

## PUBLIC CONTRACTS REVIEW BOARD

**Case 2176 – TWO 3/2025 – Tender for the Construction Works of a New Housing Block using Environmental Performance Standards at Triq l-Imdina, c/w Triq San Pietru, c/w Triq Karwija Kirkop (KKP\_E)**

3<sup>rd</sup> November 2025

The Board,

Having noted the Letter of Objection filed by Dr Matthew Paris and Dr Zackariah Esmail acting for and on behalf of **JGS Contactors Limited**, (hereinafter referred to as “*the Appellant*”) filed on the 6<sup>th</sup> October, 2025;

Having also noted the Reasoned Letter of Reply filed by Dr Leon Chetcuti acting for and on behalf the **Green Buildings Solutions Limited** (hereinafter referred to as “*the Recommended Bidder*”) filed on the 13<sup>th</sup> October, 2025;

Having also noted the Reasoned Letter of Reply filed by Dr Bryony Balzia Bartolo acting for and on behalf the **Housing Authority** (hereinafter referred to as “*the Contracting Authority*”) filed on the 15<sup>th</sup> October, 2025;

Having heard and evaluated the testimony of the witness **Mr Christian Avellino**, Chairperson of the Technical Evaluation Committee (T.E.C.), as summoned by Dr Matthew Paris acting for and on behalf JGS Contractors Limited;

Having heard and evaluated the testimony of the witness **Mr Justin Sammut** testifying for and on behalf JGS Contractors Limited as summoned by Dr Beryl Buttigieg;

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 28<sup>th</sup> October, 2025 hereunder-reproduced.

## Minutes

### **Case 2176 – TWO 3/2025 – Tender for the Construction Works of a New Housing Block using Environmental Performance Standards at Triq l-Imdina, c/w Triq San Pietru c/w Triq Karwija Kirkop (KKP\_E).**

The tender was issued on the 17<sup>th</sup> March 2025, and the closing date was the 28<sup>th</sup> April 2025. The estimated value of the tender, excluding VAT, was €3,714,151.04

On 6<sup>th</sup> October 2025 JGS Contractors Limited, lodged an appeal against the Housing Authority – the Contracting Authority, and the Recommended Bidder - Green Building Solutions Limited. In accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected since the tender was not technically compliant.

On the 30<sup>th</sup> of October 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Vincent Micallef and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.

A deposit of €18,570.75 was paid.

There were eight bids.

The attendance for this public hearing was as follows:

#### **Appellant –JGS Contractors Limited. (C104852).**

Dr Matthew Paris – Legal representative.

Dr Zack Esmail – Legal Representative.

Mr Justin Sammut – Company Representative.

Ms Alexia Sammut – Company Representative.

Mr Jonathan Grima – Company Representative.

#### **Contracting Authority – Housing Authority.**

Dr Bryony Balzia Bartolo – Legal Representative.

Dr Mattia Felice – Legal Representative.

Mr Christian Avellino – Chairperson.

Ms Leanne Sammut – Secretary.

Ms. Rita Galea – Evaluator.

Mr Simon Brincat – Evaluator.

Ms Nadine Delia – Senior Manager -Procurement Section.

Ms Lee-Ann Xuereb – Supervisor – Procurement Section.

#### **Preferred Bidder – Green Building Solutions Limited. (C61931).**

Dr Beryl Buttigieg – Legal Representative.

#### **Opening Statements.**

Mr. Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties present: the appellant, JGS Contractors Ltd., the Contracting Authority, the Housing Authority, and the Recommended Bidder, Green Building Solutions Ltd.

#### **Initial Submissions.**

### **Initial Submissions by Dr. Matthew Paris (for the Appellant)**

Dr. Paris stated that JGS Contractors Ltd. submitted three offers for this tender, and consequently, a number of controversial decisions were taken.

The first grievance concerned the rejection letter, which informed the company that its offer was not technically compliant. However, in the response to the objection letter, the reason for exclusion given by the Contracting Authority was “technical” and was later acknowledged as a mistake and revoked.

The Chairman asked Dr. Mattia Felice, representing the Housing Authority, to confirm this issue and whether it was a typographical mistake.

Dr. Felice confirmed that the issues were administratively non-compliant, noting that while there might be arguments on technical matters, the focus should primarily remain on administrative issues.

The Chairman confirmed that the rejection was based on administrative grounds.

Dr. Paris, in the interests of his client, sought clarification on whether they were excluded entirely on administrative grounds or if they also needed to address technical issues. He requested guidance on this matter.

Dr. Felice replied that the exclusion was primarily administrative in nature but arose because the three offers submitted were technically identical.

Dr. Paris stated that the rejection letter failed to explain why JGS Contractors Ltd. was found technically non-compliant. Articles 242 and 270 maintain that an explanation was required, yet none was provided.

Regarding the administrative aspect, he argued that there was no breach of the *General Rules Governing Tenders*. Clause 3.1 was very clear. Dr. Paris said he could not understand how JGS Contractors Ltd. was excluded on administrative grounds despite having submitted all required documents. The Contracting Authority first stated that they were not part of the technical evaluation, yet JGS Contractors Ltd. was then excluded as “technically non-compliant.”

The third grievance concerned the allegation of *Improper Practice*. Dr. Paris stated that such an allegation was made without any factual basis and that the Contracting Authority should revoke this claim, as it was not only legally unfounded but also damaging to the company’s reputation.

Dr. Paris concluded by noting that he would later address the *Principle of Proportionality*.

### **Initial Submissions by Dr. Mattia Felice (for the Contracting Authority).**

Dr. Felice confirmed that the Contracting Authority had reviewed all three offers submitted by the bidder. Upon examining the technical offers, the Authority noted the absence of certain guarantees, such as that of the concrete, and observed that the three offers were identical except for the price. He questioned what benefit the appellant’s offer provided to the Contracting Authority if only the prices differed.

The Evaluation Committee considered the matter under the heading of *Improper Practice* and concluded that the economic operator had deliberately failed to respond to the cheapest bid.

Once the opening details were published, such conduct could undermine the fairness of the process by sacrificing the lowest bid to Favor a higher one.

Dr. Felice warned that if the Board sanctioned such a practice, it would set a poor precedent in public procurement. The Contracting Authority, he said, could not properly assess the technical aspects without examining all offers — which was its right.

In their appeal, JGS Contractors Ltd. alleged that the *Principle of Self-Limitation* had been breached. However, Dr. Felice maintained that the Board had a duty to uphold public order, and the practice adopted by the appellant violated Article 3.1 of the *General Conditions*. Procurement, he stressed, is based on equal treatment and aims to achieve the best value at the best price. What occurred here was the very antithesis of that principle.

#### **Initial Submissions by Dr. Beryl Buttigieg (for the Recommended Bidder).**

Dr. Buttigieg noted that the tender expressly required the offers to be “non-identical.” There was a distinction, she said, between “non-identical” and “multiple” offers — the former implying a variant. It served no purpose to submit identical technical and administrative offers with only price differences, as this would breach the principle of equal treatment.

As a contractor, Dr. Buttigieg interpreted the tender to mean that if three offers were submitted, each must be technically distinct. She herself submitted one offer, whereas the appellant submitted three identical ones. She added that there appeared to be a lack of transparency when the Contracting Authority selected the highest bid over the lowest, despite the submissions being identical.

#### **Witnesses.**

##### **Mr. Christian Avellino (ID 96982M) — Summoned by Dr. Matthew Paris.**

Mr. Avellino, Chairperson of the Evaluation Committee, testified that the Committee comprised Ms. Leanne Sammut (Secretary), Mr. Simon Brincat, Ms. Rita Galea, and Ms. Diane Aquilina as evaluators. The evaluation was carried out individually, followed by a joint decision.

When the offers were opened, the appellant ranked first, second, and fourth financially, having submitted three offers. The Committee then proceeded to assess eligibility. Clarifications were requested for all three offers regarding the ESPD of Rock Cut and the contractor’s experience. JGS Contractors Ltd. replied only in relation to the second offer (the higher-priced one) and failed to respond for the first and fourth offers.

The evaluators then examined whether this constituted *Improper Practice* and reviewed the technical submissions — literature and key experts — discovering that all offers were identical. Although price differences were justified by naming different architects with varying fee percentages, the Board expected different makes or materials (for example, thermal insulation).

Dr. Paris asked whether the Committee had requested clarification from JGS Contractors Ltd. regarding the allegation of *Improper Practice*. He noted that while un responded offers might justify exclusion, another identical offer had also been excluded.

The witness admitted that no clarification on *Improper Practice* had been sought; the Evaluation Committee had taken that decision independently. The rejection letter stated: 'The EO deliberately did not respond to the cheapest bid.'

The exclusion, therefore, was based on *Improper Practice*. The *Rules Governing Tender 3.1* provide:

*'Bidders may submit up to three (3) multiple bids which should be non-identical (technically and financially) for a tender.'*

Dr. Paris asked what constituted a technical submission and quoted: *'The Technical Offer shall constitute the following:*

1. *Declaration to be submitted through the tender response format (note 3).*
2. *Technical Offer Questionnaire (note 3).*
3. *A Graphic Work Schedule (Gantt Chart) (note 3).*

*Key Experts Form, Statement of Availability Form, Self-declaration form for Key Experts (relating to public employees), and CVs, warrants, and certificates as applicable (note 2). In note 5, Literature including GPP literature (note 2).'*

He argued that the Evaluation Committee failed to distinguish between Note 2 and Note 3 — where under Note 3 nothing could be altered, whereas issues such as the architect fell under Note 2.

The witness explained that the Committee examined the documents under Note 3 and confirmed they were identical. Note 3 stated:

*'Bidders are to insert the manufacturer, brand, supplier of the items being offered.'*

He added that a price difference would have been justified, for example, if one offer cited Rock Cut and another Attard Bros. As per Note 3, no rectification could be requested. The witness emphasized that the Committee did not perform a full technical evaluation but only verified whether the offers were identical.

The Chairman then asked what could be rectified under Note 2. Mr. Avellino replied that rectification allowed certain changes, such as updating details about key experts.

**Mr. Justin Sammut (ID 177089M) — Summoned by Dr. Beryl Buttigieg.**

Mr. Sammut, Director of JGS Contractors Ltd., stated that the reason for submitting technical offers with different prices was to comply lawfully with government rules. Dr. Felice asked what the commercial purpose was following the decision. Dr. Paris objected on the grounds that commercial purpose constituted financially sensitive information.

The Chairman upheld the objection.

**Final Submissions.**

**Final Submissions by Dr. Matthew Paris.**

Dr. Paris noted that although he resisted the temptation to introduce new grievances, the appeal already covered the core issue — the aggrieved decision. Since no proper evaluation had been carried out, the decision should not stand. Under the *Rules Governing Tender*, the exclusion was neither administrative, technical, nor financial in nature. Exclusion, he argued, is not the same as rejection, and the measures taken against JGS Contractors Ltd. were punitive. The company was disqualified without being evaluated, despite submitting three complete offers with all required documents.

In the rejection letter, the Contracting Authority stated that two of JGS Contractors Ltd.'s offers were technically non-compliant, even though only eligibility had been assessed.

Article 16 of the *General Rules Governing Tender* prohibits proceeding to technical evaluation unless the offer is first found eligible.

The allegation of *Improper Practice* was serious and could affect future tenders. The Contracting Authority should have requested clarification from the contractor before making such an accusation. In such cases, the Director of Contracts should have been consulted.

Dr. Paris referred to *Case C-144/17 Lloyd's of London vs Agenzia Regionale per la Protezione per l'Ambiente della Calabria*, noting that the European Court of Justice held:

*'The principles of transparency, equal treatment and non-discrimination which derive from Articles 49 and 56 TFEU and are referred to in Article 2 of Directive 2004/18/EC of the Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts must be interpreted as not precluding legislation of a Member State, such as that at issue in the main proceedings, which does not allow two syndicates of Lloyd's of London to be excluded from participation in the same procedure for the award of a public service contract for insurance merely because their respective tenders were each signed by the General Representative of Lloyd's of London for that Member State, but instead allows their exclusion if it appears, on the basis of unambiguous evidence.'*

He argued that in this case there was *no* unambiguous evidence — the Contracting Authority had reached a hasty conclusion without justification. The offers were deemed identical merely because JGS Contractors Ltd. failed to reply to two clarification requests. That did not constitute *Improper Practice*, and such an allegation was unjustified.

The rejection letter claimed the offers were technically non-compliant even though no technical evaluation had been conducted. The appellant had complied with all tender requirements.

Regarding the administrative aspect, Dr. Paris cited the *General Rules Governing Tender* (August 2024, version 4.10), Mr. Dalli had stated in Clause 3.1:

*'Bidders may submit up to three multiple bids which should be non-identical.'*

He pointed out that it was the recommended bidder's choice to submit only one offer. *'In cases where bidders submit more than three non-identical bids, the evaluation board will only consider the first three cheapest offers submitted.'*

Referring to 'non-identical', Mr. Dalli should have defined better when he stated as *non-identical (technically and financially)*, and not *or*. Article 3.4 states that for offers to be considered

identical, both technical and financial elements must match. The offers of JGS Contractors Ltd. where not financially identical.

The Chairman observed that the phrase “and/or” was not used.

Dr. Paris further explained that the technical offer comprised two parts: one under Reg. 62 Article 1, which could not be altered, and another in which bidders could choose not to submit anything. Referring to *Procurement Note 40*, he quoted:

*‘Rectification Request – Inquiry generated by Evaluation Committees, aimed at being provided with information / documentation of selected aspects of a particular Procurement / Concession Submission that was either missing from submission, or submitted incomplete or incorrect’.*

He argued that the Committee was obliged to inform the bidder of any incorrect submission. Since JGS Contractors Ltd. was never evaluated technically, the Committee could not have reached a valid conclusion. While the Committee may have acted in good faith, they should have sought clarification instead of proceeding to exclusion.

#### **Final Submissions by Dr. Mattia Felice.**

Dr. Felice remarked that Dr. Paris had given “a lesson on how to play by the fringes.” He stated that the *Lloyd’s* case was not analogous, as there had been no ambiguity requiring clarification. The issue here was clear: the appellant submitted three identical offers at different prices. Multiple bids were permissible only when they offered alternative products, not when the products were 100% identical.

He emphasized the importance of transparency, quoting Article 3.1:

*‘In any case, if any submissions lead to any form of conflict of interest, collusion, or improper practice, the Central Government Authority/Sectoral Procurement Directorate/Contracting Authority reserves the right to disqualify any submission as necessary’.*

Dr. Felice stated that the Contracting Authority had full legal competence to make its decision. The evaluation was conducted lawfully and appropriately. Submitting three identical offers with different prices amounted to *Improper Practice*, and the Board must consider this in its decision. The Committee could not assess the administrative part without first noting that the offers were technically identical.

He added that no clarifications were necessary because the situation was not ambiguous. Suspicion increased when the appellant responded only to one clarification request — the middle-priced offer — ignoring the cheapest and highest bids. The intention was evident.

The Evaluation Committee, responsible for safeguarding public funds, acted correctly under Article 3.1 in disqualifying the offers once it detected possible foul play. The decision was taken seriously and lawfully. A clarification was not requested for because the situation was unambiguous.

#### **Final Submissions by Dr. Beryl Buttigieg.**

Dr. Buttigieg confirmed that the recommended bidder knew three bids could be submitted, provided they were both technically and financially different. It would have been simple to vary

only the price, but that would have violated Clause 3.1. Therefore, the recommended bidder submitted one offer.

She noted that witness Justin Sammut had confirmed their offers were technically identical, interpreting the law as allowing it. The Committee, however, was not obliged to seek clarification, and since the appellant breached Clause 3.1, the disqualification was justified.

**Replica.**

**Replica by Dr. Mattia Felice.**

Dr. Felice reiterated that no clarification was necessary, as there was no missing information in the technical submissions — the issue was that the offers were identical but priced differently. The Chairman noted that the Board was fully aware of what *Policy No. 40* stipulates.

**Conclusion of the Hearing.**

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

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 30<sup>th</sup> October, 2025.

Having noted the objection filed by Dr Matthew Paris and Dr Zackariah Esmail for and on behalf of JGS Contractors Limited (hereinafter referred to as “*the Appellant*”) on the 6<sup>th</sup> October, 2025, refers to the claims made by the same Appellant with regard to the tender of reference 607 – *TWO 3/2025 – Tender for the Construction Works of a New Housing Block using Environmental Performance Standards at Triq l-Imdina, c/w triq San Pietru, c/w Triq Karvija Kirkop (KKP\_E)* listed as case No. 2176 in the records of the Public Contracts Review Board.

Appearing for the Appellant:

Dr Matthew Paris & Dr Zackariah Esmail

Appearing for the Contracting Authority:

Dr Mattia Felice &

Dr Bryony Balzia Bartolo

Appearing for the Recommended Bidder

Dr Beryl Buttigieg

Whereby, **the Appellant contends** that:

Whereas, the Housing Authority (hereinafter "HA") issued a call for tenders for the supply of "Tender for the Construction Works of a New Housing Block using environmental performance standards at Triq l-Imdina, c/w Triq San Pietru c/w Triq Karwija Kirkop (KKP-E);

Whereas, Messrs. JGS Contractors Limited (hereinafter "JGS" and/or 'the appellant company') submitted a bid for this procedure;

Whereas, by means of a letter dated 24<sup>th</sup> September, 2025, the Appellant company was informed that that its offer was being rejected:

*"Thank you for participating in the above-mentioned procurement procedure. However, the Housing Authority regrets to inform you that the procurement proposal submitted by your company was not technically compliant. (hereinafter "first reason for rejection") Bidders may submit up to three (3) multiple bids which should be nonidentical (technically and financially) for a tender. The EO is disqualified based on this clause, since the three (3) offers submitted are technical identical. (hereinafter "second reason for rejection") Moreover, the EO deliberately did not reply to cheapest Bid, the EC deemed that bidder must be disqualified due to improper practice." (hereinafter "third reason for rejection") [added emphasis].*

Whereas, the Appellant company feels aggrieved by such a decision, and is hereby submitting its objection within the stipulated time-frame and accompanied with the relative payment (copy of confirmation of payment enclosed as DOC1), in accordance with inter alia article 270 of Subsidiary Legislation 601.03 (hereinafter the PPR), and this based on the following grievances:-

***Wrong evaluation - Appellant's Bid is technically compliant ("first reason for rejection")***

The rejection letter dated 24<sup>th</sup> September, 2025, alleges that the offer TID 225937 is "not technically compliant", however an in breach of reg. 242 and 272 of S.L. 601.03, it fails to explain why such an offer is technically noncompliant.

The Appellant submits that its offer is technically compliant, and that the allegation by the Contracting Authority is erroneous and should be quashed by this Honourable Board.

In any case, and without prejudice to the aforesaid, the appellant company is hereby reserving its rights to the fullest extent possible to request authorisation to submit an additional grievance, once

(and if) the Contracting Authority substantiates its position that the offer by the Economic Operator qua appellant is *"technically non-compliant"*.

Thus and thereby, the appellant company submit that, the first reason for exclusion by the Contracting Authority is mistaken and thereby should be revoked.

***Wrong evaluation - Evaluation committee acted in breach of the General Rules Governing Tenders ("second reason for rejection")***

The second reason for exclusion refers to the fact that the Tender Evaluation Committee (hereinafter 'TEC'), determined that the three (3) offers by the appellant company were *"administratively and technically identical"*. In fact, the letter of exclusion, signed by the *"Evaluation Committee"*, *inter alia* stated that,

*"By the deadline bidder submitted the requested documentation, but when evaluated by the EC noted that three (3) bids Tender ID 225936, 225937 and 225938 submitted were administratively and technically identical."*

It is the position of the appellant company that, by making such a declaration, the TEC acted in breach of the General Rules Governing Tenders (hereinafter 'GRGT'), since such governing rules make it abundantly and unambiguously clear that, any tender that is deemed as *"administratively non-complaint"* should be rejected and not considered any further by the TEC. In fact, provision 16.3 of the GRGT stipulate that:

*"Submissions which have qualified under Part 2 shall have their technical offer evaluated to ensure compliance with Clause 5(C) of the Instructions to Tenderers."*

It has been confirmed that, bids with Tender ID 225936 and 225938, have been excluded for *"administrative non-compliance"*, at which point in time their technical offer was rendered redundant and an *"unacceptable tender"* in accordance with reg. 2 of the 5.L. 601.03, thus they could have never been evaluated by the evaluation committee - this renders the actions of the TEC as being in breach of the GRGT.

An unacceptable tender renders an offer void *ex tunc* - and thereby as the Latin maxim dictates *Quod nullem est, nullum producit effectum!*

Without prejudice to the fact that, the appellant company disagrees with the statement, the evaluation process is compromised as the TEC acted in breach of the parameters upon which the Contracting Authority had itself imposed through the tender procedure, thereby breaching the principle of self-limitation.

Indeed, in PCRB Case No. 1665 of 2021, decided on 27<sup>th</sup> December, 2021, this Honourable Board expressly held that:

*"This Board opines that the Evaluation Committee did not observe the principle of Self-Limitation when it deemed the Appellant's offer as technically non-compliant when it adjudged the equipment of the Appellant company on issues not included within the Tender Dossier."*

It was thereby affirmed that if an appeal were to be upheld on grounds not expressly stipulated in the tender dossier, this would itself infringe the principle of self-limitation as well as the broader procurement principles. In view of the aforesaid, the appellant company submits that this second reason for rejection must likewise be revoked by this Honourable Board.

***Wrong evaluation - No improper practice ("third reason for rejection")***

The letter of exclusion makes vague reference to *"improper conduct/behaviour"* without providing any substantiated reason or justification. Such an allegation, made without the slightest factual basis, is procedurally unacceptable and legally unsound.

The appellant company categorically and unequivocally denies any allegation of improper conduct. At all stages of the procurement process, the Appellant has acted with integrity, in full compliance with the tender requirements and in accordance with the law. The allegation is not only unfounded but also highly prejudicial, given its potential reputational harm. The appellant hereby reserves all rights at law at their disposal in relation to such allegation.

For all intents and purposes, the allegation made by the TEC that *"the EO deliberately did not reply to cheapest Bid..."* is rejected as unfounded, and the appellant company expects the Contracting Authority to either withdraw this allegation or to substantiate it - In public procurement there is no room for conjectures, suppositions or any other guesses, in particular when these are not substantiated by hard proof evidence - Thereby the appellant company submits that the TEC acted in breach of the Public Procurement Regulations, in particular reg. 39.

In view of the aforesaid, the appellant company submits that this third reason for rejection must likewise be revoked by this Honourable Board.

### ***Breach of the Principle of Proportionality***

Without any admission of non-compliance nor that the any actions by the appellant constitute improper conduct, 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.

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 msejba bhala Firetech Cross TLS Joint Venture v. Dipartiment tal-Kuntratti*, wherein it held that not all breaches of the tender specifications should lead to exclusion, in fact it held that:

*"Ghalkemm huwa minnu illi, biex titbares it-trasparenza u ma jkunx hemm diskriminazzjoni, ir-regoli ghandhom jitharsu b'mod uniformi u prevedibbli, u s-soggettività u d-diskrezzjonalità jinaqqsu kemm jista' jkun, madankollu l-prinċipju ta' proporzjonalità jrid illi mbux nuqqas ikollu l-istess konsegwenza, iżda din ghandha tiddependi millgravità tan-nuqqas u mill-konsegwenzi tiegħu, partikolarment jekk jagħtix vantaġġ lil min jonqos jew jobloq preġudizzju lil oblaturi obra" [added emphasis]*

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

*"Ghalkemm din is-silta hija dwar legiżlazzjoni, tgħodd ukoll għal miżuri ta' implimentazzjoni u deċiżjonijiet meħudha tahtom. Din il-Qorti għalhekk tagħraf illi għandha qabel xejn tara x'inbu l-għan ewlieni tassewja għall offerti għax ma dan għandha tkejjel il-proporzjonalità talmiżuri meduħa biex jinkiseb. Fil-każ tal-lum l-għan ewlieni kien illi Gozo Channel tixtri n-nafta bl-orħos prezż. Ma' ħumiex sejrjn jinkisru l-prinċipji tat-trattament ugħali, l-prinċipju ta' għarfien reciproku u l-prinċipju tat-trasparenza jekk, bla ma jinbidlu l-kundizzjonijiet tal-offerta nfisħa, jingħata zmiēn biex jingħieb iddokument illi, forsi bi zvieta ma tqegħidx mad-dokumenti tal-offerta, waqt li certament ma jkunx qieghbed jithares il-prinċipju talproporzjonalità jekk offerta vantaggużja tigi mwarba għax ma' ngħibx dokument li għad jista jingħieb" [added emphasis]*

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.

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This Board also noted the Recommended Bidder's **Reasoned Letter of Reply** filed on the 13<sup>th</sup> October, 2025 and its verbal submission during the hearing held on 28<sup>th</sup> October, 2025, in that:

GBS strongly believes that the grounds of objections raised by JGS are unfounded and are not based on sufficient nor reasonable justifications that can safely and comfortably steer the Public Contracts Review Board ("*PCRB*") to change, alter or modify the decision of the contracting authority ("*CA*").

The objector's grounds of objection and the underlying justifications are being contested as explained hereunder

***Preliminary Observations***

The Appellant's letter of objection rests primarily on assertions of alleged procedural irregularities and unsubstantiated claims that the Evaluation Committee ("*TEC*") misapplied the Public Procurement Regulations (SL 601.03). These allegations are unfounded in fact and at law.

The decision to disqualify the Appellant was reasoned, consistent with the tender dossier, and grounded in the principles of transparency, equal treatment, and proportionality as enshrined in Regulation 39(1) of S.L. 601.03.

Each ground of exclusion was justified on objective criteria and documented during the evaluation process. The Appellant's submissions were technically non-conforming and procedurally defective.

It is further noted that the Appellant's offer was not only technically non-compliant but also vitiated by conduct contrary to the ethical and procedural integrity expected in public procurement procedures.

***On the First Reason for Rejection: Technical Non-Compliance***

The Appellant asserts that its offer was technically compliant. However, TEC's assessment identified material deficiencies and inconsistencies in relation to the mandatory technical specifications outlined in the tender dossier.

The CA is required to exclude any bid which does not comply with the conditions, specifications, or requirements set out in the procurement documents. The Appellant's submission failed to meet essential technical requirements and was therefore correctly excluded.

The burden of proving compliance lies entirely with the bidder. The contracting authority is under no obligation to re-interpret or amend tender requirements to accommodate deficiencies or shortcomings.

Regulation 272, read with Regulation 242, requires that tenderers be informed of the reasons for rejection, supported by reference to the evaluation record. The rejection letter duly fulfilled this obligation by summarising the grounds of technical noncompliance as established by TEC.

The assertion that the rejection letter lacked detail does not vitiate the validity of the exclusion.

The Public Contracts Review Board has consistently held that material non-compliance cannot be rectified or clarified post-submission. TEC's decision on this first ground was therefore fully justified and lawful.

***On the Second Reason for Rejection: Submission of Technically Identical Bids***

The tender expressly permitted up to three (3) non-identical bids; both technically and financially. This flexibility was intended to allow bidders to propose innovative or alternative solutions, not to replicate identical offers.

The Appellant submitted three offers (Tender IDs 225936, 225937, 225938) which, upon examination, were administratively and technically identical. This contravenes the express stipulation in the tender dossier and constitutes a clear breach of the tender's submission conditions.

The Appellant's assertion that two of its bids were already excluded and should not have been evaluated further misunderstands the evaluation process. TEC's reference to the "identical" nature of all three bids is an evaluative observation confirming that the Appellant failed to comply with the non-identity requirement across its submissions. This is not a breach of procedure, but a factual finding.

The purpose of the non-identity clause is to prevent manipulation of the tender mechanism by flooding the evaluation with substantially identical offers. The Appellant's conduct defeats that purpose and undermines the level playing field principle in Regulation 39(1) of SL 601.03.

TEC was therefore also correct to disqualify all three bids. The principle of self-limitation invoked by the Appellant is inapplicable here, since the exclusion arises directly from the tender documents themselves.

### ***On the Third Reason for Rejection: Improper Practice***

The reference to "*improper practice*" was made in the context of the Appellant's failure to respond transparently during clarification requests regarding the cheapest bid.

The Contracting Authority is empowered to seek clarifications from bidders, and obliges bidders to reply fully and accurately within the prescribed time. Any deliberate failure to respond constitutes improper conduct and can also serve to distort competition.

TEC's conclusion was therefore not arbitrary but derived from the Appellant's own omission, which compromised the integrity of the evaluation process.

The Appellant's argument that the allegation was "*vague*" is also unmerited. It is evidently clear that the disqualification stemmed from a procedural failure which, in a competitive procurement context, amounts to an act of non-cooperation prejudicial to transparency and equal treatment.

This ground of exclusion was therefore properly applied by TEC.

### ***On the Principle of Proportionality***

The Appellant's invocation of proportionality mischaracterises the doctrine. Proportionality does not require a Contracting Authority to overlook breaches of mandatory requirements, especially where such breaches undermine the fairness or integrity of the procurement process.

The present case does not involve minor administrative irregularities that do not affect the substance of the offer but involves fundamental breaches including identical bids, technical non-conformity, and lack of cooperation all of which are necessary for compliance.

Proportionality does not and should never extend to condoning material irregularities that prejudice other bidders or distort competition. Upholding the Appellant's exclusion is therefore the proportionate and legally correct decision.

### ***Conclusion***

The Appellant's submissions fail to demonstrate any procedural or substantive error in the decision of the CA or TEC. 6.2 The exclusion was based on clear and objective grounds fully consistent with the tender dossier and the applicable procurement regulations. 6.3 The Appellant's disqualification should therefore be confirmed, and the letter of objection dismissed in its entirety.

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This Board also noted the Contracting Authority's **Reasoned Letter of Reply** filed on the 15<sup>th</sup> October, 2025 and its verbal submission during the hearing held on 28<sup>th</sup> October, 2025, in that:

The Housing Authority ("*HA*") categorically refutes all allegations raised by JGS Contractors Limited ("*JGS*") as entirely unfounded and devoid of merit. The HA issued a call for tenders for the supply of Tender for the Construction Works of a New Housing Block using environmental performance standards at Triq I-Imdina, c/w Triq San Pietru c/w Triq Karwija Kirkop (KKP-E).

JGS Contractors Limited (JGS) submitted three offers bearing Tender ID numbers 225936, 225937, 225938 which ranked first, second and fourth respectively. JGS was aware of such rankings. The HA requested administrative requests for clarifications from JGS in relation to all three offers. Conveniently, JGS replied only with respect to the offer which placed second, while failing to respond to the correspondence concerning the offers placing first and fourth.

Pursuant to General Conditions, Clause 3.1, the HA was obliged to reject such offers given that all three offers submitted were identical from a technical point of view and thus rendered the offers administratively and technically non-compliant in accordance with Clause 3.1 of the General Conditions.

### ***First Grievance***

The HA submits that the Evaluation Committee never evaluated the tender offer submitted by JGS under TID 225937. The words "*was not technically compliant*" appearing in the first paragraph of

the letter dated 24<sup>th</sup> September, 2025, are clearly a typographical error. Indeed, the same letter continues to elaborate on the reasons for non-compliance as follows:

*"The main reasons why your procurement proposal was non-compliant are as follows:*

*The following request for rectification was deemed necessary. EO was requested to;*

- 1. Provide details concerning the sub-contractor/s and submit an ESPD for the subcontractor/s, since in the submitted ESPD, your company mentioned 1% (Rockcut Ltd) subcontracting as requesting in Section 1 - Instructions to Tenderers - Clause 5(B)(c)(2); and*
- 2. Provide attesting that the minimum average yearly turnover during the past three (3) years, being 2022-2024 is not less than €500,000 per year, as requested in Section 1-Instruction to Tenderers- Clause 5(B)(b), since this was missing from your submission.*

*By the deadline, bidder submitted the requested documentation, but when evaluated by the EC noted that three (3) bids Tender ID 225936, 225937 and 225938 submitted were administratively and technically identical. General Rules Governing Tenders Clause 3.1 states that "Bidders may submit up to three (3) multiple bids which should be non-identical (technically and financially) for a tender". The EO is disqualified based on this clause, since the three (3) offers submitted are technically identical. Moreover, The EO deliberately did not reply to cheapest Bid, the EC deemed that bidder must be disqualified due to improper practice."*

After careful examination of the above, it is evident that the phrase "was not technically compliant" in the first paragraph of the said letter constitutes a typographical error. The substantive reasons outlined in the remainder of the letter clearly relate to non-compliance with Clause 3.1. of the General conditions given that all three offers submitted were identical from a technical point of view and thus, this rendered the offer administratively and technically noncompliant in accordance with Clause 3.1 of the General Conditions.

Accordingly, no error of evaluation occurred, as the HA did not conduct a technical evaluation of the offer in question.

### ***Second Grievance***

The Evaluation Committee acted in full conformity with the General Rules Governing Tenders, particularly Article 3.1 of the General Conditions, which stipulates that bidders may submit up to

three non-identical bids. In compliance with this requirement, the Committee was obliged to compare the three bids submitted by JGS to ascertain that they were neither technically nor financially identical.

The HA never stated that the offers submitted under TID 225936 and TID 225938 were "*unacceptable tenders*" as alleged by the appellant. Rather, these were deemed "*administratively non-compliant*" for the following reasons:

*"The main reasons why your procurement proposal was non-compliant are as follows: The following request for rectification was deemed necessary. EO was requested to;*

*1. Provide details concerning the sub-contractor/s and submit an ESPD for the subcontractor/ s, since in the submitted ESPD, your company mentioned 1% (Rockcut Ltd) subcontracting as requesting in Section 1 - Instructions to Tenderers - Clause 5(B)(c)(2); and*

*2. Provide attesting that the minimum average yearly turnover during the past three (3) years, being 2022-2024 is not less than €500,000 per year, as requested in Section I-Instruction to Tenderers- Clause 5(B)(b), since this was missing from your submission.*

*By the deadline, bidder did not answer the rectification request, therefore, his offer could not be considered further. Administratively non-compliant."*

The mere classification of a tender as administratively non-compliant does not render it an unacceptable tender within the meaning of Regulation 2 of S.L. 601.03.

Moreover, once an offer is deemed administratively non-compliant, this does not preclude the Evaluation Committee from examining the submissions to ensure adherence to Article 3.1 of the General Rules.

Were such scrutiny prohibited, contracting authorities would risk implicitly condoning improper practices by contractors who intentionally submit multiple identical offers and strategically fail to respond to requests for rectification relating to the lowest-priced identical offer, thereby gaining undue financial advantage for the same works and specifications.

The General Conditions form an integral part of the tender documentation; therefore, by ensuring their strict application, the Evaluation Committee acted within its legal remit and did not violate the principle of self-limitation. On the contrary, it ensured that such principle was upheld.

Therefore, both the appellant's and also the case law quoted in support thereof are negated by the particular circumstances of this case.

### ***Third Grievance***

In relation to the third grievance, the HA submits that the reasons for considering the conduct of JGS as improper practice were explicitly set out in the letter dated 24<sup>th</sup> September, 2025, and that such determination was made in accordance with Article 3.1 of the General Conditions.

A comparative analysis carried out by the Evaluation Committee of the technical questionnaires and supporting literature confirmed that all three offers were technically identical, differing only in financial terms (see documents DOK HA1, HA2 (i) HA2 (ii), HA3, HA 4 (i) HA4 (ii), HA 5 and HA6 (i), HA 6(ii) respectively).

It is inconceivable for three offers based on identical technical specifications to yield different financial quotations, as was done by JGS. Conduct of this nature goes diametrically against the scope of an open and transparent public procurement system.

Furthermore, Article 3.1 of the General Conditions explicitly empowers the Evaluation Committee to disqualify any submission that gives rise to improper practice:

*"In any case, if any submissions lead to any form of conflict of interest, collusion, or improper practice, the Central Government Authority/ Sectoral Procurement Directorate/ Contracting Authority reserves the right to disqualify any submission as necessary."*

The fact that JGS deliberately failed to reply to the letters sent through a request for rectification dated 23<sup>rd</sup> May, 2025 concerning the offers that ranked first and fourth, knowing that failure to respond would render such offers administratively non-compliant, while simultaneously submitting three technically identical offers with only financial variations, constitutes improper practice on the part of the appellant and should not find the approval of this Board, even as a matter of principle.

### ***Fourth Grievance***

The manner in which the appellant believes that the principle of proportionality should have been applied by the EC is a travesty of what the principle actually stands for. This is so because the

principle of proportionality does not require a contracting authority to overlook serious breaches of mandatory requirements and to forgive improper and unfair practices.

The HA acted proportionately and lawfully in declaring JGS non-compliant for submitting identical offers. The decision was made strictly in accordance with the General Conditions, which impose clear procedural and substantive obligations on tenderers.

The principle of proportionality does not entail that contracting authorities must disregard or violate applicable rules. Rather, it requires that actions taken are appropriate and necessary to achieve compliance with those rules. In this case, no lesser measure was legally available or suitable, and the HA's action was entirely justified and proportionate.

For the reasons stated above, the Housing Authority respectfully maintains that all actions taken were in full conformity with the applicable tender regulations, the General Conditions, and principles of good administration. The HA therefore submits that the appeal lodged by JGS Contractors Limited should be dismissed in its entirety. Accordingly, no expenses whatsoever in relation thereto should be borne by the HA.

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

## **1. Introduction**

The Public Contracts Review Board (*"the Board"*) has considered the appeal submitted by JGS Contractors Limited (*"the Appellant"*) against the decision of the Housing Authority (*"HA"* or *"the Contracting Authority"*) dated 24<sup>th</sup> September, 2025, whereby the Appellant's tender submissions were excluded from the procurement procedure for the construction of a new housing block at *Triq l-Imdina, c/w Triq San Pietru c/w Triq Karwija, Kirkop* (Tender KKP-E).

In succinct, the appeal arises from three specific grounds of rejection cited by the Housing Authority:

1. Technical non-compliance;
2. Submission of multiple technically identical bids; and
3. Alleged improper conduct during clarification requests.

The Board has also considered the reasoned letters of reply submitted by the Housing Authority (15<sup>th</sup> October, 2025) and the Recommended Bidder (GBS) (13<sup>th</sup> October, 2025), as well as oral submissions at the hearing on the 30<sup>th</sup> October, 2025.

## **2. First Grievance – Alleged Technical Non-Compliance**

### *2.1 Appellant's Submission*

The Appellant contends that the rejection letter dated 24<sup>th</sup> September, 2025, which states that Tender ID 225937 “*was not technically compliant,*” fails to explain why the offer is alleged to be non-compliant. The Appellant relies on *Regulations 242 and 272 of Subsidiary Legislation 601.03*, asserting that the Housing Authority’s communication does not satisfy the obligation to provide intelligible, sufficient, and substantiated reasons. The Appellant reserved the right to request further clarification should the Authority substantiate its position.

### *2.2 Housing Authority's Response*

The Housing Authority asserts that the phrase “*was not technically compliant*” constitutes a typographical error and that the substantive reason for exclusion is the technical identity of the three bids submitted, in breach of *Clause 3.1 of the General Conditions*. The Authority emphasises that no technical evaluation of TID 225937 was conducted; the exclusion arises solely from non-compliance with the non-identity requirement.

### *2.3 Recommended Bidder's Response*

The Recommended Bidder (GBS) contends that the rejection was lawful, grounded in objective assessment, and that the technical non-compliance allegation is factually correct. GBS largely relies on the assertion that any deficiencies identified by the Evaluation Committee were material and justifiably excluded the Appellant.

### *2.4 Board's Consideration*

The Board finds that the Appellant is correct in asserting that the initial phrasing of “*not technically compliant*” creates ambiguity and undermines transparency. Under the *Public Procurement Regulations*, reasons for rejection must be intelligible, self-contained, and capable of guiding the tenderer’s right of appeal. To this effect, the Housing Authority’s *post-hoc* explanation of a typographical error does not cure the procedural defect.

## **3. Second Grievance – Submission of Technically Identical Bids**

### *3.1 Appellant's Submission*

The Appellant asserts that the Evaluation Committee erred in comparing three bids (TID 225936, 225937, and 225938), two of which were already excluded for administrative non-compliance. The Appellant invokes the principle of self-limitation, contending that once administrative non-compliance is established, the submission should not be further evaluated. The Appellant references *PCRB Case No. 1665 of 2021* to support this contention.

### *3.2 Housing Authority's Response*

The Housing Authority maintains that the evaluation of the three submissions was necessary to ascertain compliance with the non-identity requirement under *Clause 3.1*. It asserts that TID 225936 and TID 225938 were administratively non-compliant, yet limited comparison to determine technical identity is permissible and did not breach procedural rules.

### *3.3 Recommended Bidder's Response*

GBS contends that the Appellant's interpretation of the principle of self-limitation is overly rigid. Evaluating submissions for identity is an evaluative measure to protect the integrity of the tender process and prevent circumvention of rules through multiple identical bids.

### *3.4 Board's Consideration*

The Board finds that the Appellant is correct in principle: administratively non-compliant submissions should generally not be used as comparators unless expressly allowed by the tender documentation. While Clause 3.1 permits scrutiny to ensure non-identity, the Housing Authority's position and essentially the content of the documentation does not clearly justify reliance upon excluded submissions. This procedural defect undermines fairness and weighs in favour of re-evaluation.

However, the Board recognises that the underlying concern, preventing multiple identical submissions, is legitimate and the Authority's attempt to enforce this requirement is not *per se* unreasonable. The Appellant's argument is therefore partially correct, contributing to the decision to remit the evaluation.

In other words, and for sake of clarity, the first paragraph of the Board's considerations under this heading is making a *procedural* point, examining the procedural legality (they shouldn't have used excluded bids as comparators). Administratively non-compliant submissions (i.e. those excluded) should *not* be used as comparators unless the tender expressly allows it. This is about how the evaluation process must operate. i.e. with procedural fairness, equal treatment, and adherence to the tender rules.

The second paragraph of the Board’s considerations, on the other hand, is making a *substantive* point, therefore examining substantive legitimacy (their reason for wanting to check for identical bids was fair). At this juncture, the Authority’s concern (to prevent identical or collusive submissions) is legitimate; meaning the policy objective behind their actions is valid, even if their method (using excluded bids as comparators) was flawed.

The conclusion of the Board’s findings in this context (“partially correct... re-evaluation warranted”) reflects that duality, i.e. the appellant is right that the process was mishandled, but wrong to suggest the Authority’s concern itself was baseless.

In view of the above, while the Board agrees that excluded submissions should not have been relied upon as comparators, it also recognises that the Authority’s underlying concern, i.e. preventing identical or coordinated submissions, is, in the opinion of this Board, legitimate. The procedural misstep does not invalidate that substantive objective, but it does necessitate re-evaluation.

#### **4. Third Grievance – Allegation of improper conduct/behaviour on part of the Appellant**

##### *4.1 Appellant’s Submission*

Appellant submits that the letter of exclusion makes vague reference to “*improper conduct/behaviour*” without providing any substantiated reason or justification. Such an allegation, made without the slightest factual basis, is procedurally unacceptable and legally unsound. To this, the appellant company categorically and unequivocally denied and for of improper misconduct on its part.

##### *4.2 Housing Authority’s Response*

The HA submits that the reasons for considering the conduct of JGS as improper practice stems out from the letter dated the 24<sup>th</sup> September, 2025, and that such determination was made in accordance with *Article 3.1 of the General Conditions*.

##### *4.3 Recommended Bidder’s Response*

The recommended bidder based its submission in line with the contracting authority’s submission adding to it that the fact that JGS deliberately failed to reply to the letters sent through a request for rectification dated the 23<sup>rd</sup> May, 2025, concerning the offers that ranked first and fourth, knowing that failure to respond would render such offers administratively non-compliant, while simultaneously submitting three technically identical offers with only financial variations, constitutes improper practice on the part of the appellant.

##### *4.4 Board’s Consideration*

The Board has carefully examined the record and the respective submissions concerning the allegation of improper conduct. It is axiomatic in administrative and procurement law that accusations impugning a bidder's probity or professional conduct must be founded upon demonstrable evidence and reasoned analysis. Such allegations, if unsubstantiated or procedurally defective, risk inflicting unwarranted reputational harm and undermining confidence in the fairness of the procurement system.

In the present case, the Board observes that the Housing Authority's and the Recommended Bidder's reliance on "*improper conduct*" appears to stem from two interconnected circumstances: (i) the alleged selective failure to respond to clarification requests; and (ii) the perceived submission of multiple identical bids, interpreted as indicative of coordinated or collusive behaviour. The Authority invoked Clause 3.1 as conferring discretion to disqualify submissions that compromise the integrity or competitiveness of the procedure.

While the Board accepts that *Clause 3.1* affords a legitimate basis for excluding tenders where evidence of collusion, manipulation, or deliberate non-cooperation exists, that discretion is not unfettered. The principle of legality and the right to good administration demand that any finding of improper conduct must rest upon cogent, contemporaneous, and objectively verifiable evidence. The procedural file must demonstrate both the factual basis for the allegation and the evaluators' reasoning linking the conduct to the impairment of fair competition.

Here, the Board notes that the rejection letter, as well as the internal documentation, fail to specify the communications to which the Appellant allegedly did not respond, the nature of the requests made, or how such omissions materially affected the evaluation or competitive equality. The absence of this evidentiary trail renders the allegation unsubstantiated. The mere occurrence of similar or identical submissions, without more, does not suffice to infer collusive intent or deliberate impropriety, particularly where the tender documentation itself does not expressly prohibit similarity in format or content.

In absolute terms, the position is governed by *Article 3.1 of the General Rules Governing Tenders*, which expressly permits the submission of multiple tenders. The Article provides as follows:

*"Bidders may submit up to three multiple and non-identical (technically and financially) bids for a tender. In cases where bidders submit more than three non-identical bids, the evaluation board will only consider the first three cheapest offers submitted – irrespective of their administrative, technical and financial compliance. All other bids submitted by the tenderer will be automatically disqualified."*

In its plain and ordinary meaning, this provision establishes a clear limitation on the number and nature of tenders that a bidder may lawfully submit within the same procurement process. The rule permits

up to three tenders only where such tenders are *non-identical in both their technical and financial content*. The intent is evidently to allow a bidder to lodge multiple bids.

Moreover, where a bidder elects to submit non-identical tenders, differing in price, specification, or other substantive respects, the provision mandates that the Evaluation Board shall examine only the first three lowest-priced submissions, without regard to their compliance on administrative, technical, or financial grounds. All other tenders beyond this threshold are to be automatically disqualified.

Thus, the Article operates both as a permissive clause (authorising up to three non-identical submissions) and as a restrictive safeguard (prohibiting the submission of more than three non-distinct offers). It reflects a deliberate legislative intent to maintain procedural fairness, prevent strategic bid variation, and preserve the integrity of the evaluation process.

Furthermore, procedural fairness dictates that where a bidder's exclusion is based on "*alleged misconduct*" [emphasis of the Board], that bidder must be given sufficient particulars and an effective opportunity to rebut the allegation before the decision is finalised. The record discloses no evidence that the Appellant was afforded such an opportunity. The resulting opacity contravenes the basic tenets of due process and undermines the transparency required in public procurement.

Accordingly, the Board concludes that the Authority's finding of improper conduct was procedurally defective and unsupported by evidence meeting the requisite standard of proof. The invocation of *Clause 3.1* in these circumstances was therefore misapplied both in law and fact. The Appellant's grievance is well-founded in its entirety, as the procedural shortcomings identified strike at the core of fairness and transparency which must govern all administrative decision-making.

## **5. Fourth Grievance – Proportionality**

### *5.1 Appellant's Submission*

The Appellant invokes proportionality, arguing that exclusion was excessive where minor issues could have been rectified.

### *5.2 Housing Authority's Response*

The Authority asserts that proportionality does not require overlooking breaches of mandatory requirements or condoning procedural irregularities. Substantive breaches materially affecting competition justify exclusion.

### *5.3 Recommended Bidder's Response*

GBS supports the Authority's position, emphasising that proportionality cannot extend to condoning fundamental breaches, including technical non-compliance and submission of identical bids.

#### *5.4 Board's Consideration*

The Board accepts that the Appellant seeks to invoke the principle of proportionality in mitigation of the exclusionary decision, contending that the deficiencies identified were capable of rectification and did not justify outright rejection. While the principle of proportionality occupies a central place within both Maltese and European administrative law, requiring that administrative measures be appropriate, necessary, and not excessive in relation to their legitimate objectives, it cannot be deployed so as to dilute the force of express, mandatory tender requirements.

In this regard, the Board concurs with the Authority and the Recommended Bidder that proportionality does not compel the contracting authority to disregard substantive or structural non-compliance. Where a submission demonstrably fails to satisfy essential eligibility or technical conditions, the exclusion of that submission constitutes a proportionate and necessary measure in safeguarding equal treatment and the integrity of the competitive process. The doctrine of proportionality cannot be stretched to legitimise the acceptance of tenders that are fundamentally flawed or that jeopardise the level playing field envisaged by public procurement law.

That said, the Board observes material procedural deficiencies in the manner in which the exclusion was implemented and justified. The record reveals an absence of sufficiently clear reasoning, reliance upon administratively non-compliant submissions for comparative analysis, and a lack of probative evidence substantiating the alleged improper coordination. These shortcomings do not, in themselves, transform substantive breaches into minor defects; however, they do undermine the transparency and fairness of the evaluative process. The proportionality principle thus finds application not in the substantive assessment of compliance, but in the *manner* in which administrative discretion was exercised.

Accordingly, the Board finds that the Appellant's grievance is partially well-founded. While exclusion may have been substantively defensible in principle, the procedural missteps and the opacity of reasoning render the process disproportionate in its execution. This procedural imbalance warrants re-evaluation consistent with the principles of fairness, transparency, and sound administration.

### **6. Cumulative Assessment of the Board's Considerations**

The Board concludes that the:

1. First grievance (technical non-compliance) is well-founded;

2. Second grievance (identical bids) is partially correct;
3. Third grievance (improper practice) is well-founded;
4. Fourth grievance (proportionality) is partially correct.

The cumulative effect renders the evaluation process procedurally unsafe. Although certain substantive grounds are defensible, the procedural irregularities justify remittal for re-evaluation to safeguard transparency, fairness, and equal treatment.

**The Board,**

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

- a. To uphold in part the Appellant's Letter of Objection and contentions in the manner and form enunciated above;
- b. To revoke the rejection letter dated the 24<sup>th</sup> September, 2025;
- c. To revoke the recommendation for award dated the 24<sup>th</sup> September, 2025, made in favour of the Recommended Bidder;
- d. To order the defendants to reinstate the appellant and to reintegrate the appellant's bid in the re-evaluation process and to order a re-evaluation by a newly constituted Technical Evaluation Committee which shall (i) provide clear, coherent, self-contained reasons; (ii) treat administratively non-compliant submissions lawfully and only as permitted by Tender Dossier; and (iii) to confine findings of improper conduct to demonstrable, particularised, objective evidence.
- e. To direct that bidders be requested to extend the validity period of their respective bids, if required;
- f. To direct that the deposit paid by the Appellant be refunded in full.

**Mr Kenneth Swain**  
Chairman

**Dr Vincent Micallef**  
Member

**Mr Lawrence Ancilleri**  
Member