

PUBLIC CONTRACTS REVIEW BOARD

Case 2147 – SPD1/2025/015 – Tender for the Acquisition of a Crime Victimization Survey 2025 (TheDark2025) for the University of Malta

29th September 2025

The Board,

Having noted the letter of objection filed by Mr Daniel Abela acting for Marketing Advisory Services Limited, (hereinafter referred to as the Appellant) filed on the 26th June 2025;

Having also noted the letter of reply filed by Dr Oriella De Giovanni acting for University of Malta (hereinafter referred to as the Contracting Authority) filed on the 2nd July 2025;

Having taken cognisance and evaluated all the acts and documentation filed, as well as the submissions made by representatives of the parties;

Having noted and evaluated the minutes of the Board sitting of the 4th September 2025 hereunder-reproduced.

Minutes

Case 2147 SPD1/2025/015 – Tender for the Acquisition of a Crime Victimization Survey 2025 (The Dark 2025) for the University of Malta.

The tender was issued on the 21st March 2025, and the closing date was the 29th April 2025.

The estimated value of the tender, excluding VAT, was €43,500.00

On 26th June 2025, Marketing Advisory Services Limited (C21206) lodged an appeal against University of Malta – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected since the tender was technically non-compliant.

A deposit of €400.00 was paid.

There were three Bids.

On the 4th of September 2025, the Public Contracts Review Board (PCRB), composed of Mr Kenneth Swain as Chairman, Mr. Keith Victor Gatt and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Marketing Advisory Services Ltd (21206).

Mr Daniel Abela – Company Representative. (Managing Director).

Ms Naomi Thornley – Company Representative. (Market Researcher).

Contracting Authority – University of Malta.

Dr Carlos Bugeja - Legal Representative.

Ms. Claire Saliba – Chairperson.

Mr. Yoram Ohayon - Secretary.

Recommended Bidder – IDEA Advisory Services Limited (C32958).

Mr Alexei De Bono – Company Representative. (COO).

Opening Statements

Mr Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties present: the Appellant, Marketing Advisory Services Ltd.; the Contracting Authority, the University of Malta; and a representative of the Recommended Bidder, IDEA Advisory Services Limited. Mr Swain then invited the appellant, Mr Daniel Abela, to deliver his initial submissions. Since Mr Abela was not a lawyer and was representing himself, the Chairman explained the Board's procedures.

Initial Submissions

Initial Submissions by the Appellant (Mr. Daniel Abela.)

Mr Daniel Abela, Managing Director of Marketing Advisory Services Ltd., stated that their proposal was deemed non-compliant due to the absence of the GDPR questionnaire required under Article 5C of Section 1. He argued that it was not clearly specified whether certain information was mandatory.

Marketing Advisory Services Ltd. did not submit the GDPR questionnaire because, as stated on page 4, section 5:

“Accordingly, if the bidder (and/or any of its Sub-Contractors, Suppliers, Service Providers or any third parties processing Personal Data) is situated outside the European Economic Area or in a country which is considered as not offering an ‘adequate’ level of data protection by the European Commission, a GDPR Questionnaire shall be submitted.”

Mr Abela contended that this created inconsistency within the SPD's tender requirements. Since Marketing Advisory Services Ltd. is based in the EU, the submission of the GDPR questionnaire was unnecessary under the conditional requirements and therefore legally redundant.

He further explained:

- Whenever requirements were clear, the company provided the requested information.
- They felt they should have been asked whether the omission was intentional.
- The electronic submission platform allowed the upload of a blank document, adding to the confusion about whether the questionnaire needed to be submitted at all.

He emphasised that all public relations requirements were submitted, and his company has experience with both government and international assignments. The issue, he argued, was not negligence but ambiguity. He stressed that, irrespective of the outcome, tender documents should provide greater clarity about whether or not documents such as the GDPR questionnaire must be submitted.

Initial Submissions by the Contracting Authority (Dr Carlos Bugeja)

Dr Carlos Bugeja, representing the University of Malta, stated that the appellant had raised several grounds for appeal. When the Evaluation Committee examined the appellant's submission, the file provided was named "GDPR blank document" but contained no content. The GDPR questionnaire formed part of the mandatory technical offer as required by Article 5C of Section 1 of the SPD. The Evaluation Committee was not permitted to request clarification or missing certification. Consequently, the offer was deemed technically non-compliant, and, under standard procurement rules, the financial offer was not evaluated.

Dr Bugeja referred to Mr Abela's mention of GDPR provisions dated 28 May 2017. He cited Article 28(1) GDPR, which states:

"Where processing is to be carried out on behalf of a controller, the controller (the University) shall use only processors providing sufficient guarantees to implement appropriate technical and organisational measures in such a manner that processing will meet the requirements of this regulation to ensure the protection of the rights of the data subject."

He argued that the appellant's claim—that the questionnaire was conditional rather than mandatory for all bidders—was incorrect.

On the second and third grounds of appeal, Dr Bugeja acknowledged that adequacy decisions apply only to countries outside the EU. Nonetheless, he maintained that the GDPR questionnaire was mandatory for all bidders, regardless of their location.

On the fourth appeal, he clarified that while the Contracting Authority may request additional documentation, this does not excuse a bidder from submitting the GDPR questionnaire.

Finally, regarding the fifth appeal, he referred to the note stating: "The sole criteria will be the price." He explained that the contract would indeed be awarded to the lowest-priced compliant offer. However, since the appellant's submission was deemed technically non-compliant, their financial offer could not be considered.

Final Submissions

Final Submissions by Mr Daniel Abela

Mr Abela reiterated that greater clarity should be provided in tender documents to avoid such situations in future. He stressed the need for consistency, so that bidders are not told the questionnaire is unnecessary in one section but then treated as mandatory in another. He expressed regret at losing the opportunity to participate in what he described as an "interesting" bid but emphasised again that clearer guidance is required.

Final Submissions by Dr Carlos Bugeja

Dr Bugeja concluded by stating that he did not agree with Mr Abela's assertion that the requirements were unclear.

Conclusion of the Hearing

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

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 4th September 2025.

Having noted the objection filed by Marketing Advisory Services Ltd. (hereinafter referred to as the Appellant) on 26th June 2025, refers to the claims made by the same Appellant with regard to the tender of reference SPD1/2025/015 listed as case No. 2147 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Mr Daniel Abela

Appearing for the Contracting Authority: Dr Carlos Bugeja

Whereby, the Appellant contends that:

- a) The decision not to submit the GDPR Questionnaire was based on careful interpretation of the tender requirements. Specifically, Page 4, Section 5, Point ii) states:

Accordingly, if the bidder (and/or any of its Sub-Contractors, Suppliers, Service Providers or any third parties processing Personal Data) is situated outside the European Economic Area or in a country which is considered as not offering as 'adequate' level of data protection by the European Commission, a GDPR Questionnaire shall be submitted.

It is the Appellant opinion that the Document which was submitted was not mandatory at the initial submission stage, particularly in the absence of associated data protection risks.

The Appellant also makes reference to Page 6, Section 6 of the Tender document, which clearly states that *"the sole criterion for award shall be price"*. Based on this criteria and the information provided in the rejection letter the Appellant contends that its bid remains competitively positioned and its offer is the most economically advantageous offer.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd July 2025 and its verbal submission during the hearing held on 4th September 2025, in that:

- a) The GDPR Questionnaire referenced by the Appellant pertains to a requirement that bidders were to complete and submit, if applicable, as part of the Eligibility/Selection Criteria – not the Technical Offer. Specifically, the GDPR Questionnaire mentioned by the Appellant falls under Article 5(A) ii) of Section 1 – Instructions to Tenderers (Eligibility/Selection Criteria) of the published tender document. Conversely, the GDPR Questionnaire that the Appellant was required to complete and submit relates to Article 5 (C) i) d) of Section 1 – Instructions to Tenderers (Technical Offer). These are two separate and distinct requirements. Therefore the Appellant's claim, suggesting a presumption that some bidders might not be required to complete the GDPR questionnaire, is incorrect. The Appellant's offer was deemed non-compliant due to failure to submit the GDPR Questionnaire required under the Technical Offer.
- b) The Contracting Authority acknowledges that the adequacy decision apply exclusively to countries outside the European Union. Hence bidders established and operating within the eU Member States are not required to submit additional safeguards. In this Tender, this principle applies to GDPR requirement within the Eligibility/Selection Criteria, as stated in Article 5(A) ii) of Section 1 – Instructions to Tenderers: *"if the bidder is situated outside the European Economic Area or in a country not deemed to provide an adequate level of data protection by the European Commission, a GDPR Questionnaire shall be submitted."* Accordingly, bidders located within the EU countries were exempt from submitting the GDPR questionnaire (Eligibility). The Appellant did not submit this questionnaire as their company operates in Malta, an EU Member State, and was therefore considered administratively compliant.
- c) The right of the Contracting Authority to request the bidder to provide additional documentation to verify that the bidder or any of its sub-contractors, suppliers, service providers or any third parties processing personal data on behalf of the bidder are indeed in a position to process/transfer personal data in line with the GDPR, which the Contracting Authority may or may not invoke at its discretion during the award stage, does not imply that the bidders should not submit the GDPR Questionnaire (whether Eligibility or Technical) at tendering stage as clearly mandated in Article 5 (A) ii) and Article 5 (C) i) d) of Section 1 – Instructions to Tenderers.
- d) While Article 6.1 of Section 1 – Instructions to Tenderers states that "the sole award criterion will be the price", it also clarifies that: "The contract will be awarded to the Tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria". In this case, the Appellant's offer was technically non-compliant due to the failure to submit the mandatory GDPR Questionnaire (Technical), classified under Note 3, which precludes rectifications.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties, will now consider Appellant's grievances as follows in their entirety.

- a) It is a well-established principle under Maltese procurement law that mandatory requirements stipulated in the tender dossier apply *ab initio*, meaning from the very outset of the process. Failure to submit a mandatory document or meet a mandatory condition at tendering stage results in automatic disqualification, irrespective of the substantive merit of the bid. This principle has been consistently upheld by the PCRB, for instance in case 2074, where the Board reaffirmed that omissions relating to *ab initio* requirements cannot be rectified post-submission.
- b) The Tender document in this case expressly classified the GDPR Questionnaire (Technical) under Note 3, which clearly stipulates that: "*No rectifications shall be allowed.*", whereas the GDPR Questionnaire (Eligibility) under Note 2, which allows for rectifications. In this respect the General Rules Governing Tenderers under the Public Procurement Regulations, particularly Rule 9.2 and 9.3, allow rectification of certain administrative shortcomings. However, they expressly exclude the rectification of documents that are listed under Note 3. Had the Contracting Authority allowed for a rectification, it would have compromised the principle of equal treatment, whereby all bidders are assessed on the basis of their submissions made at the closing date, without the possibility of post-submission modifications.
- c) Here, the Board notes that article 262 of the Public Procurement Regulations provides bidders with pre-contractual remedies in cases of alleged ambiguity or uncertainty in the Tender dossier. Specifically, Article 262(1)(d) allows challenges intended "*to correct errors or to remove ambiguities of a particular term or clause included in a call for competition.*" This article is crucial, as it ensures that bidders do not unilaterally interpret requirements and take risks, but instead seek timely clarification or legal redress. The Court of Appeal in *Truevo payments Limited v Direttur tal Kuntratti et al.* (Appeal 95/21/1, 30 June 2021) underlined that bidders who fail to use this remedy cannot subsequently contest requirements after submission.
- d) With respect to Appellant's submission relating to Section 6 – Criteria for Award, although Article 6.1 of the Instructions to Tenderers states that "*the sole award criterion shall be the price*", it is equally clear that the award is conditional upon the offer being both administratively and technically compliant. This is in line with Regulation 111(2) of the Public Procurement Regulations (SL 601.03), which provides that the most economically advantageous tender can only be determined among bids that have first satisfied all mandatory criteria. Reference is also made to PCRB Case 2132, where the Board held that "*price can only be considered once administrative and technical compliance have been established*".

The Board,

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

- a) Not To Uphold the Appellant's contentions
- b) Upholds the Contracting Authority's decision; and
- c) Directs that the deposit paid by the Appellant not to be reimbursed.

Mr Kenneth Swain
Chairman

Mr Keith Victor Grech
Member

Mr Lawrence Ancilleri
Member