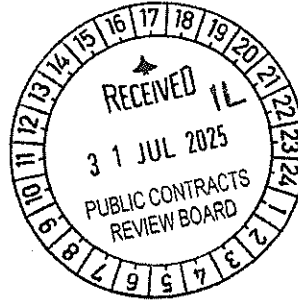




**CAMILLERI PREZIOSI**  
ADVOCATES



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

(+356) 2123 8989  
www.camilleripreziosi.com

31 July 2025

The Secretary  
Public Contracts Review Board  
Notre Dame Ditch  
Floriana

### Reasoned Letter of Reply

**Re: CT2329/2024 – WORKS – DESIGN AND BUILD TENDER FOR NEW ACUTE MENTAL HEALTH WARDS AND EXTENSION OF EMERGENCY DEPARTMENT AT MATER DEI HOSPITAL, USING ENVIRONMENTALLY FRIENDLY CONSTRUCTION MATERIALS AND PRODUCTS (the “Tender Procedure”)**

Dear Sir, Madam,

#### **1. Introduction**

- 1.1 We, the undersigned, are instructed by Mater Dei Hospital falling under the responsibility of the Ministry for Health and Active Ageing (the “**Contracting Authority**”), in connection with the Tender Procedure administered by the Department of Contracts (the “**DoC**”) on its behalf.
- 2.1 We are instructed to file this written reply in accordance with the provisions of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the “**PPR**”), in relation to the objection filed on 24 July 2025 (the “**Objection**”) by CE-BB Projects Ltd (TID 224705) (the “**Complainant**”) before the Public Contracts Review Board (this “**Board**”).

#### **3. Facts**

- 3.1. The works forming the subject matter of the tender document governing the Tender Procedure (the “**Tender Document**”) are Co-funded by the European Union (the “**EU**”).
- 3.2. The Contract Notice (the “**Contract Notice**”) published on the Tenders Electronic Daily website (<https://ted.europa.eu/en/>) in connection with the Tender Procedure provides, amongst other things, that the estimated value of the contract (excluding VAT) was **€80,173,605** (sections 2.1.3 and 5.1.5 of the Contract Notice).
- 3.3. Only one tender was submitted during the Tender Procedure, and this was submitted by the Complainant. The sole tenderer submitted a price of €135,736,275.49. The price of the tenderer was therefore €55,562,670.49 or 69.30% higher than the estimated contract value.
- 3.4. On 14 July 2025, the Complainant was advised that its tender was found to be economically not feasible, and the Tender Procedure was being cancelled in line with article 18.3(a) of the General Rules Governing Tenders (the “**Rejection Letter**”) wherein it is stated that:



*“Cancellation may occur where the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all.”*

3.5. On 24 July 2025, the Complainant submitted an objection before this Board.

**4. Background: Tender Document, General Rules, PPR and Classic Directive**

**A. Introduction**

4.1. The Tender Procedure is regulated in terms of the PPR. The PPR transpose Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC (the “**Classic Directive**”).

4.2. In addition, the Tender Procedure is also governed by the Tender Document and the General Rules Governing Tenders, V4.10 (the “**General Rules**”).

4.3. We shall set out hereunder some of the provisions of each of the above which are relevant to the Objection.

**B. Tender Document**

4.4. In terms of Section 1 – Instructions to Tenderers, sub-section 1.3 provides as follows:

*“The Estimated Procurement Value for this Call for Tenders has been based on comprehensive research including appropriate financial analysis. In the context of this procurement, the Estimated Procurement Value, based on market research, amounts to €80,173,605.56 excluding VAT.*

*The purpose of this value shall be the guidance of prospective bidders when submitting their offer and is not to be considered as a binding capping price.*

*Therefore, the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.”*

4.5. Therefore, whilst tenderers could submit offers exceeding the estimate, the Contracting Authority reserved the right to reject any such offers.

4.6. The said right is also provided in the General Rules. In terms of Section 4.7 of the Tender Document, the General Rules are applicable to the Tender Procedure.



C. *General Rules Governing Tenders*

4.7. In terms of General Rule 18.1:

*"The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority reserves the right to accept or reject any tender and/or to cancel the whole tender procedure before and after the closing established for the submission of the tenders, including instances where the financial offers submitted exceed the estimated value (budget) for the tender and/or the financial offers are deemed as economically not feasible. The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority reserves the right to initiate a new invitation to tender." [emphasis added]*

4.8. In terms of General Rule 18.2:

*"Cancellation may also occur where:*

- (a) the tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all;*
- (b) the economic or technical parameters of the project have been altered;*
- (c) exceptional circumstances or force majeure render normal performance of the project impossible;*
- (d) where there is a discrepancy in the tender document;*
- (e) there have been irregularities in the procedure, in particular where these have prevented fair competition;*
- (f) the only administratively and technically compliant offer is deemed to be an abnormally low tender." [emphasis added]*

D. *PPR*

4.9. In terms of Regulation 2 of the PPR, "unacceptable tenders" are defined as follows:

*"means tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure". [emphasis added]*

4.10. In this case, the budget of the Contracting Authority was duly determined and documented prior to the launching of the procurement procedure (as evidenced by the Contract Notice and Tender Document), and was known by all interested parties, including the Complainant.

4.11. In terms of Regulation 38(1) of the PPR:



CAMILLERI PREZIOSI  
ADVOCATES

*"The procurement document shall be written in clear and unambiguous terms so as to enable all interested parties to understand properly the terms and conditions of the process."*

4.12. In terms of Regulation 39 of the PPR:

*"(1) Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner.*

*(2) The tenderer must be selected in a transparent manner and according to a prescribed procedure.*

*(3) The design of the procurement shall not be made with the intention of excluding it from the scope of these regulations or of artificially narrowing competition. Competition shall be considered to be artificially narrowed where the design of the procurement is made with the intention of unduly favouring or disadvantaging certain economic operators." [emphasis added]*

4.13. Regulation 187 of the PPR provides as follows:

*"(1) A tender shall be considered admissible where it has been submitted by a tenderer, who has not been excluded pursuant to Part VI and who meets the selection criteria, and whose tender is in conformity with the technical specifications without being irregular or unacceptable or unsuitable.*

*(2) In particular, tenders which do not comply with the procurement documents, which were received late, where there is evidence of collusion or corruption, or which have been found by the contracting authority to be abnormally low, shall be considered as being irregular.*

*In particular tenders submitted by tenderers that do not have the required qualifications, and tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable.*

*(3) A tender shall be considered not to be suitable where it is irrelevant to the contract, being manifestly incapable, without substantial changes, of meeting the contracting authority's needs and requirements as specified in the procurement documents. A request for participation shall be considered not to be suitable where the economic operator concerned is to be or may be excluded pursuant to Part VI or does not meet the selection criteria set out by the contracting authority pursuant to regulation 217." [emphasis added]*

- 4.14. The provisions of the Tender Document, General Rules, PPR and Classic Directive all contemplate the rejection of tenders which are over budget. It is not disputed that the Complainant's tender was significantly over budget.
- 4.15. The Objection is therefore unfounded and ought to be rejected in its entirety.
- 4.16. The grievances shall now be considered separately, in the same order as set out in the Objection, for ease of reference for this Board.
- 4.17. The case-law referred to in the various sections of this reply is applicable, for the most part, to all grievances of the Complainant and was not repeated for the sake of brevity.

**5. First Grievance: *Duty to investigate the alleged price anomaly – A de facto duty to clarify – The duty is more evident, due to the sole bidder status***

**A. *Introduction***

- 5.1. The first grievance of the Complainant relates to a breach of certain alleged obligations of a procedural nature – that is, that the Contracting Authority had a duty to initiate an investigative process and obtain clarification from the Complainant about its price, and it failed to do so.
- 5.2. The Complainant splits this grievance into three (3) subsets, namely:
  - (a) Duty to investigate the alleged price anomaly
  - (b) *De facto* duty to clarify
  - (c) Duty is more evident, due to sole bidder status

We shall take these in turn however they are interlinked and the explanations in each section below are therefore, for the most part, applicable to each of these subsets of this grievance.

**B. *Duty to investigate the alleged price anomaly***

- 5.3. The Complainant's claims that the Contracting Authority had a duty or obligation to investigate and/or clarify a tender the price of which exceeds the estimated contract value are completely unfounded, unsupported and not corroborated in any manner.
- 5.4. As explained above, neither the PPR, nor the Classic Directive impose any obligation on the Contracting Authority to investigate or request clarifications from tenderers which submitted a tender which exceeds the estimated contract value (irrespective of by how much, let alone where the discrepancy is significant as in this case).
- 5.5. The receipt of a tender which exceeds the budget of the Contracting Authority is not comparable to the receipt of an abnormally low tender.



- 5.6. Regulation 243 of the PPR imposes a positive obligation on a contracting authority to investigate (and, depending on the outcome thereof, disqualify) tenders which appear to be abnormally low. The purpose of investigating abnormally low tenders is clear from Recitals (40) and (103) and article 69 of the Classic Directive, as well as Regulation 243 of the PPR. The scope of the investigation is, essentially, to ensure that the:
- (a) tenderer complies with applicable laws, including environmental, social and labour law, as well as state aid laws;
  - (b) the tender is not based on technically, economically or legally unsound assumptions or practices.
- 5.7. Therefore, where the legislator desired to impose an obligation on a contracting authority to investigate an abnormal price, it did so expressly and detailed the process to be followed.
- 5.8. This is not the case for tenders which exceed the estimated contract value, which forms the subject-matter of this case. The Classic Directive and PPR on the one hand impose an obligation on contracting authorities to investigate abnormally low tenders (in line with principles of equal treatment and non-discrimination), and on the other expressly state that tenders which exceed the budget are automatically categorised as unacceptable tenders. The rejection of a tender which exceeds the budget, irrespective of the reason for that price, is therefore expressly contemplated.
- 5.9. In addition, no law or judicial body can require a contracting authority (the purchaser) to accept a tender which exceeds the estimated contract value (the purchaser's budget).
- 5.10. This was confirmed by the Court of Appeal, in the *V.J. Salamone Case*<sup>1</sup> wherein it was stated:

*"Ibda biex, kif tajjeb imtenni mill-Prim'Awla tal-Qorti Ċivili fid-deċiżjoni tagħha li-Kamra Maltija Għan-Negozji ż-Zgħar u Medji v. Onorevoli Prim Ministru et, mogħtija fis-27 ta' Lulju 2007,*

*"Huwa prinċipju aċċettat u mistenni li min jagħmel sejha għall-offerti – kemm jekk ikun enti privata u kif ukoll jekk ikun enti pubblika jew statali – għandu kull jedd jagħzel x'irid. Mhux imħolli lil min jista' jressaq offerta f'tali sejha li jagħzel jew jiddetta x'imissu jew x'ma jmissux jaċċetta dak jew dik / enti li lilu jew lilha ssir l-offerta (bħallikieku l-bejjiegħ jista' jiddetta lix-xerrej x'imissu jixtri u mhux x'għandu bżonn jixtri)"*

*Ifisser dan li hija fid-diskrezzjoni tal-awtorita` kontraenti li tagħzel xi trid tixtri, b'dana li jekk l-awtorita` kontraenti jeħtiġielha illi tixtri medicina waħda, ma tistax tiġi l-kumpannija appellanti u ġġiegħla tixtri bilfors aktar minn medicina waħda."*

---

<sup>1</sup> Application Number 335/19, *V.J. Salamone Pharma Ltd. (C 10268) v. Central Procurement and Supplies Unit tal-Ministeru tas-Saħħa, Direttur Ġenerali tad-Departament tal-kuntratti, Charles De Giorgio Ltd (C 340)*, 28 February 2020, page 16.



CAMILLERI PREZIOSI  
ADVOCATES

- 5.11. The Complainant's attempt to impose an obligation on the Contracting Authority which finds no basis in the law is therefore rejected as completely baseless and unsupported – on the contrary, it is expressly contradicted by the provisions of the PPR and the Classic Directive.
- 5.12. The Contracting Authority's rights and obligations are set out in the PPR, the Tender Document and the General Rules. The Contracting Authority's right to reject a tender which exceeds the estimated contract value is expressly provided for in:
- (a) Sub-section 1.3 of Section 1 – Instructions to Tenderers (see paragraph 4.44.4 above)
  - (b) General Rule 18.1 (see paragraph 4.7 4.6above)
- 5.13. In addition, in terms of the PPR, a tender *"whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure shall be considered as unacceptable."*<sup>2</sup> [emphasis added]
- 5.14. As explained above, it is not disputed that the tender submitted by the Complainant exceeded the estimated contract value (by over €55,000,000 or 69.30%). It is therefore unacceptable in accordance with Regulation 187(1) of the PPR.
- 5.15. The CJEU has confirmed the above – regarding unacceptable tenders – in its decision in Case C-376/21<sup>3</sup> wherein it stated:
- "A tender must be considered not to be suitable where it is 'unacceptable' within the meaning of the second subparagraph of Article 26(4)(b) of that directive, which covers, inter alia, competitive procedures with negotiation. Under that provision, tenders submitted by tenderers whose price exceeds the contracting authority's budget as determined and documented before the launching of the procurement procedure are to be considered unacceptable."* [emphasis added]
- 5.16. Any investigation or clarification by the Contracting Authority would not have changed the fact that the offer was not acceptable since it was significantly higher than the estimate. On the contrary, obtaining further information on the Complainant's offer would have been a futile exercise, serving only to mislead the Complainant and require the Complainant to invest more time and money for no reason since, irrespective of the reason why its offer was significantly higher than the estimated contract value, any investigation or clarification could not have altered either the Contracting Authority's budget, or the Complainant's price.
- 5.17. In addition, it would have resulted in the disclosure of additional commercially sensitive information by the Complainant with absolutely no benefit since the Contracting Authority would still subsequently proceed to cancel the Tender Procedure given the massive difference between the estimated contract value and the tender submitted by the Complainant.

---

<sup>2</sup> See Regulations 1 and 187(2) of the PPR.

<sup>3</sup> Zamestnik-ministar na regionalното razvitiie i blagoustroystvoto i rakovoditel na Upravlyavashtia organ na Operativna programa "Region i v rastezh" 2014-2020 v Obshtina Razlog.



- 5.18. An investigative or clarification process is only useful if there is something to clarify and if, at the end of such process, there is the possibility of reaching a different conclusion. In this case, no findings could have resulted in a different conclusion – that is, that the offer submitted by the Complainant was significantly higher than the estimated contract value and was therefore not acceptable to the Contracting Authority.
- 5.19. Indeed, such investigative process is neither contemplated in, nor more so mandated by law.
- 5.20. It is submitted that, if the Contracting Authority embarked on such futile process, the Complainant would have then complained that the Contracting Authority carried out an exercise which served no purpose other than to obtain further confidential and commercially sensitive information unnecessarily (as it did for disclosure of price in its fourth (4<sup>th</sup>) grievance).
- C. *A de facto duty to clarify*
- 5.21. The Complainant alleges that the Contracting Authority had an obligation to clarify. As explained above, there is nothing to clarify and there's no obligation to clarify in such circumstances, neither in the Tender Document (or General Rules) nor in the PPR.
- 5.22. The Complainant refers to the OECD Principles for Integrity in Public Procurement (the "**OECD Guidelines**") and SIGMA guidelines (The Principles of Public Administration, November 2023) (the "**SIGMA Guidelines**").
- 5.23. Reference to sets of guidelines is, however, not sufficient. The Complainant had to prove that these guidelines are binding on the Contracting Authority, and that they impose a duty to clarify. The Complainant failed to do so. Even before getting to the effect of guidelines on the Contracting Authority, it would need to be established that the guidelines in fact do recommend clarifications in circumstances where a tender exceeds the estimated contract value – which they do not.
- 5.24. Guidelines, as the word implies, are simply intended to provide guidance (and are non-binding). In addition, none of the guidelines referred to by the Complainant impose (or imply) any obligation on a contracting authority to clarify an abnormally high tender.
- 5.25. The Complainant in fact does not state that these guidelines impose (or imply) such obligations and does not refer to any part thereof which supports (even marginally) its argument. The Complainant simply states that records of all exchanges with bidders should be kept, and rationale behind actions taken.
- 5.26. The Contracting Authority, as a matter of good administration, did indeed record all exchanges with the Complainant (these are done through the ePPS) and its rationale for the decision to proceed with rejection of Complainant's tender and cancellation of the Tender Procedure.



- 5.27. The Complainant then refers to Procurement Policy Note #40 (published by the DoC) and the General Rules (article 15). Neither the said policy note, nor the General Rule referred to by the Complainant, regulate tenders exceeding the estimated contract value (or abnormally low tenders, for that matter). Indeed, they add nothing to the provisions of the PPR, the Tender Document and General Rules. On the contrary, they confirm that clarifications and, or rectifications are aimed at addressing discrepancies (inconsistency and/or contradictory information), ambiguities (unclear and uncertain information) and unidentified issues (uncertainty where a requirement is being satisfied), none of which are applicable in this case.
- 5.28. Similarly, the Courts of Justice of the European Union (“CJEU”), in Case T-211/02 (*Tideland Signal Ltd v Commission of the European Union*) (the “*Tideland Case*”) referred to by the Complainant, deals with an ambiguity in a tender – “While checking whether the tender submission form, the declarations and the tender guarantee had been duly completed/submitted, the chairperson noted that the validity of the offer was not reflecting the requested 90 days from the date of the submission of the tender<sup>4</sup>.” – and not a tender which exceeded the estimated contract value.
- 5.29. In this case, there is nothing which was ambiguous. The price was not ambiguous – it was simply significantly higher than the estimated contract value. No clarification would have changed this fact. A clarification is only useful if there is an ambiguity to clarify, which there is not in the case at hand.

*D. Duty is more evident, due to the sole bidder status*

- 5.30. The Complainant argues that the fact that only one bid was submitted supports its case. The fact that there was just one bidder does not impose an obligation on the Contracting Authority to seek a clarification. On the contrary, it means that the Tender Procedure, for one or more reasons, failed to secure its objective – that is, to ensure a competitive environment.
- 5.31. This Board in Case 1410<sup>5</sup> has confirmed that having only one tenderer does not mean it should be accepted at all costs. In Case 1410, the contracting authority had changed the financial offer form during the clarification stage and split a committed cost for maintenance into two (local support costs and manufacturer’s cost). The change had no impact on the substance and was completely inconsequential (since whatever the cost for both, both were committed items) and it was therefore argued by the objector that the contracting authority should have clarified this since a clarification would simply mean that the cost indicated for maintenance would be looked at with a magnifying glass (clarified) to see its two components, with no change in price. This Board, notwithstanding that the objector was the sole tenderer and submitted a tender below the estimated contract value, rejected the objection and held as follows:

---

<sup>4</sup> Paragraph 4.

<sup>5</sup> T045/19 – Framework for the Provision of Wireless Equipment, NAC Tool and Services



*“With regard to Appellants’ contention in that, their offer should not have been discarded since there was only one offer and through a clarification, no preferential treatment would have been made, this Board would respectfully point out that the Public Procurement Regulations apply in all cases and circumstances, no matter how many offers are submitted to a publicly funded call.”*

And

*“..... At the same instance, this Board would point out that the financial offer could not be rectified to comply with the conditions laid out in the revised financial bid. In this regard, Appellants alleged request for a clarification would have amounted to a rectification, which goes against the basic principles of Public Procurement.”*

- 5.32. The main objective of a tender procedure is to secure effective competition and obtain best value for money (be it national funds or EU funds, or both). The Tender Procedure in this case failed to secure any (let alone effective) competition and obtain best value for money – only one tender was received, and this was disproportionately over budget.
- 5.33. In such cases, the Contracting Authority should (as a matter of good administration) cancel the Tender Procedure, assess the reasons for such failure and issue a new tender with revised terms addressing (to the extent possible) the reasons for such failure. This is even more so when the only offer received exceeds, by almost 70% (and over €55,000,000), the estimated contract value. It is the cancellation and reconsideration of the reasons for the failure to secure effective competition that would ensure compliance with the fundamental principles underpinning the PPR – that is, securing effective competition and obtaining value for money.
- 5.34. Indeed, the CJEU concluded in Case C-27/98<sup>6</sup> that, where a competitive process results in only one tender remaining, the contracting authority is not able to compare prices or other characteristics of various tenders to award the contract. The contracting authority is therefore not required to award the contract to the only tenderer judged to be suitable. This is more so when the only tender received is unacceptable, as it is significantly over budget.
- 5.35. Whilst in this case, the Federal law in question specifically provided that an invitation to tender may be cancelled if only one tender remains (that is, even if that tender is below the estimated contract value), the CJEU came to its conclusion based on Directive 93/37/EEC and the decision is in line with the principles underpinning public procurement legislation. The CJEU also noted that cancellation does not necessarily require serious or exceptional circumstances.
- 5.36. The PPR and the Classic Directive expressly regulate abnormally low tenders, and a situation where a tender exceeds the estimated contract value, classifying same as “unacceptable”, as explained above.

---

<sup>6</sup> Case C-27/98. Metalmeccanica Francasso SpA, Leitschutz Handels- und Montage GmbH and Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten. 16 September 1999



- 5.37. The PPR also impose obligations on the Contracting Authority to respect the fundamental principles underpinning the PPR.
- 5.38. Contracting authorities, in terms of Regulation 39 of the PPR, have an obligation to design a procurement in a manner which does not artificially narrow down competition. In addition, contracting authorities must respect the principles of transparency, equal treatment and non-discrimination.
- 5.39. In the present case, awarding a contract to a tenderer which submitted an offer which was almost 70% higher (over €55,000,000) than the estimated contract value seriously risks non-compliance with such fundamental principles.
- 5.40. It is in fact submitted that, the fact that only one bid was received does not strengthen the Complainant's claims, but significantly weakens them. Indeed, this fact supports the decision made by the Contracting Authority to cancel the Tender Procedure since:
- (a) there is a real risk that tenderers who reviewed the Contract Notice, and the Tender Document, were deterred or disincentivized from submitting a tender, including if their estimations exceeded the estimated contract value by a significant amount. It is in fact not unreasonable for a tenderer to assume that there is no possibility of them being awarded a tender for a price which exceeds the estimate by almost 70% (even though the estimate was not a price cap);
  - (b) the estimated contract value is, in terms of the PPR, a critical element of a tender procedure (it is determinate in the applicability of numerous rules under the PPR). Indeed, contract notices must, as a minimum, contain certain information (including the estimated contract value), in line with principle of transparency. Awarding a contract to a tenderer for circa 70% more than the estimated contract value would be tantamount to an admission that the estimate was entirely incorrect and (therefore) misleading, which would result in potential unfairness and unequal treatment of economic operators who, legitimately, expect a Contracting Authority to respect its estimated value and exclude significant departures from it;
  - (c) the fact that only one tenderer submitted a tender, and that this tender was circa 70% over the estimated contract value, means that the Tender Procedure failed to secure effective competition and its design and, or terms ought to be reconsidered (as explained in paragraph 5.33 **Error! Reference source not found.**above).
- 5.41. Public procurement law aims to secure the best possible outcome for public spending (in this case, including also EU funds) by opening procurement to, and ensuring genuine, EU-wide competition. In this case, only one tender was submitted, and that tender exceeds by a very substantial amount the published budget. This may be due to various factors but can certainly not result in an obligation on the Contracting Authority to accept a tender which (apart from automatically qualifying as 'unacceptable') would result in expenditure significantly in excess of the allocated budget.



- 5.42. The Complainant's arguments on feasibility are entirely flawed. The Contracting Authority is purchasing works, and what is feasible or not for such works is determined by the Contracting Authority and not the Complainant.
- 5.43. The Contracting Authority published its estimated contract value, and expressly reserved the right to reject tenders which exceeded such estimate. The Complainant's offer not only exceeded such estimate but exceeded it by almost 70%. The Contracting Authority was therefore well within its rights to reject such tender. It is the Complainant's offer which is not feasible, and not the project.
- 5.44. The Complainant's references to cases relating to abnormally low tenders (such as in section 2.3.7 of the Objection), where a Contracting Authority has an obligation to investigate to see whether to disqualify that tenderer or not, are completely irrelevant in this case since this case relates to a tender which exceeds the estimated contract value, where there is no obligation to clarify or investigate, but an express right in the Tender Document and the General Rules to reject such tender and where the PPR (Regulation 187) and Classic Directive expressly classify same as unacceptable tenders.
- 5.45. In addition, in accordance with the principle of transparency (as set out in Regulation 39(1) of the PPR), and the requirement for the procurement document to be written in clear and unambiguous terms (as set out in Regulation 38(1) of the PPR), the Contracting Authority expressly stated in the Tender Document and the General Rules (as explained above) that it has the right to reject tenders which exceeded the estimated contract value.
- 5.46. The Complainant submitted a tender with a price which was more than €55,000,000 over budget (circa 70%). The Contracting Authority has a right (if not an obligation given the significant difference between the estimated contract value as published, and the price of the only offer received) to reject the Complainant's tender.
- 5.47. In any case, this discretion rests with the Contracting Authority and neither the Complainant, nor this Board or any Court, can substitute their discretion for that of the Contracting Authority and order the Contracting Authority to consider for award a tender which exceeds (by an extremely substantial amount in this case) the estimated contract value.
- 5.48. This has been confirmed by both the Court of Appeal and the CJEU, as explained in this reply. Reference is made to the following case-law which state that neither this Board nor a Court are permitted to substitute their discretion for that of the Contracting Authority:
- (a) *Cherubino Limited Case*<sup>7</sup>: "Għal darba oħra din il-qorti tosserva illi fuq materja ta' apprezzament tekniku bhal regola ġenerali u sakemm ma jintwerewx raġunijiet gravi u konvincenti ma tiddisturbax apprezzament magħmul minn bord tekniku".

---

<sup>7</sup> Application Number 426/2014, *Cherubino Limited v. Id-Direttur (Generali) tal-Kuntratti et.* 6 Feb 2015, page 8



- (b) *SaniClean Case*<sup>8</sup>: “Ghalhekk, il-Qorti tara li, kollox ma’ kollox, l-evalwazzjoni li ghamel ilkumitat tal-ghazla kienet ragjonevoli u l-Bord ma kellux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat.”
- (c) *Executive Security Services Case*<sup>9</sup>: “Qabel xejn tajjeb li minn issa issir referenza għall-prinċipju kardinali f’materja simili illi fejn l-evalwazzjoni li jkun għamel kumitat tal-ghazla kienet ragjonevoli, allura bord jew tribunal tat-tieni istanza m’għandux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat.”

5.49. In addition, such a significant difference in value even exceeds the value which the PPR considers acceptable, in exceptional circumstances, for modifications to contract not to be so material as to be considered to be new contracts (as explained in paragraphs 7.227.22 – 7.257.25 below).

5.50. **It is submitted, with respect, that this first grievance should be rejected in its entirety since the PPR do not impose any duty or obligation on the contracting authority to investigate tenders which exceed the estimated contract value, nor can any outcome be such as to oblige the Contracting Authority to accept a tender which grossly exceeds the estimated contract value.**

## 6. The Second Grievance: Lack of Explanation – Violation of Reason-Giving Obligations

### A. Preliminary Point

6.1. If the Complainant felt the need to obtain further information to understand why its offer was “economically not feasible” – that is, if the Complainant did not consider the blatantly obvious difference of €55,000,000 / circa 70% between the offer and the estimated contract value as being sufficient to understand this – then it ought to have exercised its rights under the PPR.

6.2. The Complainant was notified, on 14 July 2025, of the reasons for rejection and cancellation. In terms of Regulation 242, the Complainant could have requested (and the Contracting Authority would have had an obligation to, as quickly as possible and in any event within fifteen days from receipt), information relating to the “*reasons for the rejection of its request to participate*”.

6.3. The Complainant failed to do so and instead proceeded to file the Objection.

### B. Introduction

6.4. The Complainant argues, in relation to this grievance, that the Contracting Authority failed to explain what was meant by “economically not feasible” and not “financially worthwhile”.

<sup>8</sup> Application Number 97/2020. *SaniClean Joint Venture v. St Vincent de Paul Long Term Care Facility et.*, 20 July 2020 (page 19).

<sup>9</sup> Application Number 205/2021/1. *Executive Security Services Ltd v. Agenzia Servizz Gov et.*, 7 March 2022 (para 5).



- 6.5. The estimated contract value for the works forming the subject-matter of the Tender Procedure was **€80,173,605.56** excluding VAT. This was clearly stated in **bold** in Section 1.3 of the Tender Document.
- 6.6. The same estimated contract value was also expressly included in the Contract Notice (in two sections thereof).
- 6.7. The Complainant submitted a price of €135,736,275.49. The price of the tenderer was therefore €55,562,670.49 or over 69% higher than the estimated contract value.
- 6.8. As explained above, the Contracting Authority expressly reserved the right to reject tenders which exceeded the estimated contract value.
- 6.9. The Complainant, in submitting its tender, accepted all terms and conditions of the Tender Document and accepted to participate in a process which is regulated by the PPR.
- 6.10. As confirmed in case *Agius Stone Works Limited v. Kunsill Lokali Valletta et*<sup>10</sup> (quoted by the Complainant in section 3.1.5 of its Objection):

*“Jekk dawn ir-regoli ġenerali kienu jiffirmaw parti mid-dokument tas-sejha, mela allura dawn kellhom is-saħħa ta’ liġi bejn il-partijiet, b’dana li meta l-offerenti tefqġu l-offerta taqħhom, huma ġew li aċċettaw li joqoqħdu qħal dawn ir-regoli (ara *Polaris Marine Services Co. Ltd v. Awtorità għat-Trasport f’Malta et* deciza mill-Qorti tal-Appell fl-24 ta’ Ġunju, 2024).”*

- 6.11. In addition, as explained above, the PPR expressly provide that a tender which exceeds the Contracting Authority’s budget is **unacceptable**.

*C. Lack of Explanation*

- 6.12. The Complainant’s claim that the rejection letter and cancellation notice failed to explain what was meant by “economically not feasible” or “not financially worthwhile” is unfounded, both in fact and at law.
- 6.13. The Complainant’s offer was unacceptable, and this is expressly provided in the PPR (as explained above). In addition, the Complainant was provided with the reason it was rejected – it was informed that its offer was economically not feasible / not financially worthwhile.
- 6.14. It is self-explanatory – evident from the numbers themselves – and no other explanation was necessary or can be provided.

---

<sup>10</sup> Application No. 65/2025/1, paragraph 24.

- 6.15. If the Complainant's tender did not exceed the estimated contract value, the Contracting Authority simply could not reject the offer as not feasible / not financially worthwhile.
- 6.16. There was no room for any other interpretation of the reasons provided and no need to 'guess' (as alleged by the Complainant) why its offer was deemed economically not feasible.
- 6.17. The Complainant refers to a judgment of the Court of Appeal (the "**Agius Stones Case**") – *Agius Stone Works Limited v. Kunsill Lokali Valletta et* – wherein the Court concluded that the reason for cancellation must be accompanied by the findings relating to same.
- 6.18. It is not contested that, if cancellation is based on findings, these findings need to be disclosed. However, cancellation could occur in some cases (as explained below) for reasons which are self-explanatory and therefore do not require any additional explanation. The reference to the *Agius Stones Case* is therefore misplaced, since the factual matrix was completely different, and the decision of the contracting authority was based on findings which were not known to the tenderers, as explained below. It is hardly credible that the Complainant required any further explanation for cancellation given the blatantly obvious difference between its offer and the Contracting Authority's budget. In any case, it is not for the Contracting Authority to explain why the tender was grossly in excess of its estimated value – this information is, on the contrary, only available to the Complainant.
- 6.19. The estimated value of the tender in the *Agius Stones Case*, excluding VAT, was €164,646.30 and nine (9) offers were received, with the cheapest (submitted by the appellant in that case) being of €132,673.50. The contracting authority in that case did not notify the tenderers with its decision (unlike in the present case). Instead, this was 'communicated' to all tenderers through a letter generated electronically on the *e-Tendering platform (e-PPS)* stating as follows:
- "Please be advised that the Call for Tenders "WORKS – TENDER FOR THE RESTORATION OF THE EXTERNAL FACADES AND THE BELL TOWERS, USING ENVIRONMENTALLY FRIENDLY PAINTS OF THE ST. PAUL'S SHIPWRECK CHURCH, VALLETTA (RE-ISSUE) with Cft Unique ID 'VLC/T/02/2023b' has been cancelled."*  
[Emphasis added]
- 6.20. The reason for cancellation only became 'known' as a result of a public post on social media by the Mayor of the Valletta Local Council – wherein he stated that there were irregularities in the procedure due to a conflict of interest (allegedly due to the presence of certain persons in a public meeting during which the evaluation committee's report was discussed).
- 6.21. Therefore, in the *Agius Stones Case*, the contracting authority had to state the reason for cancellation and explain its findings (relating to the alleged conflict of interest). The Court (rightly so as confirmed by the facts) decided that the cancellation and reasons for such were not provided (a post by the Valletta Local Council mayor on social media does not suffice). In addition, even if the reason was communicated – as irregularities in the procedure – the

contracting authority had to necessarily provide some further explanation as to those irregularities.

- 6.22. The facts forming the subject-matter of the Objection in this case are however entirely different. The decision is not based on some finding which the evaluation committee made which is not known to the Complainant. The Complainant is well aware (or at least should have been, both when it submitted its tender and when it received the Rejection Letter informing it that its offer was not feasible / financially worthwhile), that **its price by far exceeds the estimated contract value** and that the Contracting Authority reserved the right to reject offers which exceeded the said estimate, and that in terms of law such offers are **unacceptable**.
- 6.23. There is therefore no other explanation which could be given – simply put, the amount offered by the Complainant is higher (by far) than the estimated contract value and the Contracting Authority exercised its right (arguably, an obligation when the discrepancy is so significant) to reject said tender. An offer can only be considered not economically feasible if it exceeds the estimated contract value. If it does not, it conforms with the Contracting Authority's estimate and is therefore feasible. If some other circumstance arose which rendered the award not feasible for the contracting authority (notwithstanding that the offer was below the estimated contract value), then the bases for cancellation would not have been the value of the tender but the change in economic parameters. The latter was in fact the case in *Polaris Marine Services Co Ltd vs Direttur Generali tas-Saj u l-Akkwakultura*<sup>11</sup> (the "**Polaris Case**"), where the contracting authority lost access to EU funds and cancelled the tender due to change in economic parameters.
- 6.24. Similarly, if a contracting authority cancels a tender in terms of General Rules 18.3(a) because "*there has been no response at all*", and it is evident from the opening of tenders that no tender was submitted, it does not need to explain this further – it is self-explanatory.
- 6.25. Therefore, not all reasons for cancellation require a further explanation or the inclusion of findings, since there are no other findings where the price submitted exceeds the estimated contract value or there has been no response at all.

*D. Violation of Reason-Giving Obligations*

- 6.26. The Complainant claims, in section 3.2 of its Objection, that this case and the *Agius Stones Case* are similar ("parallels are clear") and that the one-liner by the Contracting Authority frustrates the Complainant's right to understand and contest the decision.
- 6.27. As explained above, there are no parallels whatsoever between the *Agius Stones Case* and this case.

---

<sup>11</sup> 331/2024/1.



6.28. In the *Agius Stones Case*:

- (a) no letter was sent to the tenderer – unlike this case where the DoC notified the Complainant pursuant to the Rejection Letter;
- (b) no reason was given for cancellation – unlike this case where the tenderer was notified that “the tender submitted by your company was found to be economically not feasible” and its offer was not financially worthwhile; and
- (c) the cancellation was not for a reason which is self-explanatory – the *Agius Stones Case* was for an alleged irregularity in the procedure resulting from an alleged conflict (based on findings of the relevant contracting authority) unlike this case where the cancellation is due to the offer of the tenderer exceeding the budget.

6.29. There is therefore no parallel to be drawn between the two cases. They are completely different.

6.30. The reference to Case No. 1040<sup>12</sup> of this Board is equally not relevant due to the different factual matrix in that case. In that case, the estimated contract value was €299,750. The reason for disqualification was not financial but qualitative since the appellants were not recognised as the local suppliers for the medicine in question, and the contracting authority had not explained this reason when it rejected the tender. The Board had in fact concluded that there was no proof or claim that the price offered was beyond expectations (unlike this case).

6.31. If the tenderer is rejected due to some non-compliance, the contracting authority must specify the reason (as set out in the General Rules) and the findings which led to it arriving to that conclusion. In the case of non-compliance, this is not self-explanatory and must of course be explained. If the offer is above budget, informing the tenderer that its offer was rejected as it was not economically feasible / financially worthwhile is self-explanatory and no further explanations or disclosure of findings are required.

6.32. The Complainant also refers to the Court of Appeal revoking the cancellation in *Cherubino Limited (C-3677) v. Dipartiment tal-Kuntratti et*<sup>13</sup>. The Complainant however does not explain the reason for the decision of the Court. The Court decided that this Board had not acted correctly when it allowed additional grievances to be made, without recording same and allowing the appellant time to provide its response to such grievances. It also decided that it is not the Board’s role to decide whether the relevant tenderer had the necessary importation license. The Court held as follows:

*“Fuq dan il-punt, din il-Qorti tirrileva li l-kwistjoni ta’ licenzji u ta’ kif se jigi impurtat il-prodott offrut gewwa Malta ma hijiex materja li għandha tinteressa lill-awtorita’*

<sup>12</sup> Case 1040 – CT 2042/2016 – Tender for the Supply of Amifampridine (3, 4 – Diaminopyridine) Tablets

<sup>13</sup> Application Number 203/17



*kontraenti jew lill-Bord. Kif jiġi esegwit il-kuntratt meta jingħata mhux kwistjoni li jrid jidhol fiha l-Bord.”*

- 6.33. The principle that the tender document constitutes a contract between the parties has been consistently upheld by this Board<sup>14</sup>.
- 6.34. The reference to this case is therefore entirely irrelevant and the decision of the Court of Appeal is not related to the failure to provide reasons for a cancellation, let alone to facts similar to this case where the reason was that the tender submitted exceeded (by far) the budget and was economically not feasible.
- 6.35. The Complainant’s claim – that is, no reason was provided, and it was therefore denied a proper explanation – is unfounded since, as explained above, the reason was given, and it was self-explanatory. The Complainant’s offer simply exceeded the Contracting Authority’s budget by €55,000,000 (close to 70%) (a fact known by the Complainant at time of submission and well before the cancellation) and was therefore not economically feasible.
- 6.36. Contrary to what the Complainant claims, the Contracting Authority complied with the principles of transparency. The principle of transparency was complied with when the Contracting Authority published the estimated contract value, both in the Contract Notice and in the Tender Document. The same principle was complied with when the Contracting Authority notified the Complainant with the reasons for rejection of its tender and cancellation of process – that is, that *“the tender submitted by your company was found to be economically not feasible”* and the process was therefore cancelled since the offer received was not financially worthwhile.
- 6.37. There is no other reasoning or findings – it is self-evident (to anyone) from the published estimated contract value and the price submitted by the Complainant.
- 6.38. In any event, even if *dato ma non concessio* this Board considers that no findings were provided, this Board should still proceed to decide the substance and such alleged (but completely unfounded allegation) non-statement of findings does not result in the decision being incorrect. This was confirmed in the *Polaris Case*, including<sup>15</sup>:

*“22. Imma anke kieku stess, il-kumpanija appellanti xorta ma garrbet ebda preġudizzju: (i) kemm għaliex ir-raġuni speċifika wara t-tħassir tassejha minħabba telf ta’ fondi Ewropej tfissret bil-miktub u oralment quddiem il-Bord ta’ Revizjoni; (ii) kemm għaliex il-kumpanija appellanti ma kinitx miżmuma milli tressaq il-provi u l-argumenti tagħha quddiem il-Bord kontra din ir-raġuni għat-tħassir tas-sejha; u (iii) kemm għaliex din ir-raġuni tat-tħassir tas-sejha kienet magħrufa mill-kumpanija*

<sup>14</sup> See Case 1107 where this Board held *“..... the Tender Document is a contract ... each clause and condition contained in the document must be strictly adhered to ... the Evaluation Committee is obliged to safeguard all the conditions dictated in the Tender Document;”* and Case 1117, where this Board held that: *“This Board had always endorsed the principle that the Tender Document is a contract and that any party to the contract must strictly abide by the conditions as laid out in the Tender Document.”*

<sup>15</sup> See also paragraphs 17-21 of the *Polaris Case*



*appellanti meta giet biex tfassal l-appell tal-lum quddiem din il-Qorti (ara f'dan issens Owen Borg v. Ronald Bezzina et deciza mill-Qorti tal-Appell fl-24 ta' Gunju 2016 u AIG Malta Limited et v. Awtorità għat-Trasport f'Malta et deciza mill-Qorti tal-Appell fl-15 ta' Dicembru 2016).*

*23. Dan biex ma jingħadx ukoll li jkun tabilhaqq ħela ta' żmien li kieku kollox kellu jithassar sabiex id-Direttur tal-Kuntratti jerġa' joħroġ ittra ta' kancellament ġdida biex il-proċess tal-kontestazzjoni jerġa' jibda mill-ġdid, meta l-kumpanija appellanti taf sew għal xiex tħassret is-sejha."*

- 6.39. The substance is straightforward – the Contracting Authority had a right to reject the offer as over budget (both in terms of the Tender Document and General Rules), and the offer is unacceptable in terms of the PPR – and any non-compliance of a procedural nature has no impact on the validity of the decision to reject the Complainant's offer and cancel the Tender Procedure. This was confirmed, as explained below, by this Board in Case 2073 (as defined below).
- 6.40. **It is submitted, with respect, that this second grievance should be rejected in its entirety since the reasons were given and there are no findings or other explanations required as to why the amount of the Complainant's offer exceeds the amount of the budget (both known by the Complainant).**
- 6.41. **In any event, even if no reasons or findings are given (which is clearly not the case), this is not sufficient to render the decision wrong and the Board must still decide on the merits<sup>16</sup>. In this case, the decision was validly taken, in conformity with the Tender Document, General Rules and PPR (as also confirmed by this Board in Case 2073 (as defined below)).**
7. **The Third Grievance: Rejection and Cancellation; disproportionate decision by the Contracting Authority – Unwarranted disclosure of commercial sensitive information**
- A. *Rejection and Cancellation; disproportionate decision by the Contracting Authority*
- 7.1. The Complainant argues, in section 4.1 of its Objection, that the decision of the Contracting Authority is disproportionate and breaches the principle of proportionality.
- 7.2. The argument in this section is difficult to comprehend.
- 7.3. Is the Complainant alleging that the Contracting Authority is obliged to award a contract to a tenderer who submitted an offer exceeding the estimate by €55,000,000 (or circa 70%)? Is the Complainant claiming that it (or any other tenderer for that matter), this Board or a Court can force a Contracting Authority to buy a service, work or supply for over €55,000,000 (or circa

---

<sup>16</sup> See Polaris Case, paragraphs 17-22



70%) more than what the Contracting Authority budgeted for the said service, work or supply when publishing the tender document to procure same?

- 7.4. These arguments are frivolous and vexatious, and ought to be rejected outright.
- 7.5. Reference is made to the *V.J. Salamone Case*<sup>17</sup>, paragraph 5.10 above, where the Court of Appeal confirmed (in case there was a need to) that it is the Contracting Authority (as purchaser) which decides what it wants to purchase (and of course at what price), subject to compliance with mandatory obligations in the PPR.
- 7.6. The principle of proportionality simply requires the Contracting Authority to not exceed the limits of what is appropriate and necessary in order to attain the objectives pursued and, where there is a choice between several appropriate measures, it should choose the least onerous.
- 7.7. In this case, there is no choice between several appropriate measures. The only offer received exceeds the budget by a significant (disproportionate) amount and the Contracting Authority has the right (if not the obligation) to proceed with rejection of tender and cancellation of process (as expressly reserved in terms of the Tender Document and General Rules and provided for in the PPR in relation to unacceptable tenders).
- 7.8. The Contracting Authority communicated same, in a transparent manner, in the Rejection Letter to the Complainant.
- 7.9. In addition, the Complainant's claims that it offered a fully compliant technical offer and that it passed all stages of the procurement process are rejected as factually incorrect. However, the compliance or otherwise of the offer was irrelevant since the tender was unacceptable. When an unacceptable tender is received and the contracting authority rejects such tender as over budget, whether the technical offer was compliant is irrelevant (as is also evident in terms of Regulation 187).
- 7.10. The decision to reject the tender as over budget is therefore independent of any other issues with the tender submitted. Therefore, in this case, even if (for the sake of the argument) the Complainant's offer was fully compliant with the requirements of the tender, the Contracting Authority would have still rejected the offer since it exceeds (by far) the estimate.
- 7.11. The Complainant's claim that the Contracting Authority should have given it the chance to address any fatal issues is also completely unfounded and baseless.
- 7.12. The Complainant was aware, at time of tendering, of the estimated contract value. It elected to, as it had the right to, submit an offer which was significantly higher than this budget

---

<sup>17</sup> Application Number 336/19, *V.J. Salamone Pharma Ltd. (C 10268) v. Central Procurement and Supplies Unit tal-Ministeru tas-Sakku, Direttur Generali tad-Dipartiment tal-kuntratti, Charles De Giorgio Ltd. (C 340)*, 28 February 2020, page 16



knowing very well that it risked rejection (as expressly contemplated in the Tender Document and General Rules) and that its offer constituted an “unacceptable offer” in terms of the PPR.

- 7.13. No investigation or clarification from the Contracting Authority could have changed such facts. The offer is what it is, and whether this is market or not or whether there are issues with the estimated contract value are superfluous. In addition, any issues with the estimated contract value had to be raised by the Complainant at the opportune stage – that is, as a remedy before closing in terms of Regulation 262. The Complainant did not do so and cannot attempt to attack the estimate at this stage (as confirmed by the Court of Appeal and this Board consistently over the last decade or more<sup>18</sup>).
- 7.14. The Complainant’s point on EU funding not yet being secured is also inaccurate and irrelevant. Whether the works were being funded from own funds, or from EU-funds (in part or in full), the Contracting Authority has a right to reject any offer which exceeds the estimated contract value (including more so an offer which is so significantly above budget, as that of the Complainant), as expressly contemplated in the Tender Document, General Rules and PPR. In addition, contrary to what is stated by the Complainant, the issue is not the feasibility of the project (objectively), but the value of the offer (specific to the Complainant) submitted by the Complainant which exceeds (by a significant amount) the published estimated contract value.
- 7.15. The Complainant also refers to the *Polaris Case* to support its argument. In the *Polaris Case*, the contracting authority had cancelled the tender due to unavailability of EU funds. This Board, notwithstanding that the contracting authority had not provided reasons for cancellation, considered the lack of funding as a justifiable reason for cancellation. The decision of this Board in the *Polaris Case* therefore does not support the Complainant’s case but contradicts it.
- 7.16. In addition, the Court of Appeal judgment in the *Polaris Case* (in appeal) also does not support the Complainant’s case. On the contrary, it supports the Contracting Authority’s decision. Firstly, the Court of Appeal upheld the decision of this Board – that is, the contracting authority had the right to cancel the tender due to lack of funds. Secondly, the Court of Appeal rejected the argument made by the appellant that, even if the EU funds were lost, this does not justify cancellation (it is pertinent to note that in the *Polaris Case* the appellant’s offer was not over budget and was actually €120,000 lower than the recommended tenderer’s offer, and the estimated contract value of the supplies was only €300,000, not €80,000,000 as in this case).
- 7.17. The Court of Appeal in fact stated in the *Polaris Case*:

*“Bla ma tidhol fuq il-kwistjoni ta’ jekk kienx tort tal-appellati jew le li ma setghux jintuzaw il-fondi Ewropej għal dan il-proġett, għaliex dan mhuwiex il-mertu ta’ dawn il-proċeduri, xorta jibqa’ l-fatt li skont id- dokument tas-sejha: 70% minn dan il-*

---

<sup>18</sup> See Court of Appeal (Superior Jurisdiction), Application Number 95/21/1: Truevo Payments Limited (C62721) v. 1. Direttur tal-Kuntratti; 2. Ministeru għall-Finanzi u x-Xogħol U 3. Credorax Bank Limited (C46542), paragraphs 7-9; and Case 1578 – TM 026/2020 - Tender for the Provision of Services of an insurance Broker for Transport Malta (TM)



*proġett kien ħa jiġi mħallas minn fondi Ewropej. Żgur u mhux forsi, it-telf ta' finanzjament ta' 70% jgħloq bidla fundamentali li jolqot l-aspett ekonomiku tal-proġett għaliex filwaqt li qabel l-awtorità kontraenti kienet ħa tħallas biss it-30% tal-proġett, issa li ma tistax aktar tgawdi mill-fondi Ewropej hija trid tħallas il-100%, jekk trid tkompli bil-proġett."*

- 7.18. Therefore, in the *Polaris Case*, notwithstanding that the offer submitted was lower than the estimated contract value, the fact that the contracting authority had lost the EU funds (equivalent to 70% or €210,000) was deemed sufficient to justify cancellation due to a change in financial parameters. The *Polaris Case* therefore related to a different ground for cancellation – change in economic parameters due to a change impacting the contracting authority not the tenderer.
- 7.19. In this case, the Complainant's offer is over budget – which, in and of itself, is sufficient for the Contracting Authority to cancel the Tender Procedure as expressly provided in the tender documentation as explained above. In addition, the Complainant's offer is more than €55,000,000 over budget. Therefore, if the Court of Appeal in the *Polaris Case* considered the contracting authority losing 70% of funds (equivalent to €210,000), due to no fault of the tenderer which submitted a compliant offer below the estimated contract value, to be material enough to justify cancellation by the contracting authority, more so is the Contracting Authority justified in this case to cancel the Tender Procedure where the offer submitted by the Complainant (due to only the Complainant's fault) exceeds the estimated contract value by €55,562,669.93 (or 69.30%).
- 7.20. There is nothing disproportionate in rejecting an offer which is disproportionately above budget. On the contrary, the Contracting Authority would have acted incorrectly if it accepted an offer which was so significantly higher than the estimate, an offer which the PPR and Classic Directive consider "**unacceptable**".
- 7.21. Indeed, awarding a contract to a tenderer which offered a price significantly higher than the estimate is effectively awarding a contract which is substantially different from that published in the Tender Procedure. In accordance with the principle of transparency, the Contracting Authority published the estimated contract value. The Contracting Authority has an obligation not to design the tender documents in a manner which artificially narrows down competition. Publishing an estimated contract value of circa €80,000,000 and then awarding the contract to a tenderer for over €135,000,000 would breach such principles and obligations.
- 7.22. By analogy, the PPR regulate modifications to existing contracts and consider substantial alterations to be prohibited since a substantial alteration to terms published at tender stage would be tantamount to awarding a new contract and, therefore, require a fresh tender process. A modification which is below (a) the thresholds (for works, threshold is €5,538,000), and (b) 15% of the initial contract value for works contracts, is permitted as long as it does not alter the overall nature of the contract.



- 7.23. If the modification rule set out above had to be applied by analogy to this case, the change in value exceeds both the threshold (by circa 10 times) and 15% of the initial contract value (by circa 4 times). It is therefore clearly not *de minimis*.
- 7.24. In addition, Regulation 246 of the PPR also regulates other modifications and in each case (it is pertinent to note that these apply in exceptional circumstances, such as for additional works which were not foreseeable), the PPR impose a cap on price increases of 50%.
- 7.25. Such rules on modifications regulate a completely different circumstances and are not relevant for accepting over budget tenders. However, it is useful to see that, even where there are exceptional circumstances (and these are interpreted very restrictively by the CJEU) which necessitate a modification to a contract, in no circumstances is an increase of more than 50% permitted since it is deemed to be too material to be done without a fresh tender process. It is also pertinent to note that in those cases, additional works are provided (therefore there is an additional benefit to the contracting authority).
- 7.26. In this case, there is no justification whatsoever to award the contract for a price which is so materially disproportionate to the Contracting Authority's published estimate.
- 7.27. The Contracting Authority therefore submits that it acted in full compliance with the principles of transparency, proportionality, equal treatment and non-discrimination.
- 7.28. The Contracting Authority's right to cancel a tender has been confirmed, consistently, by the CJEU.
- 7.29. In Case C-27/98<sup>19</sup>, the CJEU held that a contracting authority could cancel a tender process, and it can do so even if there are no exceptional circumstances for doing so. It stated as follows:

*"It follows that the contracting authority's option, implicitly recognised by Directive 93/37, to decide not to award a contract put out to tender or to recommence the tendering procedure is not made subject by that directive to the requirement that there must be serious or exceptional circumstances."<sup>20</sup>*

And:

*"It follows that, to meet the objective of developing effective competition in the area of public contracts, Directive 93/37 seeks to organise the award of contracts in such a way that the contracting authority is able to compare the different tenders and to accept the most advantageous on the basis of objective criteria such as those listed by way of example in Article 30(1) (see, to that effect, on the subject of Directive 71/305, Beentjes, cited above, paragraph 27).*

---

<sup>19</sup> Case C-27/98, *Metalmeccanica Francasso SpA, Leitschutz Handels- und Montage GmbH and Amt der Salzburger Landesregierung für den Bundesminister für wirtschaftliche Angelegenheiten*, 16 September 1999

<sup>20</sup> *Ibid.* Paragraph 25



*Where, on conclusion of one of the procedures for the award of public works contracts laid down by Directive 93/37, there is only one tender remaining, the contracting authority is not in a position to compare prices or other characteristics of various tenders in order to award the contract in accordance with the criteria set out in Chapter 3 of Title IV of Directive 93/37.*

*It follows from the foregoing that the contracting authority is not required to award the contract to the only tenderer judged to be suitable.”<sup>21</sup>*

*[emphasis added]*

- 7.30. Case C-92/00 HI<sup>22</sup>: In this case, the CJEU ruled that there is no implied obligation on contracting authorities to carry an award procedure to its conclusion<sup>23</sup>. The Court stated that contracting authorities must communicate the grounds for a decision to withdraw an invitation to tender, ensuring a minimum level of transparency and compliance with the principle of equal treatment. This judgment clarified the extent of discretion available to contracting authorities in cancelling tenders.
- 7.31. This Board has also had the opportunity, very recently, to decide a case on almost identical facts.
- 7.32. Reference is made to *Case 2073 – TWO 1/2024 - Tender for the Restoration of Terracotta Tiled Pitched Roofs and Its Timber Structure at Harmony, 1B, Triq Medjez, Pembroke & at St Andrew’s House, Flat 3, Triq il-Forti Pembroke, and the Restoration of the Parapet Walls with Reduced Environmental Impact*, decided by this Board on 11<sup>th</sup> February 2025 (“**Case 2073**”).
- 7.33. In Case 2073, the contracting authority received one bid. The estimated contract value was €66,095, and the tender received was over 50% more than the estimated contract value. The tenderer was notified with the cancellation as follows:
- “... tender has been cancelled in terms of Article 18.3 (a) of the General Rules Governing Tenders which states that cancellation may occur where the “tender procedure has been unsuccessful, namely where no qualitative tender has been received””*
- 7.34. The Contracting Authority argued that, based on the quoted reason – “no qualitative tender has been received” – and even though there was a typo since the letter did not include the words “financially worthwhile”, the sole tenderer surely must have noted that his bid cannot

---

<sup>21</sup> Ibid. Paragraphs 31-33.

<sup>22</sup> *Hospital Ingenieure Krankenhaustechnik Planungs GmbH (HI) and Stadt Wien*

<sup>23</sup> Ibid Paragraph 43



be sustained and that this tender would need to be cancelled since this only bid was more than 50% of the estimated contract value<sup>24</sup>. The Contracting Authority also argued:

*“So in bidding more than 50% over the estimated value the objector clearly knew that his bid would definitely not be 'qualitatively or financially worthwhile'. At the price quoted by this bidder, the required quality would have been twice that required or offered.*

*So it is incredible how the objector is expecting the Housing Authority to pay twice as much. Even if the Authority was not dealing with public funds still it would not have been ready to spend its funds in such a manner.”<sup>25</sup>*

- 7.35. The contracting authority also argued that the allegations made by the tenderer – that is, (a) that cancellation was unlawful and disproportionate, (b) that the tenderer should have been given an opportunity to be heard before cancellation, and (c) that the contracting authority had an obligation to ask the bidder to clarify / rectify his bid – are all unfounded.
- 7.36. This Board, in its decision regarding Case 2073, fully agreed with the contracting authority and rejected all of the objector’s grievances in a clear and unequivocal manner. It held:

*“• The Appellant’s bid exceeded the estimated tender value by more than 50%, thereby triggering the cancellation provision under Article 18.3(a), which permits cancellation when no “qualitatively or financially worthwhile” tender is received.*

*• In the Board’s view, invoking Article 18.3(a) to cancel the tender was justified and proportionate, given that the submitted bid was substantially above the estimated value.*

*• The Board observes, however, that the Contracting Authority could have been clearer by explicitly mentioning the 50% exceedance in addition to citing Article 18.3(a), which would have better conveyed the reasons for cancellation to the Appellant.*

*• Although the typographical omission and the lack of direct mention of the 50% exceedance may have reduced the clarity of the cancellation notice to the Appellant, the Board is of the opinion that cancellation itself was valid, justified, and in strict compliance with the General Rules Governing Tenders and the PPR.*

*Therefore, the Board does not uphold the Appellant’s grievance on this point. However, due to the drafting matter referred to above, it directs that the deposit paid by the Appellant be reimbursed.”<sup>26</sup> [emphasis added]*

And

---

<sup>24</sup> Case 2073, Page 4 thereof.

<sup>25</sup> Case 2073, Page 5 thereof

<sup>26</sup> Case 2073, Page 6



*"In the Board's view, the Contracting Authority's decision to invoke Article 18.3(a) was both justified and proportionate, given that the Appellant's bid significantly exceeded the estimated tender value."<sup>27</sup> [emphasis added]*

And

*"Based on the reasons given above, the Board does not deem that the tender cancellation is unlawful and disproportionate and that the evaluation board acted in a lawful and proportionate manner when cancelling the tender."<sup>28</sup> [emphasis added]*

- 7.37. Therefore, in a very recent case based on almost identical facts – save that (a) the amount was significantly less material, (b) the difference between the estimated contract value and the sole tenderer's offer was less significant in terms of percentage difference and insignificant in terms of monetary value when compared to the €55,000,000 difference of this case, and (c) the contracting authority in Case 2073 failed to provide the reasons for its decision (it failed to refer to offer as being not economically feasible, and failed to refer to cancellation due to no offer being financially worthwhile, both of which were provided by the Contracting Authority in this case) – this Board rejected all the arguments put forward by the objector (which arguments are almost replicated by the Complainant in this case).
- 7.38. All these decisions confirm that contracting authorities have significant discretion in deciding whether to proceed with a tender, provided they comply with transparency and equal treatment principles. In the case of a tender which exceeds (let alone by such a significant margin) the estimated contract value, this right is even more sacrosanct.
- 7.39. This Board has confirmed that rejecting a tender which is over budget is justified, lawful and proportionate, and in **strict compliance** with the General Rules Governing Tenders and the PPR (see Case 2073).
- 7.40. **It is submitted, with respect, that this first part of the third grievance should be rejected in its entirety since it is entirely unfounded, both in fact and at law.**

*B. Unwarranted disclosure of commercial sensitive information*

- 7.41. The Complainant appears to be arguing that the fact that its price was published when tenders were opened automatically on the ePPS means that the cancellation prejudices the Complainant.
- 7.42. The Complainant's claim is frivolous and vexatious. Had this argument to be accepted, it would mean that a contracting authority is precluded from cancelling a tender process if at least one

---

<sup>27</sup> Case 2073, Page 7

<sup>28</sup> Case 2073, Page 7



tenderer submits a tender, since once a price is published such right is lost. In every tender process the prices of tenderers are published.

- 7.43. It is also contradictory that the Complainant argues that its global price constitutes commercially sensitive information, but at the same time argues that the Contracting Authority should have sought further details about its price (see *First Grievance*, paragraph 50 above).
- 7.44. The General Rules expressly provide that tenders will be opened in public session through the ePPS (see General Rule 13) and that the Summary of Tender will be immediately available to view on [www.etenders.gov.mt](http://www.etenders.gov.mt), and:
- “At the tender opening session, the tenderers' names, the tender ID, and where applicable the tendered price will be published.”*
- 7.45. This provides tenderers, in accordance with the principle of transparency, with information about who their competitors for that tender are and where they stand in terms of financial offer.
- 7.46. The disclosure of the price was therefore expressly contemplated, and each tenderer knows, at submission stage, that its price will be published. This does not automatically result in the Contracting Authority losing its right to cancel the Tender Procedure, simply because it could prejudice the tenderer(s) whose price has been published.
- 7.47. The disclosure of the price is also expressly contemplated in the PPR (Regulations 71(2) and 110(1)).
- 7.48. The Contracting Authority does not contest that cancellation is a measure of last resort. However, such measure is more than justified where the only tender received is significantly over budget as is the case here (as also confirmed by the CJEU, this Board and the Court of Appeal).
- 7.49. The Complainant once again refers to case-law which is however irrelevant to this case, as explained hereunder.
- 7.50. The Complainant refers to *Cateressence Limited (C-49407) v. Ministeru tal-Intern u Sigurta' Nazzjonali; id-Dirrettur Generali (Kuntratti); u James Caterers Limited (C-30139)*<sup>29</sup>. This case related to a decision by this Board (not the contracting authority) to cancel a tender following a request by a tenderer to order the contracting authority to effect changes to the tender document (essentially, to include certain requirements). It is therefore completely irrelevant to this case, where the Contracting Authority is exercising an express right it has in terms of

---

<sup>29</sup> Appeal No 401/2019



the Tender Document and General Rules, and where the matter relates to an unacceptable tender (as defined in the PPR).

- 7.51. Similarly, the *Melchior Dimech v Ministeru għall-finanzi u Xogħol et*<sup>30</sup> case is based on entirely different facts. The appellant in that case, after being deemed technically non-compliant, objected before this Board requesting that the tender is cancelled because the offers had not been evaluated and awarded within the ninety (90) day validity period of tenders. This Board, whilst stating that its power to cancel the tendering process in terms of Regulation 90(3) of the PPR should only be exercised if it is in the best overall interest of the situation, concluded that cancellation was not justified. In addition, this Board noted that the General Rules do not require cancellation if the validity period lapses. The Court of Appeal agreed with this Board, concluding that the contracting authority / Director of Contracts had the right (discretion) to cancel a tender in such case not the obligation, and that it was correct in concluding that the failure to award by the end of the validity period was not sufficient to justify cancellation.
- 7.52. The cancellation in the present case is completely different – it is not because of some procedural deficiency, such as not awarding the contract within the period of validity (which, in terms of the General Rules, does not necessitate cancellation). On the contrary, it is for a very significant and material issue – that is, because the Complainant elected to submit an offer which by far exceeds the estimated contract value already known by the Complainant.
- 7.53. If the Complainant’s argument were to be accepted, cancellation could never occur once a tenderer’s price is published. This is of course not the case and neither of the cases referred to by the Complainant support this view (nor does the Tender Document, General Rules or PPR). Cancellation is permitted (and in some cases the best option, such as in this case for the reasons outlined above) as long as it is proportionate to do so. In the present case, it is definitely proportionate to do so given the excessive difference between the price of the Complainant and the estimated contract value.
- 7.54. Finally, the Complainant refers to anti-competitive conduct and breaches of competition law, stating these are prohibited under the Treaty on the Functioning of the European Union (the “TFEU”).
- 7.55. The Complainant however fails to explain how the Contracting Authority’s behaviour – that is, exercising its expressly reserved right to not pay more (in this case, €55,000,000 more) than it has budgeted for these works – constitutes a breach of the TFEU. This second part of the third grievance should therefore be rejected since the Complainant did not explain, clearly, the reasons for such grievance (as required in terms of the PPR and case-law of this Board, the Court of Appeal and the CJEU).
- 7.56. Without prejudice to the above, the cancellation of a tender because the only tender received is materially and disproportionately over budget is not anti-competitive; it is, as explained

---

<sup>30</sup> Appeal No. 429/2023/1

above, a right expressly recognized by the Tender Document, General Rules, PPR, this Board, the Court of Appeal and the CJEU.

7.57. **It is submitted, with respect, that this second part of the third grievance should be rejected in its entirety since it is entirely unfounded, both in fact and at law.**

**8. The Fourth Grievance: Refund of the deposit paid**

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

8.2. However, the Contracting Authority would not object to the refund of the deposit if the Objection is withdrawn. Indeed, the Complainant now has a detailed response and any doubt it may have had (which, as explained above, it should not have had) as to the basis for rejection should be resolved through this response. If it proceeds to maintain its Objection, then it should not be able to rely on the (unfounded) justification that no reasons / findings were disclosed to it to argue full refund irrespective of the outcome.

8.3. In addition, as explained above, the Complainant had a legal remedy it could have exercised if it did not consider the reason provided to be clear.

8.4. If the Complainant felt the need to obtain further information to understand why its offer was “economically not feasible” – that is, if this was not patently obvious to the Complainant given the difference of €55,000,000 / circa 70% between its offer and the estimated contract value – then it ought to have exercised its rights under the PPR.

8.5. The Complainant was notified, on 14 July 2025, of the reasons for rejection and cancellation. In terms of Regulation 242, the Complainant could have requested (and the Contracting Authority would have had an obligation to, as quickly as possible and in any event within fifteen days from receipt), information relating to the “*reasons for the rejection of its request to participate*”.

8.6. The Contracting Authority would have provided any necessary clarifications immediately and would have avoided unnecessary delays in the project. The Complainant however chose not to exercise its right to obtain such information and instead used this as a (baseless) justification for refunding the deposit, irrespective of the outcome of these proceedings.

8.7. Finally, the case quoted by the Complainant – *Borg Bros v. Ministeru għall-familja u Solidarjeta’ et* – is once again irrelevant for the purposes of this present case. In that case, the cancellation was due to “*the economic or technical parameters of the project*” having been altered. The contracting authority had to therefore explain what economic or technical parameters were altered for the contracting authority, so that the tenderer could make an informed decision as to whether to file the objection or not. The cause of cancellation was therefore attributable to a change in circumstances pertaining to the contracting authority, unlike the offer submitted



CAMILLERI PREZIOSI  
ADVOCATES

not being economically feasible / financial worthwhile (which is attributable to the tenderer's actions – its offer – and not a change in circumstances of the contracting authority).

- 8.8. This is of course not the case here, for the reasons outlined above. The reference to the Complainant's offer being "economically not feasible" could have not meant anything other than the offer being (significantly) in excess of the estimated budget for this project.

**9. Conclusion**

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

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

Yours faithfully,

Steve Decesare

Ron Galea Cavallazzi

Stefan Cutajar