

PUBLIC CONTRACTS REVIEW BOARD

Case 2114 – NP03/2024 – Negotiated Procedure for the Provision of Home Help in the Community Services in Malta (AACC)

5th June 2025

The Board,

Having noted the letter of objection filed by Dr Clement Mifsud Bonnici, Dr Calvin Calleja and Dr Krista Refalo on behalf of Ganado Advocates acting for and on behalf of Bad Boy Cleaning Services Limited, (hereinafter referred to as the appellant) filed on the 1st March 2024;

Having also noted the letter of reply filed by Dr Noel Bezzina acting for the Active Ageing and Community Care (hereinafter referred to as the Contracting Authority) filed on the 11th March 2024;

Having also noted the letter of reply filed by Dr Mark Anthony Debono acting for the Department of Contracts (hereinafter referred to as the DOC) filed on the 11th March 2024;

Having heard and evaluated the testimony of the witness Ms Mary Grace Balzan (Procurement Manager, Active Ageing and Community Care) as summoned by Dr Clement Mifsud Bonnici acting for Bad Boy Cleaning Services Limited;

Having heard and evaluated the testimony of the witness Ms. Graziella Calleja (Assistant Director, Department of Contracts and Secretary of the General Contracts Committee (GCC)) as summoned by Dr Clement Mifsud Bonnici acting for Bad Boy Cleaning Services Limited;

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 29th May 2025 hereunder-reproduced;

Minutes

Case 2114 NP03/2024 – Negotiated Procedure for the Provision of Home Help in the Community Services in Malta – AACC.

The tender was issued on the 16th of January 2024, and the closing date was the 23rd of January 2024.

The estimated value of the tender, excluding VAT, was €1,000,000.

On 1st March 2024, Bad Boy Cleaning Services Ltd.(C8836) lodged an appeal against The Department of Contracts – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected for the decision to resort to a negotiated procedure without prior publication.

A deposit of €5,055.05. was paid.

There were two bids.

On the 29th of May 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Ana Thomas and Dr Ing Damien Gatt as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Bad Boys Cleaning Services Ltd (C8836)

Dr Clement Mifsud Bonnici – Legal Representative.

Dr Calvin Calleja – Legal Representative.

Mr. Stephen Camilleri – Company Representative.

Contracting Authority – Active Ageing & Community Care.

Dr Noel Bezzina – Legal Representative.

Ms. Marisa Cassar – Procurement Officer.

Ms. Mary Grace Balzan – Procurement Manager.

Department of Contracts.

Dr Mark Anthony Debono – Legal Representative.

Witness:

Ms. Graziella Calleja – Assistant Director –DOC.

Opening Statements

Mr. Kenneth Swain, Chairman of the Public Contracts Review Board (PCRB), welcomed the parties and invited the appellant's legal representative, Dr Clement Mifsud Bonnici, to deliver his initial submissions.

Initial Submissions by the Appellant

Dr Clement Mifsud Bonnici stated that there would be no opening submissions.

Witness: Ms. Mary Grace Balzan (ID 474775M)

Summoned by Dr Clement Mifsud Bonnici

Ms. Mary Grace Balzan identified herself as the Procurement Manager at Active Ageing Community Care (AACC), with responsibility for compliance certificates.

In reference to the correspondence with Ms. Calleja, particularly the emails dated 25 January and 29 December, Ms. Balzan confirmed she had sent these emails to the Department of Contracts. Although neither she nor Dr Mifsud Bonnici had copies of the emails, she recalled that the tender had been evaluated and that the award of the framework agreement was contingent on the issuance of compliance certificates. Due to delays in obtaining these certificates, AACC negotiated an extension of three months with the current supplier to ensure service continuity until the tender process was finalized.

Regarding Tender 2390/22, she asserted that the services under both the negotiated procedure and the tender were identical. There had been six submissions for the tender, with only three deemed eligible. She referred to Tender CT2191/2021, which had been cancelled, noting that it also involved the same services and received two submissions.

Ms. Balzan explained that the legal basis for adopting the negotiated procedure was the extended time required to obtain the compliance certificates. When Dr Mifsud Bonnici asked whether the justification was based on "absence of competition for technical reasons," she could not confirm. He requested disclosure of the emails dated 19 December 2023 and 24 January 2024 to assist the witness.

Ms. Balzan stated that AACC continued procuring services from Support Services, the incumbent contractor, but could not confirm whether the products supplied were unique. Negotiations with the contractor took place from July 2023 to 24 January 2024. The tender dossier for the negotiated procedure referred to the "2022 contract agreement" with the following clause:

"To ensure continuity of services for a period of three months under the same terms and conditions as the original contract dated January 2022."

She further clarified that the Department of Contracts permitted a one-year request for proposals (RFP) after the 2021 tender expired. The RFP was published in the Government Gazette and covered the period from January 2022 to January 2023. Although it was a competitive process, Support Services was the sole respondent.

Cross-Examination by Dr Mark Anthony Debono

Dr Debono asked whether the steps taken before the negotiated procedure influenced the Contracting Authority's stance. Ms. Balzan stated that she had referred to the RFP with the intent to maintain the same terms and conditions as the previous contract. When asked whether any other economic operators could provide services under the same terms, she was unable to respond definitively.

Witness: Ms. Graziella Calleja (ID 246275M)

Summoned by Dr Clement Mifsud Bonnici

Dr Mifsud Bonnici requested that the testimony of Ms. Graziella Calleja, given today 29th May 2025 in the Case No.2097 in relation to the procedure followed by the General Contracts Committee (GCC) concerning the vetting or approval of negotiated procedures, be admitted as evidence in the current appeal. There were no objections from the parties, and the PCRB granted the request.

Ms. Calleja identified herself as Assistant Director within the Department of Contracts' Demand Management Unit since 2018, and Secretary to the General Contracts Committee.

Dr Mifsud Bonnici confirmed that the parties agreed to rely on previous hearing transcripts to avoid repetitive questions. Dr Debono raised an observation concerning the transcript, which the Chairman ruled as irrelevant.

In response to the Contracting Authority's claim that "competition is absent for technical reasons," Ms. Calleja stated that, in this case, only the incumbent contractor could provide the necessary supplies. She noted that the justification email was supported by a budget office note and endorsement from the Permanent Secretary. However, she was unsure whether the GCC had verified if Support Services was indeed the sole provider and stated that any clarifications would be available in the correspondence.

Cross-Examination by Dr Mark Anthony Debono

Dr Debono asked whether, during the contract decision-making process, the Contracting Authority merely received legal guidance and did not make a final recommendation. Ms. Calleja confirmed this understanding.

Final Submissions

Dr Clement Mifsud Bonnici (Appellant's Representative)

Dr Mifsud Bonnici began by addressing the two preliminary objections raised by the Contracting Authority. He agreed with the first—that the Contracting Authority had no legitimate opponent. Regarding the second, concerning the deposit, the Contracting Authority demanded €52,000, based on a contract value of €10 million as stated in the award notice on ePPS. However, Document C1 showed the contract value as €1 million, on which the deposit was calculated. He invoked the principles of strict interpretation and the burden of proof lying with the Government.

Citing Regulation 270, he emphasized that the regulation permits challenging a Contracting Authority's decision. He argued that the invitation to appeal, as per Document C1, established his right to contest. He further quoted relevant legal texts regarding the justification of negotiated procedures:

"Competition is absent for technical reasons"

"The protection of exclusive rights, including intellectual property rights."

These apply only when no reasonable alternatives exist and where competition has not been artificially restricted.

He referenced Recital 15 of Directive 2014/24/EU, noting that:

“Technical reasons must be rigorously defined and justified on a case-by-case basis...”

He cited *Case C-385/02 (Commission v Italy)* and *Case C-394/02 (Commission v Greece)* as precedents, where the European Court of Justice (ECJ) dismissed justifications deemed vague or insufficient. He briefly mentioned *Case C-275/08 (Commission v Germany)*.

Dr Mifsud Bonnici argued that the Government failed to prove the absence of competition. Evidence showed that other suppliers had submitted bids under previous tenders for the same services. Ms. Balzan confirmed the services in the 2021 and 2023 tenders were the same as those under the negotiated procedure, thus invalidating the claim that competition was absent due to technical reasons. He concluded that the decision to award the contract via a negotiated procedure to Support Services should be annulled.

Dr Noel Bezzina

Dr Bezzina argued that the PCRB should consider the broader context, particularly the need for service continuity. Due to the delay in awarding the new tender, the Contracting Authority justifiably adopted the negotiated procedure on a temporary basis with the incumbent supplier.

Dr Mark Anthony Debono

Dr Debono maintained that the Contracting Authority is not responsible for vetting negotiated procedures but for ensuring compliance with legal requirements. He argued that Regulation 270 is not the appropriate legal remedy to challenge the validity of the procedure; Regulation 277 applies in such cases. He concluded that the Contracting Authority acted lawfully under the legal provisions governing public procurement in cases of absent competition due to technical reasons.

Conclusion of the Hearing

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 29th May 2025.

Having noted the objection filed by Bad Boy Cleaning Services Limited (hereinafter referred to as the Appellant) on 1st March 2024, refers to the claims made by the same Appellant with regards to the tender of reference NP03/2024 listed as case No. 2114 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Noel Bezzina

Appearing for the Department of Contracts: Dr Mark Anthony Debono

Whereby, the Appellant contends that:

- a) ***First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor -***

The Claimant submits that the Contracting Authority is recommending the award of this 2024 Negotiated Procedure to the Incumbent Contractor without this being permissible at law. That the Negotiated Procedure could have been awarded without prior publication in terms of Regulations 150 et seq. of the PPR which require: a. The Director General (Contracts)'s prior approval to use the negotiated procedure without prior publication. This approval must be requested and provided in writing in advance. The Contracting Authority must have sent a duly substantiated request to substantiate the need to use this procedure. and b. That one of the grounds provided for in Regulation 154 of the PPR for the use of the negotiated procedure without prior publication subsists.

The Claimant submits that according to Regulation 150(1) of PPR, the prior approval of the Director General (Contracts) must have been obtained for the use of a negotiated procedure without prior publication, and, that it is practice, that the Director General's prior approval is also obtained prior to the award of any public contract pursuant to negotiated procedure. This is not just a formalistic exercise but rather is an approval which is required as a matter of law; *ad validitatem*. The Claimant submits that it has no evidence in hand, at the date of filing of this application, that this prior approval was duly obtained. On this basis, the Claimant is assuming that such a prior approval was not obtained since, as shall be explained in the subsequent paragraph, any such

request (if made at all) could not have substantiated the use of the negotiated procedure without prior publication.

The Claimant has gone through each ground exhaustively listed in Regulation 154 of the PPR (in the case of public service contracts) and none of those grounds exist in the case of the Negotiated Procedure:

- i) Regulation 154(a) is inapplicable because the Framework Agreement was awarded according to law to three tenderers and therefore it cannot be said that there were "*no tenderers or no suitable tenderers or no requests to participate [...] in response to an open procedure*".
- ii) Regulation 154(b) is inapplicable since competition in the market for the provision of the services described in the 2024 Negotiated Procedure is clearly evidenced in the number of interested tenderers who took part in the Framework Agreement.
- iii) Regulation 154(c) is inapplicable since there is evidently no case of extreme urgency as contemplated in the law-which as this Honourable Board is aware, has been interpreted restrictively by jurisprudence of the Courts of Justice of the European Union. It is opportune to raise, at such an early stage, that urgency caused by the Contracting Authority's negligence or delay to issue a new tender does not qualify as "extreme urgency". In furtherance to this, there is no evidence of "extreme urgency" given that the Contracting Authority had the time to issue no less than 3 Negotiated Procedures (as evidenced above) relating to the same subject matter in the interim.
- iv) Regulation 154(d) is inapplicable inter alia because repetition of similar services cannot be resorted to 3 years following the conclusion, that is, the signing of a public contract awarded by means of an open, competitive tender procedure. This is not the case as shall be proven during the proceedings.
- v) Regulation 154(e) is inapplicable because it certainly cannot be said that any design contest was involved, where design contest is defined as, "*those procedures which enable the contracting authority to acquire, mainly in the fields of town and country planning, architecture and engineering or data processing, a plan or design selected by a jury after being put out to competition with or without the award of prizes*".
- vi) Regulation 154(f) is inapplicable since the Incumbent Contractor is not, according to the Claimant's knowledge and that provided on the Malta Business Registry website, in winding-up or any similar procedure.

Therefore, and on this basis, the Contracting Authority had no basis or grounds to recommend the award the 2024 Negotiated Procedure to the Contract Beneficiary by way of a "negotiated procedure without prior publication" in accordance with law.

- b) ***Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law -***

The Claimant submits that the Contracting Authority has failed to use the VEAT notice mandatorily required by law. Article 3a of the Remedies Directive provides: “Content of a notice for voluntary ex ante transparency The notice referred to in the second indent of Article 2d(4), the format of which shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 3b(2), shall contain the following information: (a) the name and contact details of the contracting authority; (b) a description of the object of the contract; (c) a justification of the decision of the contracting authority to award the contract without prior publication of a contract notice in the Official Journal of the European Union; (d) the name and contact details of the economic operator in favour of whom a contract award decision has been taken; and (e) where appropriate, any other information deemed useful by the contracting authority.

The "voluntary ex-ante transparency notice" purportedly uploaded on ePPS by the Contracting Authority is not valid given that it does not comply with the standard form and does not provide the minimum information a VEAT notice should disclose. Further, the notice should also have been published on the Official Journal of the European Union. The Claimant has found no such notice published on the CJEU.

This Board also noted the Contracting Authority’s Reasoned Letter of Reply filed on 11th March 2024 and its verbal submission during the hearing held on 29th May 2025, in that:

a) ***The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor. -***

In essence, by virtue of this ground of appeal, the Objector argues that the Contracting Authority couldn't have awarded the negotiated procedure because, as it is being assumed by the Objector, the Contracting Authority did not have the requisite approvals in advance by the Director General of the Department of Contracts. Additionally, the Objector also argues that if the Contracting Authority did indeed have the approval to award the negotiated procedure, it still couldn't have awarded the Negotiated Procedure since the grounds stipulated in regulation 154 of the PPR are inapplicable. In this regard, the Contracting Authority submits that, contrary to what is being alleged by the Objector, the Contracting Authority had all the necessary approvals to proceed with the negotiated procedure and subsequently award the same, and this as will be proven in the course of these proceedings. Additionally, the Contracting Authority also submits that such approval by the Director General (Contracts) was granted in terms of Regulation 154(1)(b)(ii) of the PPR subject to certain conditions. According to Regulation 154(1)(b) (ii) of the PPR, a negotiated procedure without prior publication may be used in cases where the services can be supplied only by a particular economic operator due to the fact that competition is absent for technical reasons. The facts leading to the awarding of the negotiated procedure fit exactly within the parameters of Regulation 154(1)(b)(ii). The incumbent economic operator has the specialised knowledge in

providing home help services to the specific demographic groups with the required methodologies that significantly enhance service delivery efficiency or effectiveness, as this service required complex care needs of individuals within the community that only the selected provider could reasonably meet in such a short time-span. Faced with the urgent need to continue these services without interruption, the Contracting authority not only needed to address the immediacy of the requirement but also the scale and complexity of service delivery. It has to be stated that although a tender for a Framework Agreement was issued (CT 2390/2022 - Framework Agreement for the Provision of Home Help Services in the Community within the Active Ageing and Community Care), several unforeseen setbacks throughout the tender process delayed the award of the contract to prospective bidders. This meant that, the service currently offered was jeopardised since there were no other agreements and/ or contracts in place ensuring continuity of the services. It has to be borne in mind that the purpose of the negotiated procedure and even the Framework Agreement is to procure a service intended to support the beneficiaries (being elderly individuals and people with special needs) to keep on living in the community independently for as long as possible. Additionally, such service is also intended to support informal carers and offers elderly people and people with special needs assistance in performing light domestic chores. Therefore, in order to ensure continuity, procurement through a negotiated procedure had to be resorted to, in light of the prevailing circumstances surrounding the award of the Framework Agreement. Indeed, the approval given for the current negotiated procedure was given for a definite term, that is, for a period of three months.

b) ***The Contracting Authority has not used the VEAT notice mandatory required by law. -***

In this regard, the Contracting Authority humbly submits that, notwithstanding what is being argued by the Objector, the Contracting Authority has indeed submitted the voluntary ex ante transparency notice with all the required details and information which should be disclosed through the VEAT notice.

This Board also noted the DOC's Reasoned Letter of Reply filed on 11th March 2024 and its verbal submission during the hearing held on 29th May 2025, in that:

c) ***Preliminary Plea - The Deposit -***

Preliminary, the DoC submits that this Honourable Public Contracts Review Board is to dismiss this objection on the basis that the deposit for the hearing of the appeal has not been satisfied. In terms of regulation 273 of the Public Procurement Regulations, 2016 (the appellant has not paid the full amount required to lodge this appeal since the amount paid is only five thousand fifty-five euro (€5,055.05) that is not sufficient to cover the 0.5% deposit terms representing the ten million five hundred nineteen thousand euro (€10,519,000) representing the estimated procurement value in terms of section 1.3 of the tender document. The deposit that should have been paid is fifty two

thousand five hundred and ninety five euro (€52,595), which amount is to be reduced to the maximum of fifty thousand (€50,000).

d) ***Preliminary Plea - Legitimate defendant -***

In terms of the documentation presented, it is clearly evident that the Contracting Authority is not the Department of Contracts and consequently the Public Contracts Review Board is to declare the Department of Contracts as not being the legitimate defendant.

e) ***First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor -***

Whilst the consent for the use of the negotiated procedure is required ex lege and therefore, the statement that the prior approval was not obtained is to be proven. The appellant may not be allowed to make conjectures and assumptions in particular in the field of public procurement. The appellant may not be allowed to utilise the remedy afforded in terms to impugn the procedure since this remedy is to be utilised in regulation 262(1)(e) of the Public Procurement Regulations, 2016 () where the prospective tenderer is allowed a time window of two thirds of the time allowed for the filing of tender offers, to file a call for remedies in order to cancel a call for competition on the basis that the call for competition is violation of Law or that it is likely to violate the Law. Therefore, the Public Contracts Review Board is not to abstain from hearing the grievances of this objection on the basis that the appellant had at its disposal remedies that were to be exercised at the opportune time. The action of the appellant in seeking to impugn the decision of the Contracting Authority on the basis that the use of the negotiated procedure is unfounded in Law since the time allowed to contest the procedure has lapsed, this having to be filed within the first two thirds of the time allowed for the receipt of tenders. The only grievances that may be raised by the appellant in the present objection refer to whether the recommended tenderer is in conformity with the contents of the tender document and since these have not been raised within the ten day time limit provided in regulation 271 of the Public Procurement Regulations, 2016 (Subsidiary Legislation 601.03 of the Laws of Malta), these are to be considered as waived and renounced. Without prejudice, even if the Public Contracts Review Board were to admit the hearing of the action of the appellant for the contestation of the use of the negotiated procedure, it is submitted that there are specific grounds upon which the approval for the use of the negotiated procedure is justified subject to the circumstances provided by the Public Procurement Regulations, 2016, and- these requirements in order to address the functional requirements of the Contracting Authority, Therefore, the Contracting Authority shall be required to explain its requirement for undergoing the procurement procedure. The appellant may therefore not challenge the administrative discretion afforded to the Contracting Authority in obtaining permission avail itself of the Negotiated Procedure, unless the appellant proves that there has been a misuse of power.

f) ***Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law -***

With all due respect, stating that the notice published by the Contracting Authority is sufficient for prospective tenderers to be notified of the procurement made by the same Contracting Authority. Without prejudice, the submissions of the appellant are completely untruthful since the Contracting Authority has indeed published the voluntary ex ante transparency notice. On this basis, the Public Contracts Review Board should dismiss the grievance of the appellant as being unfounded in fact and in Law.

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 Appellant's grievances.

- a) ***On the First Preliminary Plea of the Department of Contracts – The Deposit –***
 - The Board refers to the Evaluation Report, which sets the Estimated Contract Value at EUR 1,000,000.
 - In accordance with the Public Procurement Regulations (PPR), a deposit of 0.5% of the Estimated Value would amount to EUR 5,000.
 - The Appellant submitted a deposit of EUR 5,055.05, which slightly exceeds the statutory requirement as calculated by this Board.
 - It appears that the Appellant based its calculation on an “Award Notice” indicating a Grand Total Cost (excluding VAT) of EUR 1,011,010.
 - In light of the above, the Board **does not uphold** this preliminary plea raised by the Department of Contracts.
- b) ***On the Second Preliminary Plea of the Department of Contracts – Legitimate Defendant –***
 - The Board notes that this procurement process, conducted through a Negotiated Procedure, falls under the responsibility of Active Ageing and Community Care, which acts as the Contracting Authority in this instance.
 - Accordingly, the Board **upholds** the position of the Department of Contracts regarding this preliminary plea.
- c) ***First Ground of Appeal: The Contracting Authority could not award the Negotiated Procedure to the Incumbent Contractor –***
 - The Board notes the Department of Contracts' argument that the Appellant allegedly relied on the incorrect regulation when filing the appeal. However, the appeal was lodged under Regulation 270 of the PPR — the same regulation cited in the Contracting Authority's published Award Notice. The Board therefore finds the appeal procedurally valid.
 - The Negotiated Procedure in question was authorised in terms of Regulation 154(1)(b)(ii) of the PPR, which permits such a procedure without prior publication where services can be

provided only by a specific economic operator due to the absence of competition for technical reasons

- The scope of this Board's review, therefore, is limited to assessing whether the use of this exceptional procedure was justified under the stated grounds.
 - The Board observes that the Contracting Authority has failed to demonstrate the claimed absence of competition. Testimony by Ms Mary Grace Balzan confirmed that previous calls for tender — involving substantially identical Terms of Reference and Technical Specifications — attracted multiple interested and participating economic operators.
 - Furthermore, Ms Graziella Calleja, under oath, was unable to confirm whether the General Contracts Committee (GCC) had verified the accuracy of the Contracting Authority's assertion regarding the lack of competition
 - Given this evidence, the Board cannot accept that the provision of home help community services in Malta is subject to an absence of competition due to technical reasons.
 - Consequently, the Board upholds this ground of appeal.
- d) ***Second Ground of Appeal: The Contracting Authority has not used the VEAT notice mandatorily required by law –***
- In view of the Board's decision to uphold the first ground of appeal, this second ground becomes moot. Accordingly, the Board does not consider it further.

The Board,

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

- a) Dismisses the first preliminary plea of the Department of Contracts concerning the Deposit;
- b) Upholds the second preliminary plea of the Department of Contracts concerning the identification of the Legitimate Defendant;
- c) Upholds the Appellant's first ground of appeal and directs the Contracting Authority to cancel the Negotiated Procedure, in accordance with Regulation 276(h) of the PPR;
- d) Orders that the full deposit paid by the Appellant be reimbursed.

Mr Kenneth Swain
Chairman

Dr Ana Thomas
Member

Dr Ing Damien Gatt
Member