

PUBLIC CONTRACTS REVIEW BOARD

Appeal Reference Number 2128
Tender Reference Number SPD4/2024/066
Tender Name **Specific Contract for the Provision of a Customer Relationship Management (CRM) Software including Maintenance and Support Services for Agenzija Sapport**

The Public Contracts Review Board (hereinafter the 'Board' or the 'PCRB') convened a public hearing on the 1st July, 2025 to hear the appeal as filed by the appellant Webee Limited (hereinafter the 'Appellant') on the 14th April, 2025, and after taking cognisance of:

The tender document for the 'Specific Contract for the Provision of a Customer Relationship Management (CRM) Software including Maintenance and Support Services for Agenzija Sapport' (hereinafter referred to as the "Tender Document");

The minutes of the proceedings dated 1st July, 2025 which are being reproduced hereunder:

"PUBLIC CONTRACTS REVIEW BOARD

Case SPD4/2024/066 – Specific Contract for the Provision of a Customer Relationship Management (CRM) Software including Maintenance and Support Services for Agenzija Sapport.

The tender was issued on the 5th of December 2024, and the closing date was the 3rd February 2025.

The estimated value of the tender, excluding VAT, was €78,400.00.

On 14th April 2025, Webee Limited. (MT2139-7530) lodged an appeal against Agenzija Sapport and Department of Contracts. – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant's bid was disqualified. A deposit of €400.00 was paid and there were six bids.

On the 1st July 2025, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas as Chairperson, Mr Lawrence Ancilleri, and Mr. Keith Victor Grech as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: Webee Limited. (MT2139-7530)

- Dr Zack Esmail – Legal Representative.
- Mr. Roderick Bartolo – Company Representative.
- Mr. Calvin Briffa – Company Representative (online).

Contracting Authority: Agenzija Sapport

- Dr Herman Mula – Legal Representative.
- Ms. Donalise Ellul – Chairperson.
- Mr. Paul Formosa – Secretary.
- Mr. Kenny Muscat – Evaluator.
- Mr. Kurt Borg – Evaluator.
- Ms. Stephanie Etim Grech – Procurement Manager.
- Ms. Alison Attard – Company representative.

Department of Contracts.

Dr Mark Anthony Debono – Legal Representative

Recommended Bidder: Ixead Ltd. (C105530)

- Mr. Joseph Cilia - Company Representative.

Opening Statements

Dr Ana Thomas, Chairperson of the Public Contracts Review Board, welcomed the parties and invited the appellant's legal representative, Dr Zack Esmail, to present his initial submissions.

Initial Submissions.

Initial Submissions by the Appellant

Dr Zack Esmail, legal representative for Webee Limited, began by stating that the appeal is based on a single issue, which can be broken down into three related grievances, all pertaining to the requirement of a maintenance proposal. A clarification request had been sent to Webee Ltd., which the company duly answered.

- The first grievance is that the clarification was in fact responded to, satisfying the requirements set by Agenzija Sapport.
- The second grievance concerns the fact that the maintenance proposal is a condition related to contract performance. He referred to the *Joe Micallef* case, which holds that a party cannot be penalised for an obligation that is already governed by specific contractual mechanisms. Penalties apply only upon failure to meet those contractual requirements.
- The third grievance relates to the principle of proportionality. Dr Esmail indicated that several legal judgments will be referenced to support this point.

Dr Ana Thomas summarised the appellant's position: the clarification was answered, and the requirement in question constitutes a performance condition.

Initial Submissions by the Contracting Authority

Dr Herman Mula, representing Agenzija Sapport, stated that the three grievances all relate to the required maintenance proposal. The requirement was clearly stipulated as a condition for the tender, and non-compliance carried consequences. Witnesses would later explain that this proposal was not an optional or additional document, but rather fundamental to the service being tendered.

Dr Mula stressed that the clarification received from the appellant—where it was indicated that key experts would handle maintenance—was insufficient. The proposal was supposed to address maintenance guarantees, frequency of support, and other essential service elements. Since the contract involves an evolving IT service, these details are vital.

He further argued that the jurisprudence cited by Dr Esmail is not applicable. Instead, Agenzija Sapport referenced other relevant cases that supported their position. Regarding proportionality, Dr Mula maintained that the committee acted within its bounds. Accepting a non-compliant bid would have been unfair to other bidders who followed all requirements.

Initial Submissions by the Department of Contracts

Dr Mark Anthony Debono, on behalf of the Department of Contracts, stated that the Evaluation Committee was limited by procedural constraints and could not revisit matters already addressed.

- On the second grievance, he pointed to Clause 262, which allows for remedies to be sought if there were objections to performance conditions.
- Regarding the third grievance, proportionality, he concluded that the committee had no alternative but to exclude the appellant's offer.

Witness:

Mr Kurt Borg (ID 361492M) – Summoned by Dr Zack Esmail

Mr Borg, the technical evaluator on the committee, confirmed the composition of the Evaluation Board. He explained that the committee met twice and reviewed all submissions in detail.

Referring to Section 1, Article 7 of the Technical Specifications (Pg. 5), he stated that as an IT evaluator, he expected the following from the maintenance proposal:

1. A mechanism for ensuring timely system upgrades.
2. A procedure for reporting issues, their severity, and resolution times.
3. A schedule for annual updates requiring planned service downtimes.
4. Contact information for support, particularly important as the service would support 10 internal staff and 5 users with disabilities.

These expectations were listed in Section 3 (pages 10–11) of the Terms of Reference. The evaluation criteria included a service-level agreement (SLA) categorising issues by criticality.

In response to Dr Esmail's question about where these details were specified in the documents, Mr Borg clarified that Appendix C served as a template, and it was expected that bidders would build their maintenance proposal on that basis. They also expected bidders to include email contacts for support.

'The contractor is to provide maintenance and support services for 12 months'.

A bidder could have included other things that were not requested. 'Not limited to' in their contracts.

Cross-Examination by Dr Herman Mula

Mr Borg emphasised three main components: Corrective Maintenance, Help Desk Support, and Preventive Upgrades. He underscored that the proposal needed to be a standalone document to serve as a reference in the event of contractual issues. The clarity and structure of this report had a direct impact on evaluation outcomes.

Mr Roderick Bartolo (ID 66687M) – Summoned by Dr Zack Esmail.

Mr Bartolo identified himself as an engineer with an MBA, additional certifications in software development, and 12 years of experience as the owner of Webee Ltd. He explained the role of Customer Relationship Management (CRM) software in managing client data securely and efficiently. He confirmed that Webee's submission complied with all the tender's prerequisites and that the company's key experts were in place.

Final Submissions

Final Submissions by Dr Zack Esmail

Dr Esmail opened with the second grievance, reiterating that the maintenance requirement is a contract performance condition. He referred to Clause 3.5, which states that the contractor is required to provide maintenance and support services for 24 months. Non-performance would incur penalties, confirming this is a performance obligation.

Regarding the first grievance, he stressed that Webee provided assurances that maintenance would be handled by its key experts. He argued that there is a disconnect between what is written in the tender and what the evaluators *expected*. Bidders cannot be held responsible for assumptions or expectations that were not explicitly stated in the documents. The requirement did not dictate a specific format or structure for the maintenance proposal.

On the third grievance, Dr Esmail referenced the principle of proportionality, noting that both this Board and the Court of Appeal have upheld that not every omission or irregularity should lead to exclusion.

At this point, The Chairperson intervened and asked Dr Mula to clarify if the prescribed response format and the tender preparation tool was a requested part of the tender, or if they referred to it on the ePPS.

Dr Mula remarked that it was written on the clarification and pointed to where it could be uploaded.

Final Submissions by Dr Herman Mula

Dr Mula reiterated that Mr. Borg's testimony confirmed all their arguments, when he mentioned the utmost importance of this type of tender, with an ad hoc report to help the committee to evaluate. This was not something that could be curtailed, because it was to be safeguarded with an obligation in the contract when it is awarded to the preferred bidder. Given the vulnerable end-users involved, especially individuals with disabilities, this ad hoc was more specific, as they needed an effective maintenance and response.

The evaluation committee needed this report to be able to evaluate the best bidder.

Final Submissions by Dr Mark Anthony Debono

Dr Debono supported the assertion that the importance of the maintenance proposal was evident. A technically competent bidder with 12 years of experience should have been able to meet this requirement. He cited Regulation 39, which binds the evaluation committee to decisions based solely on written submissions.

He further explained that Regulation 16 of the General Rules Governing Tenders obliges the committee to strictly follow the written tender documents and procedures. Allowing post-submission amendments would have undermined the fairness of the process.

Concluding Remarks by Dr Zack Esmail

Dr Esmail remarked that he appreciates the work done by the Agency. A lot has been said about quality, however, this tender is cheapest compliant not best price quality ratio. Since Webee was the cheapest and ticked all the boxes, the committee could not mention quality.

The maintenance proposal was not BPQR but the cheapest compliant. The way the tender was drafted by the Contracting Authority could not be reviewed. The rules of the games cannot be changed at this stage.

Dr Thomas asked if there was a contestation regarding the cheapest offer. Nobody objected.

Conclusion of the Hearing

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

The written pleadings as filed by Webee Limited on the 14th April, 2025, together with proof of payment of a deposit in the amount of €400, wherein it held as follows:

*"Whereas, this is an objection, being filed by **Webee Limited** [TID 221658] (hereinafter 'Webee' and/or "Appellant"), in accordance with regulation 270 of S.L. 601.03 of the Laws of Malta.*

*Whereas **Webee** participated in the tender with number SPD4/2024/066, together with other economic operators, following a call by the Department of Contracts (hereinafter "**DOC**") on behalf of the Contracting authority Agenzija Support.*

Whereas, by means of a letter of rejection dated 4th April 2025, Appellants where informed that that their offer was being rejected;

"Thank you for participating in the above-mentioned tender procedure. We regret to inform you that the offer submitted was not technically compliant."

Whereas, the Appellants feels aggrieved by the decision, and is thereby submitting its objection within the time-frame and accompanied with the relative payment, based on the following grievances:

1. **Wrong evaluation: Appellants offer is compliant – Clarification Request Addressed**

- 1.1 *It is the submission of the appellants that, the rejection of its bid is unfounded and should be declared null and void. The DOC in its rejection letter held that:*

“The main reason why your procurement proposal was non-compliant is as follows:

As per Section 1, Article 7. Selection and Award Requirements, (A)(ii)(2) Economic Operators were requested to upload the Maintenance Proposal.

During Evaluation, your company could not establish where the Maintenance Proposal was submitted in the offer. Since the Maintenance Proposal falls under note 3 which states that "No rectification shall be allowed. Only clarifications on the submitted information may be requested", your company was given the opportunity via a clarification to clarify position by indicating where the Maintenance Proposal was submitted in the offer.

Your company replied prior the stipulated deadline by stating that the maintenance and support services as specified in Appendix C of Doc. C – Letter of Engagement and in Section 3.5 of the Terms of Reference in Doc. B are fully incorporated within the offer through the Key Experts Form that was submitted.

The Evaluation Committee considers that the Key Expert form submitted entails to the experience and qualifications of each key expert and not about the maintenance requested in the tender document. Furthermore, there is no mention of Corrective Maintenance, Help Desk, Preventive Maintenance, Software and Computing Resources Upgrade and Support Services which every bidder required to corroborate and submit all as listed under Art. 3.5 of Section 3 - TOR and Art. 7 Selection and Award Requirements.

.....

For the above reasons the Evaluation Committee deems the offer as not technically compliant, and it should not be considered any further.”

- 1.2 *The Appellant submits that the clarification request was indeed addressed, clearly confirming that the requirements of the maintenance proposals are fully incorporated within the Appellant’s offer through the Key Expert Forms;*
- 1.3 *The appellant confirmed by way of its clarification that specific individuals outlined in the Key Expert Forms addressed all maintenance requirements as per the contractual requirements of the Tender and thereby any doubts that the Evaluation Committee may have had, have been addressed fully by the clarification reply given by the Economic Operator.*
- 1.4 *The appellant, both in its original submissions and once again through the confirmation provided as per the clarification reply ascertained beyond any doubt that it shall fully adhere to all maintenance which must be carried out as per the tender document. Thus*

the evaluation committee should have been comfortably satisfied that the works shall be conducted in accordance with the timeframes imposed.

- 1.5 *Section 7 [Selection and Award Requirements] Section A (1) clearly shows that the tenderer confirms fully and entirely the Mandatory General Requirements, which clearly includes all maintenance requirements, stating that:*

*Participant's confirmation that the participant has examined, **and accepts in full and in its entirety, the content of the Mandatory General Requirements detailed in document named Document B- Mandatory General Requirements found under the CfT documents in ePPS** (including any amendments made through subsequent Clarifications Notes issued by the Contracting Authority) without reservation of restriction.*

- 1.6 *This therefore means that the Evaluation Committee was wrong to reject the appellant's offer.*
- 1.7 *In view of the aforesaid, Appellants are hereby requesting this Honourable Board, to uphold its grievance, since the evaluation committee has done a wrong evaluation of its bid.*

2. Criteria as contract performance conditions

- 2.1 *On a strictly without prejudice basis, the criteria on which the DOC/Contracting Authority is basing itself to oust the bid of the economic operator is a contract performance condition and thus should never lead to an exclusion. This is because the economic operator once chosen for the bid would be contractually obliged to deliver all required maintenance and as such should not be penalised at evaluation stage.*
- 2.2 *Reference is hereby being made to Document C of the Tender Dossier [Letter of Engagement] clearly stating that the Preferred Bidder shall be responsible for the 'maintenance and support services to meet or exceed the service levels as detailed in Appendix C [Maintenance and Support Services]'. This re-affirms that the preferred bidder will unequivocally commit to all maintenance and support services.*
- 2.3 *Clauses 10,11 and 12 of Document C [Letter of Engagement] also makes reference to instances whereby the Supplier fails to comply with the maintenance as per the Tender requirements and as such Contracting Authority shall impose penalties should the necessary maintenance not be provided.*
- 2.4 *The concept of Performance Related Criteria was confirmed in the judgment in the names of **Joe Micallef & Son Express Skip Services Ltd v. Id-Direttur tal-Anzjani u Kura fil-Komunita**¹*

'Inoltre, il-ligi trid li min ikun involut fi trasport ta' merkanzija perikoluza jkollu imqar persuna wahda li jkun konsulent bi-certifikat DGSA. Dan ifisser li biex l-appellat Saviour Mifsud ikun konformi mal-ligi jrid jizgura li

*jabtar konsulent tas-sigurta` ghat-trasport li jkollu dan ic-certifikat. Mhux mehtieg li dan Saviour Mifsud personalment ikollu dan iccertifikat, izda li jabtar konsulent b`din il-kwalifika. Din kwisjoni, pero`, li tolqot l-esekuzzjoni tal-kuntratt, u kif intqal mill-Qorti Suprema tal-Kanada fis-sentenza **Double N Earthmovers Ltd. v. Edmonton (City)**, decizja fil-25 ta` Jannar, 2007 (kaz 2007 SCC3), li kienet tikkoncerna wkoll garr ta` skart, "to impose a duty on owners to investigate whether a bidder will comply with the terms of its bid would overwhelm and ultimately frustrate the tender process by creating unwelcome uncertainties. ... **Whether or not the bidder is at the time of tender, capable of performing as promised is irrelevant in the light of the bidder's legal obligation to do so once its bid is accepted.**"*

- 2.5 *This principle has also be re-affirmed in a recent PCRB decision dated 2nd April 2025, in the names of **Carmelo Stivala Group versus Malta Strategic Partnerships Projects Limited**, whereby it was inter alia held that:*

"The appellant submits that the criteria concerning Key Experts should be understood as contract performance conditions and, as such, should not be used as a basis for exclusion during the evaluation stage. The appellant argues that such criteria are intended to ensure the successful performance of the contract once awarded, rather than as a criterion for evaluating the technical compliance of the bid itself. Since the required documentation for Key Experts was not requested at the tender stage but only after contract award, the appellant maintains that exclusion based on this non-submission is a disproportionate sanction.

...

*The Board acknowledges that the qualifications and certificates of Key Experts are critical to the performance of the contract. **However, the Board agrees with the appellant that these requirements should not have been a basis for excluding the tenderer during the evaluation stage"***

[added emphasis]

- 2.6 *Thus and thereby, and in line with settled judgments, the performance of a contract should not fall within the competence and scope of the evaluation committee, and thereby any exclusion based on such premise is not justified.*

3. Proportionality

- 3.1 *Without any admission of non-compliance, the principle of proportionality has always been interpreted as a principle which cannot create an imbalance between the rights of the entity invoking it and the rights of third parties – The principle which seeks to create a balance between competing interests.*

- 3.2 *In this case, the Appellant's, whilst still holding that there are no breaches, any such alleged breach is negligible – they do not in any manner impinge on the rights of others, or worst still, they do not create any advantage whatsoever to the Appellant's - **the Appellant's is for all intents and purposes fully compliant!***
- 3.3 *The principle of proportionality was inter alia invoked by the Court of Appeal, in the case **Fire-tech Limited (C17901) u Cross Zlin AS (60715886) flimkien maghrufa u msejha bhala Firetech Cross TLS Joint Venture v. Dipartiment tal-Kuntratt**², wherein it held that not all breaches of the tender specifications should lead to exclusion, in fact it held that:*

*“Għalkemm huwa minnu illi, biex tithares it-trasparenza u ma jkunx hemm diskriminazzjoni, ir-regoli għandhom jitharsu b’mod uniformi u prevedibbli, u s-sogġettività u d-diskrezzjonalità jtnaqqsu kemm jista’ jkun, **madankollu l-principju ta’ proporzjonalità jrid illi mhux kull nuqqas ikollu l-istess konsegwenza, iżda din għandha tiddependi mill-gravità tan-nuqqas u mill-konsegwenzi tiegħu, partikolarment jekk jaghtix vantaġġ lil min jonqos jew johloqx preġudizzju lil oblaturi oħra**”*

[added emphasis]

- 3.4 *The same has been confirmed in the case in the names of **Cassar Petroleum Services Limited vs Gozo Channel Limited u d-Direttur tal-Kuntratt**³, wherein it was held that:*

“Għalkemm din is-silta hija dwar legiżlazzjoni, tghodd ukoll għal miżuri ta’ implimentazzjoni u decizjonijiet mebudha tahtom. Din il-Qorti għalhekk tagħraf illi għandha qabel xejn tara x’inbu l-għan enlieni tas-sejba għall offerti ghax ma dan għandha tkejjel il-proporzjonalita tal-miżuri meduha biex jinkiseb. Fil-każ tal-lum l-għan enlieni kien illi Gozo Channel tixtri n-nafta bl-orhos preżż.

*Ma’ humiex sejr in jinkisru l-principji tat-trattament ugwali, l-principju ta’ għarfien reciproku u l-principju tat-trasparenza jekk, bla ma jimbidlu l-kundizzjonijiet tal-offerta nfisha, **jinghata zmien biex jingieb id-dokument illi, forsi bi zvista ma tqeghidx mad-dokumenti tal-offerta, waqt li certament ma jkunx qieghed jithares il-principju tal-proporzjonalita jekk offerta vantaggjuza tigi mwarba ghax ma’ ngibx dokument li għad jista jingieb**”*

[added emphasis]

- 3.5 *Thus and thereby, the Appellants, based on the principle of proportionality and without prejudice to any other grievance herein defined, the Appellant is respectfully asking this Honourable Board to determine that the decision of the defendants, or whosoever, is not proportionate and thus in breach of inter alia reg. 39 (1) of S.L. 601.03.*

² -Gimgha 30 ta' Ottubru 2015 Numru 18 Rikors Numru 281/2015

³ 362/2014/1

NOW, THEREFORE, whilst reserving the right to put forward any other submissions, the Appellants are hereby requesting this Honourable Board to:

- i. To order the defendants, or whosoever of them, to revoke the letter dated 4th April 2025 and cancel the recommended award to the recommended tenderer; and*
- ii. To order the defendants, or whosoever of them, to re-instate the offer of the Appellants, and to re-evaluate the bids by a newly composed evaluation committee; and*
- iii. To refund the deposit paid by the Appellants in its entirety; and*
- iv. To do anything else which is conducive and necessary for the proper execution of the above requests;*

Appellants are hereby reserving the right to present further evidence and submissions, during the hearing. Additionally, Appellants are hereby reserving the right to submit additional grievances, and undisclosed information provided.”

The joint written reply as filed by Agenzija Sapport and the Department of Contracts on the 22nd April, 2025 (hereinafter the ‘Contracting Authority’) wherein it held as follows:

“Facts

A call for tenders for the Provision of a Customer Relationship Management (CRM) Software including Maentenance and Support Services for Agenzija Sapport was issued.

The offer submitted by the Appellant was rejected since it was deemed as not technically compliant with a reasoned decision by the Sectoral Procurement Directorate dated the 4th April 2025.

Agenzija Sapport and DoC humbly submit that they disagree with the grievances raised and are hereby presenting their submissions in reply.

1. First Greivance: “Wrong Evaluation: Appelants offer is compliant – Clarification Request adressed”

As regards this first greivance the appellant is claiming⁴ that both in its original submissions and again through the clarification note submitted, ascertain beyond any doubt that the appellant fully adhered with all maintenance which must be carried out as per the tender document.

*Whereby the respondent points out that the clarification requested was for the appellant to indicate “by way of clarification” where in its offer it uploaded a maintenance proposal quoting the tender document at Section 1, Article 7. Selection and Award Requirements, (A)(ii)(2) where Economic Operators were **requested to upload the Maintenance Proposal.***

⁴ Section 1.4 of the Appeal

Whereby in its clarification reply, the appellant clarified that the maintenance proposal was included in the Key Experts form which included various categories of maintenance and the experts who would be duly performing such maintenance.

Whereby as rightfully indicated in the reasoned decision delivered in the 4th April by the Evaluation Committee, the Key Expert form submitted entails to the experience and qualifications of each key expert and not about the maintenance requested in the tender document.

Whereby from this it follows that a maintenance proposal, as indicated by the Evaluation Committee should have been an ad hoc document outlining also: Corrective Maintenance, Help Desk, Preventive Maintenance, Software and Computing Resources Upgrade, Support Services and also outlining a maintenance service schedule, describing in detail the scope of such maintenance service including inter alia the methods for routine/preventive maintenance, record keeping, compliance checks and emergency 24/7 response.

Whereby in addition, the Evaluation Committee, further clarified in its decision that such ad hoc "maintenance report" had to be uploaded "together with the "GDPR Questionnaire", 'Key Expert Form and Declarations' and 'Document A - Fees Schedule as a Zipped Folder under the "Financial Section" through the prescribed Tender Response Format and by using the Tender Preparation Tool provided."

Whereby the above makes it more than evident that the decision of the Evaluation Committee to rule the offer of the appellant as not technically compliant was fair, justified, legal, and inevitable.

In view of the above this grievance ought to be rejected.

2. Second Greivance: Criteria as contract performance conditions

As regards this second greivance the appellant is, strictly upon a without prejudice basis, contending that the same appellant could't have been ruled as technically non-compliant since the obligation for providing mainitenace would have been borne upon the appellant once winning the bid and signing the contract agreement.

Whereby in this regard it is paramount to quote Regulation 62 of the Public Procurement Regulations (SL 601.03) which with regards to having a "valid bid" stresses the following:

"62.(1) Without prejudice to Part VI and regulation 235(2), the authority responsible for the tendering process must ensure that an economic operator must ab initio be eligible to qualify for a tender and must consequently be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of the same.

(2) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit.

Provided that such requests are made in full compliance with the principles of equal treatment and transparency.

(3) The financial bid cannot be changed with the exception for the correction of evident arithmetic errors as may be allowed in the procurement document.”

Whereby the procedure undertaken by the Evaluation Committee was in total compliance with the above quoted regulation, with particular reference to sub-article (2) which states that the Authority ‘may’ request for clarification, which in fact in this case it did.

Whereby the clarification was requested since the appellant was clearly not in line with the regulation above quoted, whereby the appellant clearly failed to submit important documentation (the maintenance proposal) requested on pain of non-compliance by the same tender document. The latter is rightfully mentioned since in this second grievance the appellant is clearly contending that the omission by the same appellant was not on pain of non-compliance, which reasoning is in the humble opinion of the respondents incorrect, since – as rightfully quoted by the Evaluation Committee in the reasoned decision delivered on the 4th April – the maintenance proposal fell under note 3 which stressed that no rectification was allowed with regards to the maintenance proposal and only clarification, which direction clearly highlights the paramount importance of the maintenance proposal.

Whereby additionally, the appellant reinforces his reasoning by quoting Clauses 10-12 of Document ‘C’ (Letter of Engagement) which are contractual safeguards in the eventuality where the winning bidder fails to comply with the maintenance conditions agreed in the eventual contract governing the service. The latter does not in any way nullify the obligation upon the bidder to submit what is requested from it (i.e. the maintenance proposal and on pain of non-compliance).

Whereby with regards to the jurisprudence quoted by the appellant namely in:

“Joe Micallef & Son Express Skip Services Ltd v. Id-Direttur tal-Anzjani u Kura fil-Komunita” is referring to the case where a bidder does not show enough qualifications qualifying it up to the task to perform the duties in the service being tendered for. This in the humble opinion of the respondents is not the same reason upon which the appellant was refused, as the refusal was tantamount to technical non-compliance. In Maltese Public Procurement (and generally in EU procurement): If a tender calls for strict technical compliance (as in this case where it was clearly requested on pain of non-compliance to submit a maintenance proposal), then any technical non-compliance, and this obviously includes not submitting a whole document, should lead to rejection. This reasoning is upheld in the following jurisprudence:

- ***Technoline Ltd. vs Central Procurement and Supplies Unit (PCRB Appeal: 2268/2018):*** *“It is a logical circumstance that, the fact that the Contracting Authority has in its possession the samples, is proof enough that these were submitted by the Appellants and such samples do not show the manufacture’s name and details. In this regard, it is obvious that the samples submitted by Appellants were not the proper ones and the Evaluation Committee could not ask for a clarification as otherwise they would have breached the basic principle of equal treatment and transparency...”*

...It was clearly proven by the Authority that, the samples received were not according to what was requested in the tender dossier and did not satisfy the objective for which they were requested.”

Whereby in addition, the appellant quotes Carmelo Stivala Group Vs. Malta Strategic Partnerships Projects Limited which stated that the key expert criteria should not be taken as a basis for excluding a tender bid. This in the humble opinion of the respondents absolutely strikes away from the circumstances of this appeal, as the exclusion was not tied to the key expert criteria, but rather to a technical proposal which had to be drafted and submitted independently from the key expert criteria. In fact, the respondents strongly opine that the Evaluation Committee was perfectly correct in stating that the clarification submitted by the appellant explaining that the maintenance proposal should be inferred from the key expert criteria is not acceptable and absolutely unclear as it does not satisfy the requisites entailed by the maintenance regime listed in Document C (letter of engagement).

Whereby the above reasoning based on facts clearly shows that the maintenance proposal was a crucial document to be inserted by the appellant and that the decision taken by the Evaluation Committee to decalare the bid by the appellant as technically non-compliant was legally correct.

In view of the above this grievance ought to be rejected.

3. Third Greivance: Proportionality

As regards this third greivance the appellant is caliming that the Evaluation Board was not in line with Regulation 39(1) of SL 601.03 which Regulation states the following:

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

Whereby the respondents do not agree with the weighting given by the appellant to the omission of the appellant of not submitting the maintenance proposal by claiming unproportionality in the decision by the Evaluation Board.

Whilst the respondents agree with the jurisprudence quoted⁵ by the appellant upon this matter, which jurisprudence inter alia states that not all defaults by bidders should incur a consequence of exclusion, and that it ought to depend upon the gravity of such default to have such exclusion justified, the respondents claim that the omission committed by the appellants was a crucial technical shortcoming which was requested by the tender under pain of non-compliance. The latter is evident in view of the fact that no rectification was permitted upon this matter, since the rectification option, in this case would have clearly been in discrimination with other bidders. From this it follows that such omission from the appellant was a grave shortcoming which could lead to no other way but the technical non-compliance, and thus exclusion of the bid of the same appellant. In view of the above, the greivance made by the Appellant ought to be rejected.

Therefore, whist reserving the right to make further submissions and to present evidence, both written and oral, in furtherance to this reply, the Contracting Authority humbly submits that the appeal lodged by the Appellant ought to be rejected in full, whilst the decision of the Contracting Authority and the Evaluation Board ought to be confirmed. The relevant deposit is to be forfeited.”

⁵ Fire tech Limited Case

The opening and closing submissions of the Appellant and the Contracting Authority as delivered by their legal representatives;

Considers;

This Board notes that the Appellant has brought forward three (3) grievances, the first relating to the fact that the Appellant replied to the clarification sought by the Tender Evaluation Committee during the tender process, the second and without prejudice to the first that the Maintenance Proposal is a performance condition, and the third is based on alleged lack of proportionality.

A. The Appellant's Reply to the Request for Clarification

The Appellant on the one hand argues that the Maintenance Proposal mentioned in the tender document was not required *per se* and the Contracting Authority on the other hand argues that the Maintenance Proposal was required as a stand alone document as per the Tender Document and that it was a fundamental document. When the Tender Evaluation Committee requested a clarification as to where the Maintenance Proposal is found within the Appellant's bid, the Appellant's reply was that it was incorporated in the Key Expert Forms submitted.

When testifying, Mr Kurt Borg who was an evaluator in this tender process confirms under oath that the Maintenance Proposal was required as a standalone document and that it was expected to feature three (3) main components, that is, Corrective Maintenance, Help Desk Support, and Preventive Upgrades.

This Board considers that it is necessary to note the requirements for technical specifications as requested in this Tender Document, namely Point 7 (A) as found on Pages 5, 6 and 7 of the Tender Document. When it came to "Technical Specifications" it clearly results that under point (ii) the Contracting Authority required a technical offer which was to include the following:

- (1) "Filled-in Key Experts Form the Statement of Availability Form, the Self-declaration form for Key Experts (relating to public employees) and CVs ^(Note 2)"
- (2) "Maintenance Proposal ^(Note 3)"

It is therefore, amply clear that the Maintenance Proposal was required as a separate, standalone document in the submission of bids. Furthermore, the Sectoral Procurement Directorate within the Department of Contracts ensured that this is clear by publishing Clarification Note No.2 dated 10th January, 2025 where it stated as follows:

"Question 4: Upload Maintenance Proposal Document – Can you please advise where the Maintenance Proposal document needs to be uploaded within the ePPS portal?"

*Answer 4: **The Contracting Authority clarifies that the Maintenance Proposal Document is to be uploaded together with** the 'GDPR Questionnaire', 'Key Expert Form and Declarations' and 'Document A – Fees Schedule' as a Zipped Folder under the "Financial Section" through the prescribed Tender Response Format and by using the Tender Preparation Tool provided."*

Therefore, after having reviewed the Tender Document as a whole including the second clarification note issued by the Department of Contracts well before the deadline for bids, this Board deems that there was no room for interpretation – the Maintenance Proposal was required as a separate

document, and that the Key Expert Forms and information contained therein were not to be considered in lieu of a Maintenance Proposal.

On this point this Board refers to the judgment in the names “**Trackwell FiMS noe vs. Id-Direttur Ġenerali tal-Kuntratti et**” delivered by the Court of Appeal in its Superior Jurisdiction on the 13th March, 2025, also referred to by the Contracting Authority in its submissions, wherein the Court’s considerations were as follows:

“43. Issa filwaqt li huwa kollu minnu li bemm sentenza ta’ din il-Qorti li huma fis-sens, li l-offerent m’ghandux jiġi skwalifikat fuq in-nuqqas tal-ghotja ta’ xi taghrif mitlub fid-dokument tas-sejha, **jekk kemm-il darba l-kumitat ta’ evalwazzjoni jkun jista’ jikseb dak it-taghrif minn xi parti ohra tad-dokumenti li jiġu sottomessi bhala parti minn dik l-offerta** (ara f’dan is-sens *Bonnici Bros Projects Ltd et v. Ministeru Ghas-Sabha et moghtija mill-Qorti tal-Appell fit-30 ta’ Lulju, 2018, u Rockcut Limited v. Id-Direttur Ġenerali tad-Dipartiment tal-Kuntratti et moghtija mill-Qorti tal-Appell fit-25 ta’ Ġunju, 2018*), **fl-istess waqt, huwa daqshekk iehor maghruf sewwa fil-ġurisprudenza, li meta r-regolamenti tas-sejha jitolbu b’mod espress ċertu tip ta’ dokument, dak id-dokument ghandu jinghata bil-mod ta’ kif ikun mitlub, u dan sal-gheluq taż-żmien għall-offerti** (ara f’dan is-sens: *Derek Garden Centre Co Ltd v. Direttorat għall-Akkwist Settorjali et moghtija mill-Qorti tal-Appell fit-30 ta’ Lulju, 2024 u Melchiore Dimech v. Ministeru għall-Finanzi u x-Xoghol et moghtija mill-Qorti tal-Appell fit-30 ta’ Novembru, 2023*).

44. **Kemm hu hekk, inghad kemm-il darba li hija fir-responsabbiltà ta’ kull offerent li jobdi l-kundizzjonijiet tas-sejha bhala «a reasonable well informed and normally diligent tenderer», u għalhekk, galadarba r-regoli tas-sejha inkwistjoni kienu jimponu fuq l-offerenti l-obbligu li jressqu kopja tal-kontijiet finanzjarji ghas-snin 2020, 2021, u 2022, Trackwell kellha tiżgura li tressaq id-dokumenti finanzjarji tagħha għal dawn it-tliet snin shaħ u mhux għal sentejn minnhom biss** (ara f’dan il-kuntest *Attard Farm Supplies Limited v. Korporazzjoni ghas-Servizzi tal-Ilma moghtija mill-Qorti tal-Appell fit-29 ta’ Anwissu, 2023*). **Fis-sewwa, ir-regoli tassejha għalhekk qegħdin hemm, u sewwasew sabiex jiġu mharsa u mhux biex jiġu mwarra** (ara *Legacy Ventures Limited v. Direttur Ġenerali tal-Kuntratti et moghtija mill-Qorti tal-Appell fit-30 ta’ Lulju, 2024*).

45. **Wiehed ghandu wkoll jifhem u japprezza, li daqskemm l-offerenti ghandhom joqogħdu attenti li jipprezentaw dak kollu li jkun intalab minnhom fid-dokumenti tas-sejha, huwa daqshekk iehor importanti li daww mgħobbija bir-responsabbiltà li jgħarblu l-offerti, jiġifieri l-membri tal-kumitat ta’ evalwazzjoni, ghandhom jimxu skrupolożament mal-kundizzjonijiet li jkun għew imnizzlin fid-dokument tas-sejha** (ara *Reactilab Limited v. Korporazzjoni ghas-Servizzi tal-Ilma et moghtija mill-Qorti tal-Appell fit-19 ta’ Ottubru, 2023*).

46. **Dan għaliex, meta fil-kuntest ta’ procedura ta’ sejha għall-offerti, l-awtorità kontraenti tfassal il-kundizzjonijiet li bi hsiebha timponi fuq l-offerenti, hija tkun qiegħda tillimita l-eżerċizzju tas-setgħa diskrezzjonali tagħha bil-quddiem — b’dana li hija ma tkunx tistax tmur lura mill-kundizzjonijiet tas-sejha, minghajr ma tikser il-prinċipju tat-trattament indaqs bejn l-offerenti** (ara *Polaris Marine Services Co Ltd v. Direttur Ġenerali tal-Kuntratti et moghtija mill-Qorti tal-Appell fit-29 ta’ Anwissu, 2023 u Quattro Labs Limited*

pro et noe v. Malta College of Art, Science and Technology mogħtija mill-Qorti tal-Appell f'it-13 ta' April, 2018).

*47. Bi thaddim ta' dawn il-prinċipji għall-fatti ta' dan il-każ, din il-Qorti tqis li għadarba l-awtorità kontraenti talbet lill-offerenti sabiex jipprezentaw il-kontijiet finanzjarji tagħhom għas-snin 2020, 2021 u 2022, u **l-awtorità kontraenti ħabbret minn qabel li n-nuqqas tat-tressiq ta' xi wiehed minn daww id-dokumenti kellu jigi kkastigat bis-sanzjoni kiefra taliskwalifika awtomatika**, mela allura bin-nuqqas tagħha, jiggifieri dak li ma tipprezentax il-kontijiet finanzjarji għas-sena 2021, Trackwell maddbet ilgebla fuq saqajha, u ma halliet l-ebda għażla oħra f'idejn il-kumitat ta' evalwazzjoni, għajr dik li jiskwalifikaha mill-proċedura tal-akkwist.” (Added emphasis of the PCRB).*

Therefore, the Board deems that the Appellant's grievance is unfounded and is as such being rejected.

B. Maintenance Proposal *qua* Performance Condition

This Board cannot agree with the Appellant's argumentation that the required maintenance proposal is a performance condition in that the Tender Document is crystal clear when it demanded a maintenance proposal (Note 3) as part of the economic operator's technical offer. It is in this Board's view that nothing in the Tender Document could be said to support the Appellant's argument.

Therefore, the Board deems that the Appellant's grievance is unfounded and is as such being rejected.

C. Proportionality

After having assessed the procurement procedure as a whole, this Board found nothing untoward or disproportionate in the Contracting Authority's approach to the economic operators or to the Appellant. On the contrary, the Tender Evaluation Committee offered the Appellant the opportunity to clarify where within its bid may they find the Maintenance Proposal, and the Tender Evaluation Committee deemed the Appellant as technically not compliant after it resulted to them that the Maintenance Proposal was not in fact submitted.

Therefore, the Board deems that the Appellant's grievance is unfounded and is as such being rejected.

DECIDE

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to reject the appeal filed by Webee Limited in its entirety, and hereby confirms the rejection letter dated 4th April, 2025 and the award notice also dated 4th April, 2025. The Board further decides not to re-imburse the deposit paid by Webee Limited.

Dr Ana Thomas
Chairperson

Mr Keith Victor Grech
Member

Mr Lawrence Ancilleri
Member

