submitted after taking into consideration this Board's findings;
- ii) Rejects the Appellant's fifth request to order the Department of Contracts to award the tender to the Appellant not only in view of the above order, but also in view of the fact that such a request may never be entertained by this Board in that it falls well outside of its powers as afforded to it by law;
- iii) Accede to the Appellant's sixth request and hereby orders the full refund of the deposit paid by the Appellant Jamesco Trading Limited (C-17196);
- iv) Abstains from taking cognisance of the Appellant's seventh request.

Dr Ana Thomas
Chairperson

Mr Keith Victor Grech
Member

Mr Lawrence Ancilleri
Member