

PUBLIC CONTRACTS REVIEW BOARD

Appeal Reference Number 2208
Tender Reference Number WSC/T/016/2025
Tender Name “Services – Tender for the Development, Provision and Implementation of a CRM Software for Water Services Corporation”

The Public Contracts Review Board (hereinafter the ‘Board’ or the ‘PCRB’) convened a public hearing on the 2nd February, 2026 to hear the appeal as filed by the appellant IBM Global Services España S.A. (hereinafter the ‘Appellant’) dated the 22nd November, 2025 (with a stamp dated 24th November, 2025), and after taking cognisance of:

The tender document for the ‘Services – Tender for the Development, Provision and Implementation of a CRM Software for Water Services Corporation’ (hereinafter referred to as the “Tender Document”);

The minutes of the proceedings dated 2nd February, 2026 which are being reproduced hereunder:

“PUBLIC CONTRACTS REVIEW BOARD

Case 2208 – Objection – WSC/T/016/2025 – Services – Tender for the Development Provision and Implementation of a CRM Software for Water Services Corporation.

The tender was issued on the 10th March 2025, and the closing date was the 21st May 2025.

The estimated value of the tender, excluding VAT, was €1,500,000.00

On the 22nd November 2025 IBM Global Services Espana S.A lodged an appeal against the Water Services Corporation – the Contracting Authority. In accordance with Regulation 270 of the Public Procurement Regulations.

On the 2nd February 2026, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas as Chairperson, Ing Dr Damien Gatt and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.

A deposit of €7,500 was paid.

There were five bids.

The attendance for this public hearing was as follows:

Appellant – IBM Global Services.

Dr Carl Grech – Legal Representative.

Dr Antonio Ghio – Legal Representative.
Dr Andrea Vella – Legal Representative.
Mr. Fabian Pappe – Company Representative.

Contracting Authority – Water Services Corporation.

Dr John L Gauci – Legal Representative.
Mr. Matthew Costa – Chairperson.
Ms. Christine Scicluna – Secretary.
Mr. Owen Attard – Evaluator.
Mr. David Bezzina – Evaluator.
Ms. Dina Gatt – Evaluator.
Ms. Catherine Degabriele -- PRS Professional.
Ing Anthony Muscat – PRS Lead Professional.

Recommended Bidder – Deloitte Advisory and Technology Limited (C23487)

Dr Steve DeCesare – Legal Representative.
Dr Stefan Cutajar – Legal Representative.
Mr Ludwig Micallef – Company Representative.
Mr Andrea Muscat – Company Representative.

Opening Statements

Dr. Ana Thomas, Chairperson of the Public Contracts Review Board, welcomed the parties present, namely the Appellant, IBM Global Services, the Contracting Authority, Water Services Corporation, and the Recommended Bidder, Deloitte Advisory and Technology Limited.

Initial Submissions

The Chairperson, Dr Thomas minuted that the appellant IBM Global Services Espana S.A asked for proceedings to be in the English Language, and also minuted that there were no objections from all parties. Since the appellant had no evidence and they were relying on the tender document, they agreed to forego initial submissions and move to the Contracting Authority's evidence.

Witness:

Mr Owen Attard (ID.no.400094M) summoned by Dr John Gauci.

Mr Owen Attard, an evaluator, and the manager of Software Development Water Services, explained why IBM was excluded. He said that under Note 3, there was the list of functionalities and there was a section for the field officer services, which was marked 'no' as this was descoped by Water Services. In the

clarifications exchanged, the bidders knew that the system had to have the functionality, to safeguard the future investment.

The field officer application was combined with the CRM solution, and it would show the places where to go to fix, the problem, and when the people are on sight, they could close the application on sight when a report was issued. That part of the system was out of scope in the financial aspect, but when it came for the demo, the Committee needed to see it and the system needed to have it.

Dr Thomas asked how this was communicated.

Mr Attard said that this was in the tender and during the clarification meetings, and the same clarifications were submitted online. Referring to a clarification meeting, held on 25th March 2025, the witness confirmed he was present and mentioned that during the meeting, someone asked if the Fields Officers application was required and if they needed to include licences for the field officers. Dr Gauci quoted:

“Field Officers Application is out of scope for this tender and field users’ licenses are not to be included. Tenderers should still show us and proof the ability to have the ‘Field Officers Application’ as described in the tender dossier”.

Mr Attard said that the other bidders marked it as ‘YES’, showed the demo, but it was not considered for the financial aspects. IBM replied by marking all the field section ‘No’. A clarification or a rectification could not be given as this was Note 3.

Cross examination by Dr Carl Grech (for the appellant).

Dr Grech thought that the witness was not clear enough, and asked how to justify something, that was descope in the financial point of view and kept, for a technical requirement. The witness said that the Committee, wanted to see it in the demo, to see that the system was capable of doing it, however, the Company did not want to invest in the field officers’ services.

Dr Grech asked what the reason was to descope it from the financial aspect.

Mr Attard explained that each module had different licences, and they did not need to buy them. It was not irrelevant, because in the long run, they needed a system that was capable to integrate with SAP, and to enhance on it in the future.

Dr Grech said that the bottom line for the exclusion of IBM, was because of a potential future requirement of the CA. The witness agreed. Dr Grech was right to state that Deloitte and IBM had submitted their bid, using, the CRM software sales force. This software had the technical capability for Field Officers

Application. Deloitte had marked 'Yes' and they presented the demo. After the closing date.

The demo was part of Note 3. IBM did not produce a demo, since they answered 'No' in Note 3. The Committee verified that the software, CRM Salesforce proposed by Deloitte, had the capability for the Field Officers Application.

Dr Thomas asked the witness if they revisited the decision of deeming IBM. The witness said 'No'. The Board visited the idea, that the Salesforce, might have the same functionality, but since it was marked 'No' in Note 3 they could neither ask for a clarification nor a rectification.

Dr Grech asked if the Authority, still deemed that, there was nothing more to do, after considering that the software had the technical capability for the application and after considering that IBM had indicated 'No' because it had been descoped by the Authority.

The witness stated that they considered this question but since it was Note 3, they could not ask for a rectification. The Committee could not assume that the two systems were the same, and they had to stand by to what was submitted by IBM.

Dr Grech asked why, a demonstration by IBM, was not requested, at the point when the Committee stopped receiving bids and the application had been descoped for financial reasons. The witness said that since it was marked 'No' they could not proceed with the demo, as that would have been contradictory.

Re cross Examination by Dr John Gauci.

Dr Gauci told the witness, that it was suggested to the Authority that the two software systems were the same. The witness said that they were only assumptions, because they could have different versions of the system, without the needed functionality. It was not clear for the Board, that the two systems were the same.

Re cross examination by Dr Carl Grech.

The witness could not verify, the version numbers of software, submitted by IBM and Deloitte.

Dr Thomas understood that the Board stopped assessing as soon as they saw the 'No', and after seeing the demo by Deloitte, which could have been the same product with a different version. The Board did not ask IBM for a rectification as it was on Note 3. The Board did not assess the versions; it was only assumptions.

Final Submissions by Dr Carl Grech (for the appellant).

Dr Grech stated that this was a clear misunderstanding of the CA and its rights, when faced with an obvious error, in a submission by the bidder. The Evaluation Committee was under the impression, that if a submission is in Note 3, nothing could be done from their end. This was incorrect. In line with decided Case Law in the CJEU, he referred to Case 599/10 of the 29th of March 2012, SAG ELV Slovensko and quotes:

“The CA may ask tenderers, in writing, to clarify their tenders, without over requesting or accepting any amendment to the tenders. In the exercise of the discretion thus enjoyed by the CA, that Authority must read the various tenders equally and fairly, in such a way, that a request for clarification, cannot appear unduly to have favoured or disadvantaged, the tender or tenderers, to which the request was addressed, once the procedure selection of tenders, has been completed and in the light of its outcome”.

There was a ‘No’, because it was descoped indicated in the Field of application. The CA carried out its verifications on the same software by a different bidder, identified that it had the technical capabilities requested even if it was descoped, and failed to request clarifications. The CA’s hands were bound to request a rectification, but to carry a full and equal and fair assessment, the CA could have asked for a clarification, for the version of the software and its technical capability.

The CA could not have evaluated this bid, in the light, that it might be needed in the future. This is where it erodes, and that is why there were clarifications from other bidders. The CA made a request, that was not clear in the documentation, to state that was not clear in the documentation, to state that this request was not in the financial scope.

Dr Grech said, that the financial and the technical was intrinsically linked. The Field Officers Application was not a simple piece of software, but it was complicated, and required financial resources by the bidder, which, were not part of the scope. The CA could have verified, that the software by IBM was capable of handling the request by asking for a clarification.

In light of the Principles of Proportionality, IBM should have been requested a clarification. Dr Grech stated that the other parties mentioned, the application of principle of self-limitation and that IBM should have known what they were doing. He stated that the confusion was caused by the CA, and the CA refused to request for a clarification. They would have made their position clear, that the ‘No’ was not referred to the software, but to the descoping.

The Contracting Authority could have requested a demo from IBM. The CA did not treat IBM equally and fairly and stopped short in verifying the request of that confusion.

Final Submissions by Dr John Gauci (for the Contracting Authority).

Dr Gauci stated that the Corporation, was very clear, when it descoped the Field Officers Application. This was mentioned four or five times during the clarification meeting. The reply was 'Verbatim'.

"Fields Officers Application is out of scope, for this tender, and field user's licences are not to be included" because that is where the financial aspect comes in.

"Tenderers should still show us and prove the ability to have the Field Officer's Application, as described in Tender Dossier Section 3, clause 4.2.1.4. That was reply 1. The same thing was repeated verbatim in reply 23 and 36. 'Out of scope' was referring to the pricing and the Authority could not have been clearer".

The CA did not want the tender to start charging the licence from now, but as part of the package, so that the corporation could introduce it at a future date.

Dr Thomas asked if it was requested in the same contract.

Dr Gauci explained that the software would have the functionality, to be used at a later stage. The CA did not want licences for this application from the 1st year. Deloitte replied 'Yes' and were invited to provide their demo.

The procedure for the production for the demo, did not come at a later stage, but was part and parcel of the tender. All the bidders, who were compliant with the requests, were invited to demonstrate their capability. Dr Gauci referred to a Case with a similar situation, but less strict, because the bidder left the box blank.

This Board had justly said

"Contrary to the argumentation brought forward by the appellant, leaves no room for interpretation, where it states that tenderers that fail to complete or upload the requested documentation will be deemed as non-complaint, and will not be considered further for final adjudication".

This was a question of a rectification for a 'Yes' to be transferred to 'No' and vice versa. A bidder could not be asked by a clarification, whether a No should be a YES. This is prohibited by Procurement Rules, and it would change the technical questionnaire.

Final Submissions by Dr Steve DeCesare (for the Recommended Bidder).

Dr DeCesare referred to regulation 62 of the PPR, which results in the tender document having Notes 1-3. The CA may, request tenderers whose submissions appear to be incomplete, erroneous or contain missing documentation. In this case this was in Note 3, and the document was not missing, incomplete or had an error, but the 'NO' was included 14 times for each of the specific elements, with an explanation about the 'NO' inserted. It was clearly an intentional 'NO'. The fact that another bidder had submitted a similar software was irrelevant. Referring to the General Rules 16.3 Part 3 and he quotes: *A demo is only requested to corroborate technical compliance offer.*

No bidder could rely on a demo of another bidder to render its offer compliant. Regarding the Slovensko Case, no clarification would render the 'NO' into a 'YES'. He referred to Case Law mentioned in his reply that dealt with Note 3 and rectifications.

Replica by Dr Carl Grech (for the appellant).

Dr Grech stated that the CA had rejected a bidder on the basis, that, by its own admission, had to be the result of a separate Procurement Process. The Contracting Authority wanted a product without the Field Officers Application. It knew that this was an additional technical capability, and that an additional licence had to be paid. The technical bid and the financial bid were going to be a result of a potential procurement process that, might or might not happen in the future, and yet decided to exclude IBM.

Conclusion of the Hearing

With no further submissions, Dr Ana Thomas thanked all parties and formally concluded the session."

The written pleadings as filed by IBM Global Services España S.A. dated the 22nd November, 2025 (with a stamp dated 24th November, 2025), together with proof of payment of a deposit in the amount of €7,500, wherein it held as follows:

"Please consider this letter as a formal and official objection and consequently also an appeal by IBM Global Services España S.A. of Plaza Pablo Ruiz Picasso 11, 28020 Madrid Spain, TID 227061, ('Appellant') to the decision reached by the Procurement Office as per letter of the 13th November 2025, enclosed for ease of reference, in virtue of which the Appellants was informed that:

Clause 4.1 to Clause 4.12 in Technical Questionnaire were answered as NO. As per clarifications this requirement was not requested but bidder still needed to proof that this requirement was supported.

The appellant is appealing from this decision for the following reasons:

1) *The Evaluation Committee ought to have requested a clarification of the Appellant's submittal:*

The Contracting Authority in this case has disqualified the Appellant on the basis that the Appellant has declared in its offer that the CRM Software that it intended to provide to satisfy the requirements of the Authority, that is Salesforce, for the Field Officers Application, which required an additional Salesforce module.

In the clarification meeting, several companies asked about this point and the issuing authority published the following official response:

Question 1 Is the 'Field Officers Application' required, and do we need to include licenses for the 'Field Officers'?

Reply I Field Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the 'Field Officers Application' as described in tender dossier Section 3 Clause 4.2.1 point number 4.

In view of this Clarification, the Appellant considered the Field Officers Application to be out of scope of the Tender, and thus in the Technical Questionnaire it replied "NO" in the column Information on item being offered, adding that this requirement had been de-scoped.

Nevertheless, the Evaluation Committee proceeded to recommend for award a competitor who also intended to provide the identical platform Salesforce as a CRM solution to the Contracting Authority.

It should thus have been self evident to the Evaluation Committee that the software being proposed by the Appellant did in fact satisfy the requirements for the Ability to provide a Field Officers Application, which is inherent and implicit in Salesforce, even if this was descoped from the Contract.

The Technical Questionnaire was listed as Note 3 and thus the Evaluation Committee ought to have requested a clarification on this the ability to provide this module, when it full well knew, or ought to have known, that the Appellant replied as it did to the questionnaire, not because the software suggested for implementation did not have the functionality, but because of the fact that the Contracting Authority had first included questions about the module in the questionnaire and then proceeded to de-scope it through a clarification.

In terms of Clause 15 of the General Rules Governing Tenders, the evaluation committee may, after obtaining approval form the Director General (Contracts)/Departmental Contracts Committee/Sectoral Procurement Directorate, as the case may be, ask a tenderer to clarify any aspect of his tender.

Similarly in terms of Article 62(3) of the Public Procurement Regulations - SL 174.04 on Valid Bids reads as follows:

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.

In this case, the economic operator was deemed to be eligible to qualify for this tender and was in possession of all the requirements stipulated in the procurement documents.

Thus, in line with the principles of equal treatment and transparency the Contracting Authority should have requested a clarification on this point, rather than disqualifying the Appellant.

Reference is also made to Regulation 146 of the Public Procurement Regulations that reads as follows:

Those tenders may be clarified, specified and optimised at the request of the contracting authority. However, such clarification, specification, optimisation or additional information may not involve changes to the essential aspects of the tender or of the public procurement, including the needs and requirements set out in the contract notice or in the descriptive document, where variations to those aspects, needs and requirements are likely to distort competition or have a discriminatory effect.

In this case, the Appellant was disqualified from the Tender on the basis of a requirement that was descoped from the Tender. Thus, there could be no doubt that any clarification would have not involved any changes to the essential aspects of the tender.

The indication NO was a mere lapsus calami caused by the ambiguity created by the Contracting Authority itself, which could have very easily been clarified had the Appellant been given the possibility to do so.

As regards the principle of proportionality, this Tribunal has repeatedly held that, in order to establish whether the actions a Contracting Authority comply with that principle, it must be ascertained whether the means which it employs are suitable for the purpose of achieving the desired objective and whether they do not go beyond what is necessary to achieve it.

In the circumstances it was unnecessary and completely disproportionate to deem the bid as inadmissible, particularly even more so when the

It should not be the intention of a contracting committee as regulated by EU Rules of what is necessary for a bona fide offer on any public procurement tender to disqualify an otherwise lawfully submitted tender when there is little if any doubt that what the Department may have regarded as a de minimis omission would in no way have given rise to any doubt in the minds of the Contracting Authority/ Director of Contracts or indeed in the eyes of any other bidders or interested third parties.

2. The Contracting Authority has failed to provide unambiguous tender requirements

In terms of Regulation 38 of the Public Procurement Regulations, the procurement documents are to be written in clear and unambiguous terms so as to enable all the interested parties to understand properly the terms and conditions of the process.

In this case, for whatever reason, the Contracting Authority included in the Technical Questionnaire forms requests for declarations about modules that were not within the scope of the Contract itself.

This situation gave rise to substantial ambiguity as if the Field Officers Application was out of scope of the Contract, why should it have had a bearing at all on the tendering process, and more problematically, why was it deemed to be a basis for disqualification of an otherwise technically and financially compliant offer.

The fact that the procurement documents were ambiguous led to a disproportionate, unfair, discriminatory and opaque procurement process. This ambiguous requirement led to a situation where a qualified bidder did not have an equal opportunity to compete on a level playing field as in the case at hand the Contracting Authority first created unclear requirements and then disqualified a bidder for a minor error that could have been clarified.

In view of the above, you are also kindly requested to immediately and completely suspend the adjudication process in relation to the tender in caption..”

The written reply as filed by Water Services Corporation on the 3rd December, 2025 (with a stamp dated 4th December, 2025 (hereinafter the ‘Contracting Authority’) wherein it held as follows:

“1. Introduction

At the outset, it is necessary to place matters on a clear and accurate footing, because the premise underlying IBM's objection rests on a fundamental misunderstanding of what the Corporation actually clarified during the tender process, and, flowing from that, an incorrect expectation as to what the Evaluation Committee could lawfully do with the Technical Questionnaire once submitted.

The objection suggests that the Corporation "descope" the Field Officers Application entirely, and that IBM's "NO" answers in the Technical Questionnaire were therefore of no consequence. This is factually incorrect. The Corporation did not remove the functional requirement; it removed the pricing element only. This distinction was drawn expressly, repeatedly, and in identical language during the Clarification Meeting, where the Corporation made it abundantly clear that while bidders were not to include field-user licences in their financial offer, they were still required to show and prove the ability of their CRM solution to support the Field Officers Application. The wording used could not have been more direct, and the Corporation will quote it verbatim further below.

The difficulty arises because IBM elected to interpret "out of scope" as meaning "not required", and consequently proceeded to respond "NO" to every technical requirement relating to the Field Officers Application in the Note 3 Technical Questionnaire. Once submitted, those responses became legally irrevocable. Note 3 items are not subject to rectification, and the Evaluation Committee cannot-either explicitly or implicitly-invite a bidder to reverse a "NO" into a "YES", nor recharacterise a declared non-compliance as a compliance. The Committee is bound to evaluate what the bidder actually declares, not what the bidder may later claim it meant to declare.

This reasoned reply will therefore address, step by step, the following: first, what the Corporation actually clarified, quoting the precise text; second, what IBM actually submitted in its Technical Questionnaire; third, why, under the Tender rules and Note 3, the Evaluation Committee could not lawfully reopen IBM's answers; and finally, why the recommendation for award is correct and should be upheld.

2. The Clarifications And What They Actually Meant

To deal fairly with IBM's objection, the first thing that needs to be done is return to the actual clarifications. IBM's entire argument rests on what it believes the Corporation 'descope'd'. However, once one looks at what was actually stated in black and white, the position becomes straightforward.

During the Clarification Meeting of 25 March 2025, bidders asked the Corporation several direct questions about the Field Officers Application. In plain terms: is this module required, and do we need to quote for licences?

And each time, the Corporation gave the same answer. For absolute clarity, it is being quoted verbatim:

"Field Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the 'Field Officers Application' as described in tender dossier Section 3 Clause 4.2.1 point number 4."

This is what the Corporation said in Reply 1. It then said the same thing in Reply 23 and again in Reply 36.

The Corporation could not have been more explicit. "Out of scope" referred to pricing; meaning: do not include the cost of licences. But in the very same breath, the Corporation added the crucial instruction: "Tenderers should still show us and prove the ability..."

So the requirement was never removed. It was never even softened. It remained a mandatory functional capability that tenderers were still obliged to demonstrate in their technical offer.

IBM's interpretation that "out of scope" meant "no longer required at all" simply does not reflect the actual text. The clarifications spell it out directly: no licences, but yes, you must still show and prove the ability.

Importantly, nothing in the Corporation's clarification even hints that tenderers should answer "NO" in the Technical Questionnaire. On the contrary, the clarifications make it obvious that the Corporation expected to see evidence of this ability reflected in the technical responses.

It follows that IBM's starting premise, i.e. that they were entitled to treat the functionality as excluded from the technical evaluation, is simply incorrect. The misunderstanding arises not from anything the Corporation said, but from how IBM chose to interpret "out of scope", despite the clarifications expressly stating the opposite.

With that point resolved, one must now look at IBM's actual submission, because their answers in the Technical Questionnaire directly contradict the wording quoted above.

3. IBM's Own Answers in the Technical Questionnaire

Against that background, IBM chose to answer "NO" to every Field Officers Application requirement in the Technical Questionnaire. The form itself (which IBM submitted) shows this clearly: for each of the items under Section 4.0 (Field Officers Application), the response marked is "NO", accompanied by IBM's own annotation: "Descoped in Tender Clarification by WSC".

This was recorded exactly in the Technical Questionnaire on pages 7-8 of the submitted form.

The Tender Dossier, however, makes it very clear that the Technical Questionnaire falls under Note 3, which explicitly states that the information submitted in that form "shall not be subject to rectifications". The Instructions to Tenderers themselves repeat the same rule: "No rectifications shall be allowed. Only clarifications on the submitted information may be requested."

Once IBM stated "NO", the Evaluation Committee had no lawful ability to ask them to revise it to "YES". The Committee could only seek clarifications on what had already been declared, not invite IBM to alter the core content of a Note 3 answer. A "NO" is not something the Committee can legally reinterpret as a "YES".

4. Equal Treatment, Proportionality and Why the Disqualification Was Inevitable

IBM argues that the Evaluation Committee should have inferred functional compliance because Deloitte also proposed Salesforce, and that therefore the Committee "must have known" that IBM could provide the required module. This is not how public procurement operates.

The Committee does not evaluate software brands; it evaluates what each bidder declares in its own technical submission. Deloitte expressly declared "YES" to all mandatory requirements. IBM expressly declared "NO". Equal treatment obliges the Committee to take those declarations at face value. It cannot assume that IBM is compliant merely because it uses a platform that could support the functionality. It must evaluate the bid IBM submitted, not the one IBM could have submitted.

The proportionality argument also falls away once one examines the structure of this Tender. The Field Officers Application was never removed from the technical scope. It appears within Section 4.2 of the Specifications - the core architecture the Corporation intends to implement over the lifetime of the project. Even though licences are not being purchased at this stage, the Corporation must still ensure that the CRM solution it selects can support this capability.

A mandatory technical requirement answered twelve times with 'NO' in a Note 3 form cannot be treated as a triviality. Under the Tender rules, that alone triggers disqualification. The Committee had no margin to treat it otherwise without violating the rules applicable to all operators.

As for IBM's suggestion that its "NO" responses were a mere oversight, the record contradicts this. A genuine slip would be isolated and unaccompanied by explanation. Here, the negative answers were consistent, repeated, and justified with the bidder's own note: "Descoped in Tender Clarification by WSC". That is not a lapsus; that is a misinterpretation by the bidder - one which the Evaluation Committee is legally prohibited from correcting through rectification.

The result, therefore, was not punitive nor excessive: it was a direct, mechanical consequence of how Note 3 operates. The Evaluation Committee did precisely what the Tender required it to do. It evaluated the technical submissions as filed. It respected Note 3. It respected equal treatment. And it recommended award to the bidder who actually declared compliance.

Reference is made inter alia, to a decision of this Board, delivered in Case 1849-SPD8/2022/107 - Supplies - Framework Contract for the Supply and Delivery of Laboratory Kits in Two (2) Lots - Lot 2, on 28 February 2023:

"3rd & 4th grievance - In relation to these two grievances, this Board agrees with argumentation brought forward by the Contracting Authority. Moreover, it is essential to point out that the Technical Offer Form is subject to 'Note 3'. Therefore, this Board, is quite incredulous as to why the Appellant is requesting "..... the adjudicating board was reasonably expected to request a rectification of the Technical offer....." when this is clearly not possible. Furthermore, a clarification (which is allowed under Note 3) would certainly not have resolved this issue of non-compliance. Reference is also made to the General Rules Governing Tender section 16.3 where it is stated ".....No clarifications shall be allowed where there is no doubt that the submitted technical offer does not comply to the requested specifications....."

Therefore, this Board opines that the Evaluation Committee correctly assessed and dealt with the situation at hand.

iii. 5th grievance - The Board opines that the Technical Offer Form, contrary to the argumentation brought forward by Appellant, leaves no room for interpretation when it states "Tenderers that fail to complete, duly sign and upload the requested information will be deemed as non-compliant and will not be considered further for final adjudication." Reference is made to Court of Appeal case NQuayMT vs Infrastructure Malta (35/22/1) whereby it was stated "L- eccess fil-manjaminita u fit-tfittix sabiex jigu salvati offerti akkost ta kollox mhux espressjoni ta proporzjonalita imma huwa sproporzjon kontra min kien "compliant" mil bidu nett. Din il-Qorti mhuxl-ewwel darba li tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tieghu, isegwi rigorozimament dak li trid is-sejba għall-offerti u m'ghandux jippretendi li jigi mitlub "jiranga" I-offerta biex ikun kompatibbli ma dak mitlub."

For these reasons, the Corporation maintains that IBM's objection is without foundation and must be dismissed.

5. Conclusion

For the above reasons, WSC respectfully submits that the objection is wholly unfounded.

The clarifications were crystal clear: the Corporation only removed the costing of the Field Officers Application, not the requirement for bidders to show that their system can support it. Despite this, IBM went ahead and marked twelve separate "NO" answers in the Technical Questionnaire and did so under Note 3, where the rules expressly state that such answers cannot be changed after submission.

Once IBM submitted those negative replies, the Evaluation Committee had its hands tied. It could not invite IBM to change a "NO" into a "YES", because that would amount to rewriting the bid after the deadline, something the law simply does not allow. The Committee did exactly what it was supposed to do: it evaluated the bids as filed. Deloitte declared compliance; IBM declared non-compliance. The outcome flowed naturally from that.

There was no ambiguity, no disproportionate treatment, and no room for interpretation. The disqualification was not only correct, it was the only lawful conclusion the Committee could reach. For these reasons, the Corporation respectfully maintains that the objection should be dismissed in full.

In view of the above and other submissions that will be made at the hearing of this Objection, WSC respectfully requests the Public Contracts Review Board to dismiss the objection and to uphold the recommendation for award as issued.”

The written reply as filed by Deloitte Advisory and Technology Limited on the 12th December, 2025 (with a stamp dated 11th December, 2025 (hereinafter the ‘Preferred Bidder’) wherein it held as follows:

"1. Introduction

1.1 We are instructed by Deloitte Advisory and Technology Limited (“Deloitte”) to file this written reply in accordance with the provisions of regulation 276(c) of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the “PPR”), in reply to the objection filed by IBM Global Services Espana S.A. (TID 227061) (“IBM”) in connection with the Tender Procedure (the “Objection”), and notified to Deloitte by the Public Contracts Review Board (the “Board”) on 1st December 2025.

1.2 Deloitte shall set out hereunder its replies on the Objection, whilst expressly reserving its right to make further submissions and to present evidence in relation to matters of fact which will be established during the hearing.

2 Facts

2.1 The sole award criterion, as set out in clause 6 of tender document regulating the Tender Procedure (the “Tender Document”) and issued by Water Services Corporation (the “Contracting Authority”), was the price. The contract would be awarded to the tenderer submitting the cheapest priced offer satisfying the administrative and technical criteria.

2.2 The Tender Document required tenderers to complete a technical offer questionnaire (clause 5(C)(i)b) as part of the technical offer (the “Technical Questionnaire”). The Technical Questionnaire was marked as Note 3 both in clause 5(C) of the Tender Document, and in the form of the Technical Questionnaire attached as part of the documentation which tenderers needed to complete.

2.3 The Tender Document sets out, in clause 5, the applicable clarifications or rectifications. The relevant ones are as follows:

Note 2: “Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within five (5) working days from notification.”

Note 3: “No rectifications shall be allowed. Only clarifications on the submitted information may be requested. Tenderers will be requested to clarify the submitted information within five (5) working days from notification.”

2.4 IBM was disqualified as technically non-compliant, for the following reason:

“Clause 4.1 to Clause 4.12 in Technical Questionnaire were answered as NO. As per clarifications this requirement was not requested but bidder still needed to proof that this requirement was supported.”

2.5 IBM contests the said disqualification in terms of the Objection, alleging that:

2.5.1 First Grievance – the Contracting Authority should have sought a clarification (the “First Grievance”)

2.5.2 Second Grievance – the Contracting Authority failed to provide unambiguous tender requirements (the “Second Grievance”)

3 First Grievance – Contracting Authority should have sought a clarification

A. Introduction

3.1 The Technical Questionnaire provides that:

“This Technical Questionnaire is an integral part of the technical offer to be provided by the Economic Operator in response to Selection and Award Requirements as detailed in Section 1, Article 5(C), Specifications, of tender dossier.”

3.2 In addition, the Technical Questionnaire (which as explained above was marked as Note 3) also includes the following statement:

“The information on item being offered provided in the table below falls under Note 3 (Notes to Clause 5, of Tender Dossier) and shall not be subject to rectifications.”

3.3 IBM marked each of sections 4.1 to 4.12 of the Technical Questionnaire with “NO”. This fact is not contested by IBM.

3.4 IBM claims, in its Objection, that it did so intentionally because the clarifications issued by the Contracting Authority had removed this requirement, in its entirety, from the scope of the tender.

3.5 IBM also contends, in its Objection, that this was in fact an error on IBM’s part – *lapsus calami* (fifth paragraph of page 3). This statement however contradicts earlier statements and the facts of this case which show that IBM, intentionally, marked each of these twelve (12) items with “NO” as, in its view, these requirements were no longer applicable.

3.6 During the Tender Procedure, clarifications were issued in relation to this requirement, namely (the “Clarifications”):

3.6.1 Reply 14 of Clarification Note 6:

Question:

“Field Service users – out of the 50 field service users, how many are technicians and how many would be ‘Supervisor’ roles and essentially assigning cases to field technicians? a.

Out of these field-technicians how many are full time WSC employees and how many are contractors.”

Reply:

“Field Officers Application is out of scope for this tender and field users licences are not to be included. Tenderers should still show us proof of the ability to have the ‘Field Officers Application’ as described in the tender dossiers Section 3 Clause 4.2.1 point number 4”.

3.6.2 Reply 1 of Clarification Note 8:

Question:

“Is the ‘Field Officers Application’ required, and do we need to include licenses for the ‘Field Officers’?”

Reply:

“Id Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the ‘Field Officers Application’ as described in tender dossier Section 3 Clause 4.2.1 point number 4.”

B. Principle of Proportionality

3.7 IBM claims that the Contracting Authority acted in breach of the principle of proportionality. It is not contested that the principle of proportionality is a fundamental principle which, together with other principles such as the principles of equal treatment, non-discrimination and self-limitation, must be complied with in a public procurement process.

3.8 The principle of proportionality, in a nutshell, provides that a contracting authority should not adopt a measure which exceeds the limits of what is necessary in order to achieve the objectives pursued and that where there is a choice between several appropriate measures, recourse must be had to the least onerous¹.

3.9 The key wording is therefore that the Contracting Authority must have a choice between several appropriate measures.

3.10 In this case, for the reasons outlined below, it is submitted that it had no other lawful choice but to disqualify a tenderer who ticked “NO” in its Technical Questionnaire, as consistently confirmed by the Board and Court of Appeal.

C. Principle of Self-limitation

3.11 The principle of self-limitation on the other hand requires the Contracting Authority to evaluate tenders strictly on the basis of the conditions stipulated within the Tender Document.

¹ *Tideland Signal v Commission, T-211/02 paragraph 39*

3.12 In Case T-415/10², the Court held:

“It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates.

It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations.”

3.13 As shall be explained hereunder (and as confirmed by the Board and Court of Appeal time and time again), where a contracting authority marks a document as Note 3 then its hands are tied – it cannot allow any rectification of that document, including under the guise of a clarification.

D. Merits

3.14 It is evident, from the above, that the evidence of the solution’s ability to including the field officer application was required.

3.15 If the field officers’ application was completely out of scope, then the Contracting Authority would have stopped at the first sentence of the Clarifications and amended the Technical Questionnaire to exclude section 4.

3.16 On the contrary, in both instances, it was made clear that evidence of the ability of the relevant solution to have the field officers’ application, as set out in Section 3 – Specifications/Terms of Reference (Note 3), paragraph 4.2.1, 4) was required.

3.17 This was further corroborated by the fact that the Technical Questionnaire was not revised. The Technical Questionnaire, as explained in the form itself, was an integral part of the technical offer “in response to Selection and Award Requirements as detailed in Section 1, Article 5(C), Specifications, of tender dossier.”

3.18 IBM acknowledges and accepts that the Technical Questionnaire was marked as Note 3. However, it argues that the Contracting Authority should have sought a clarification.

3.19 A clarification is only required when a tender contains an ambiguity or error which can be corrected. In the case of Note 3, no corrections or rectifications are permitted.

3.20 In addition, it is clear that IBM made a conscious decision to mark each item in section 4 of the Technical Questionnaire with “NO”. It was not done erroneously but intentionally (not that this would make a difference, given the Technical Questionnaire is marked Note 3). This is

² Nexans France v European Joint Undertaking for ITER and the Development of Fusion Energy

confirmed by IBM itself in its Objection, wherein it states it did so as it considered it to be completely out of scope.

3.21 *The fact that another tenderer relies on a similar or identical platform is, with respect, entirely irrelevant. Tenders need to be assessed on the basis of the documentation submitted by the tenderer as part of its tender, irrespective of what other tenderers may or may have not submitted.*

3.22 *Indeed, this Board has held that not even experience of a tenderer with the relevant contracting authority can be considered by the evaluation committee unless the tenderer submitted the documentation required to prove such experience.*

3.23 *This was decided in Case 595 of 2010³ where Enemalta plc had issued a tender for the excavation of an underground tunnel from St. Andrew's to Maghtab. The tenderer, Rockcut Limited, had been disqualified as administratively non-compliant. The tender document required evidence of relevant experience in execution of works of a similar nature. The tenderer had cited projects undertaken for Enemalta plc itself (that is, the contracting authority). The tenderer failed to however submit certification from its client, namely Enemalta plc. The Board, in case 595 of 2010, rightly concluded that:*

"It was the onus of the tenderer to submit all relevant information as requested in the tender document and not for the Evaluation Board to seek confirmation of the listed contract of works carried out by the Appellant."

And that:

The Evaluation Board's duties are to:

I. Ensure that all documentation is received and is in accordance with the specified requirements as stipulated in the conditions of the tender document.

II. Confirm that the documentation is administratively compliant. In this case, this Board opines that the decision taken by the Evaluation Board to deem the Appellant's offer as being 'Administratively non compliant' was justified.

III. The Evaluation Board should not act as Auditors but as Evaluators. In this regard, the same Board were not in duty bound to seek additional information which was missing from the tender documentation and which was mandatory obligation on the Appellant's part to submit.

This Board noted that it was not the first time that the Appellant tendered for such projects and the Appellant was fully aware that all requested documentation in a tender document should be submitted. Especially when one takes into account the magnitude of the tender under appeal."

3.24 *The Board therefore rejected the appeal.*

³ *Similar decision was adopted in Case No.238 of 2010, where certificates from clients relied upon were not submitted.*

3.25 In the present case, the situation is similar (albeit less favourable to IBM). Even if, for the sake of the argument, the evaluation committee was familiar with the software in question (whether through another tender or from public knowledge), the evaluation committee is precluded from evaluating IBM's submission on something other than what was submitted by IBM (that is, a "NO" for each item in section 4 of the Technical Questionnaire) and decide that the "NO" actually means "YES".

3.26 This Board has recently decided other cases wherein an alleged lapsus calami led to the disqualification of a tenderer (even in cases where it was a genuine mistake). Some of these decisions include:

3.26.1 Case 1780 – CT2391/2021 – Supplies – Supply, Installation, Commissioning and Testing of a Virtual Environment and SAN Solution to the Water Services Corporation, decided on 29th August 2022

As per the testimony under oath of Mr Alexander Attard, point 11.12 of the Technical Offer Questionnaire required four different response times to which the bidder replied 'Yes' and 'The proposed SLA covers all parts and labour with on site response and a 6 hrs CTR service level for the full 5 year period as requested'. This was deemed non-compliant by the Evaluation Committee.

Any change that would have resulted in making the bid / offer technically compliant would have been a rectification, something which was not possible. Hence, in the opinion of this Board, the Evaluation Committee correctly discarded the Appellant's offer as technically non-compliant.

A clarification would not have 'solved' the issue at hand and any further action by the Evaluation Committee would have been going against a fundamental principle of public procurement, i.e. Self-Limitation.

Also a level playing field between all economic operators participating in the tender procedure would have been shattered. This also as confirmed in *Rockcut Limited vs Malta Industrial Parks Ltd et* (Court of Appeal decided on 31st May 2019) whereby: "jekk ir-regoli tas-sejha jimponu l-preżenza ta tali tagbrif, hu mistenni li offerenti li jiehdu sebem f'dik is-sejha joqoghd u ghal dawk ir-regoli. Wara kollox ir-regoli tas-sejha qeghdin hemm biex jigu mbarsa u mhux biex jigu mwarrba. Biex jigi zgurati il-barsien ta' dawn il-principji, l-awtorita' kontraenti hija obbligata li tosserva strettament il-kriterji li hija stress tkun stabiliet (ara f'dan is-sens is-sentenza tad-29 ta' April 2004, il-Kummissjoni v. CAS Succhi Di Frutta S.p.A, C-496/99, punt 115)".

And

"When also considering that the Technical Offer Questionnaire falls under Note 3, i.e. no rectifications are allowed, such 'disqualification' of Appellant's bid is deemed to be in total congruence with normal public procurement praxis."

3.26.2 Case No 2078 – CFT 009-3622/24 (CPSU 0743/24) – Supplies Tender - Tender for the Supply of Vinyl Coated Gypsum Tiles

The offer was disqualified because the tenderer included, in the Financial Bid Form, a price with three decimal points. The Board rejected the objection as the Financial Bid Form was marked as Note 3 and no rectification was possible. The Board concluded:

“Therefore, contrary to the appellant’s argument, if this appeal were to be upheld it would contradict the principles of proportionality and equal treatment.”

3.26.3 Case 2147 – SPD1/2025/015 – Tender for the Acquisition of a Crime Victimization Survey 2025 (TheDark2025) for the University of Malta decided on 29th September 2025

The Board held:

“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.

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.”

3.26.4 Case No 2187 – SPD2/2025/056 “Framework Contract for the Leasing of Monoblock Portacabins and Portable Toilets for the Fairyland Event including the supply, delivery, installation, cleaning and removal using environmentally friendly materials for the Malta Tourism Authority” decided on 1st December 2025

In this case, the objector claimed that it failed to tick “Yes” (it is pertinent to note, it did not tick “NO” here but omitted to tick “YES”) due to a clerical error and that this could have been clarified. The Board rejected this argument given the Technical Questionnaire was marked as Note 3:

“This Board, having reviewed the Technical Offer Questionnaire in detail, as well as the procurement file as a whole, cannot agree with the Appellant in that Items 6 and 7 required a confirmation of information already submitted or information provided purely by the Contracting Authority. What was required in certain parts of Items 6 and 7 was

confirmation by the economic operator that he/ she/ it shall adhere to for example “GPP Criteria – Adherence to Green Public Procurement outlined in Section 3 of the Tender Document”, that the winning bidder shall “bind themselves to accept any changes in the dates / locations that may be requested”.

Here, we are not dealing with information which is not clear enough and could have been clarified, but rather a clerical oversight, an omission which required correction. Given the fact that as already considered above the Technical Offer Questionnaire was Note 3, rectifications were disallowed and the Contracting Authority could not have asked for the rectification needed to correct the omissions of the Appellant.”

3.27 Of particular relevance is also the Court of Appeal (Superior Jurisdiction) judgment in the names *Krypton Chemists Limited (C-8933) v. Central Procurement and Supplies Unit and Cherubino Limited (C-3677)* dated 13th November, 2025⁴

“28. Hija rilevanti hafna wkoll f'dan il-qasam tal-liġi d-distinzjoni li teżisti bejn kjarifika u rettifika.

29. Kjarifika hija l-azzjoni li permezz tagħha l-awtorità kontraenti tista' titlob spjegazzjoni jew interpretazzjoni fuq informazzjoni li tkun diġà giet sottomessa mal-offerta. Naturalment il-proċedura tal-kjarifika ma tistax tintuża biex dak li jkun idabbal informazzjoni ġdida jew biex ibiddel isustanza tal-offerta. Il-Qorti tal-Appell fis-sentenza *Rockcut Limited v. Direttur Generali tad-Dipartiment tal-Kuntratti deċiża fil-25 ta' Gunju, 2018* stabbiliet li ma tistax tinghata kjarifika ta' tagħrif li ma jkunx inghata għaliex il-kjarifika sservi biss biex tagħmel aktar ċar tagħrif li jkun diġà mogħti iżda li ma huwiex ċar biżżejjed. Kif inghad fis-sentenza *Steelshape Ltd v. Direttur tal-Kuntratti deċiża fis-7 ta' Anwissu, 2013*, dak li offerent għandu jgħid, għandu jgħidu mal-offerta u mhux jippretendi li jkun mistoqsi d-dettalji tal-modus operandi tiegħu. Kjarifika, għalbekk hija limitata għal spjegazzjoni ta' elementi diġà preżenti fl-offerta, mingħajr ma tinbidel il-kompożizzjoni tagħha.

30. Rettifika, min-naha l-oħra, hija l-azzjoni li tippermetti lill-awtorità kontraenti titlob korrezzjoni ta' żbalji jew omissjonijiet. Tali rettifika hija permessa li ssir sakemm din ma tkunx giet esplicitament eskluża fiddokument tas-sejba. Ifisser dan, li jekk skont id-dokument tas-sejba ma tistax issir rettifika mela allura l-awtorità kontraenti tkun miżmuma mill-tilob rettifika għaliex l-awtorità kontraenti hija marbuta mal-kundizzjonijiet tas-sejba, b'dana li jekk hija ma tharishomx hija tkun qiegħda tivvantaġġa offerent fuq iehor (ara *Projekte Global Ltd v. Kunsill Lokali Marsaskala deċiża mill-Qorti tal-Appell fis-7 ta' Ottubru, 2014* fejn offerta li ma kinitx akkumpanjata minn garanzija xierqa ma setgħetx tiġi rettifikata għaliex tali rettifika kienet projbita mill-kundizzjonijiet tas-sejba). Minbarra dan, irrettifika tista' ssir biss jekk l-ommissjoni jew żball ikunu manifesti, klerikali jew formali, u dawn la jaffettwaw il-kompetizzjoni u lanqas ma jbiddu ssustanza tal-offerta bħal bdil fil-preżż, fl-ispeċifikazzjonijiet tekniċi, jew f'elementi essenzjali, Hekk pereżempju fis-sentenza *AIB Insurance Brokers Ltd v. Awtorità dwar it-Trasport ta' Malta deċiża fis-27 ta' Ottubru, 2021*, il-Qorti tal-Appell aċċettat rettifika ta' dokument nieqes li ma kienx essenzjali u ma biddilx l-offerta.”

⁴ Application No. 322/2025/1.

3.28 Two (2) key points raised by the Court relate to the fact that clarifications are only permitted when there is something which is not clear in the submission (in the present case, IBM clearly and intentionally indicated “NO” for twelve items, consecutively) and rectifications are not permitted (whether formulated as clarifications or not) when same is expressly excluded in the Tender Document (such as when something is marked as Note 3).

E. Conclusion

3.29 The Board and the Court of Appeal have consistently held that documents, such as the Technical Questionnaire, cannot be rectified or clarified where the submission is already clear. In this case, there is no doubt that IBM marked all of item 4 of the Technical Questionnaire with “NO”, that this was intentional (although, whether it was intentional or not is not relevant) and that this rendered its offer non-compliant.

3.30 As reiterated by the Board and the Court of Appeal, rectification is prohibited and allowing a tenderer to ‘clarify’ a “NO” (which leaves no room for interpretation) would be tantamount to permitting a rectification and this would constitute a breach of the principles of equal treatment and self-limitation.

3.31 It is submitted, with respect, that this First Grievance therefore ought to be rejected.

4 Second Grievance – Failure of Contracting Authority to provide unambiguous tender requirements

4.1 IBM alleges that the requirement in the Tender Document relating to Field Officers Application, as amended by the clarifications, was ambiguous.

4.2 In terms of the PPR, a tenderer can challenge the way a Tender Document (which includes clarifications thereto) is drafted only through a remedy before closing in terms of Regulation 262.

4.3 IBM failed to do so.

4.4 IBM cannot at this stage claim that two clarifications – clearly stating that the tenderers must still prove that the solution offered had the ability to provide Field Officer Application (which clarifications were issued on 2nd April 2025) – created an ambiguity.

4.5 The Tender Document provides, in Section 4.8, that the General Rules Governing Tenders (amongst others) are applicable to the Tender Procedure. In terms of General Rule 5.2:

“Tenderers bear **sole liability for examining** with appropriate care the procurement documents, including those design documents available for inspection, and any clarification notes to the procurement documents issued during the tendering period, and **for obtaining reliable information with respect to conditions and obligations** that may in any way affect the amount or nature of the tender or the execution of the services/supplies/works.....” [emphasis added]

4.6 Therefore, each tenderer had an obligation to carefully assess the Tender Document prior to submission, including in particular the Technical Questionnaire which was marked as Note 3.

4.7 IBM, upon submission of its tender, accepted in full and in its entirety the content of the Tender Document. This is clearly and expressly stated in General Rule 9.4 which provides as follows:

*“In submitting a tender..... **the tenderer accepts in full and in its entirety, the content of this tender document, including subsequent Clarifications issued by the Central Government Authority/Contracting Authority (CGA/CA)**..... Tenderers are expected to examine carefully and comply with all instructions, **forms**, contract provisions and specifications contained in this procurement document.....” [emphasis added]*

4.8 The contents of the Tender Document were disclosed and known to all parties at the outset. IBM cannot, at the 11th hour simply because it has not been successful in its tender, submit grievances to the Board which relate to the way the Tender Document was published or subsequently clarified.

Case-law of the Board and Court of Appeal

4.9 The Board, and the Court of Appeal, have been very consistent in their approach on this matter. In a nutshell, if a grievance relates to the content of the Tender Document, the grievance could have only been raised in a remedy before closing in terms of Regulation 262.

4.10 Any grievances relating to the Tender Document raised at a later stage have, rightly so, been discarded by the Board and Court of Appeal.

4.11 Reference in this reply shall be made to only a few of the recent decisions and judgments on this point:

4.11.1 Case 1588 – MFEA/PPCD/035/2020 - Tender for the Provision of a Roaming, Outdoor, Photographic Exhibition showcasing EU-Funded Projects in Malta and Gozo for the Planning and Priorities Coordination Division

This case was decided on 8th July 2021. The Board held as follows:

“The Board opines that the arguments brought forward by the Appellant during the virtual hearing are arguments that should have been brought forward under a call for remedies ‘before closing date of a call for competition’ under Regulation 262 rather than an appeal / objection under Regulation 270, ‘decisions taken after the closing date for submissions of an offer.’ The Board does not uphold Appellant’s second grievance.”

4.11.2 Case 1690 – CT2097/2021 – Supplies Tender to Procure and Implement a CCTV System including Environmentally friendly Equipment and Client Workstations within Government State Schools

This case was decided on 11th March 2022. The Board held as follows:

“Therefore, this Board opines, that the Appellant should have either used Regulation 262 of the Public Procurement Regulations to seek remedy if it was of the opinion that the tender specifications and conditions were impossible to be met, or at the very least to make a clarification request to the Contracting Authority during the bidding process.”

4.11.3 Case 1733 – SVP 04/2022 – Call for Quotations for the Provision of Waste Collection Services using Environmentally Friendly Transportation Services at St Vincent De Paul Long Term Care Facility

This case was decided on 30th May 2022. The Board held as follows:

*“If the Appellant found this reply as being ambiguous, it had tools at its disposal, such as putting forward more clarification requests and finally filing a Call for Remedies objection as per Regulation 262 of the Public Procurement Regulations. **It cannot at this stage lament about details, or lack of, which were known to it as from the beginning of the tender procedure.**” [emphasis added]*

4.11.4 Court of Appeal (Superior Jurisdiction), Application Number 95/21/1: Truevo Payments Limited (C62721) v. 1. Direttur tal-Kuntratti; 2. Ministeru għall-Finanzi u x-Xogħol U 3. Credorax Bank Limited (C46342).

This case was decided by the Court of Appeal (Superior Jurisdiction) on 30th June 2021, declaring the objection filed by Credorax Ltd before the Board null and without effect, as its grievances all related to matters which had to be raised through a remedy before closing. Court held as follows:

“7. Mhux l-istess jista’ jingħad fil-kuntest tal-aggravju l-iehor tas-soġjeta` issa appellanti, dak marbut mal-inammissibilita` tal-ażżjoni in vista tar-rimedju ikkontemplat fir-Regolament 262 aktar qabel indikat. Hu ier li l-ilmenti tas-soġjeta` Credorax Ltd huma diretti lejn il-proċedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-soġjeta` qed tilmenta mill-użu tal-proċedura tal-ghoti tal-kuntratt b’negożjati, fuq il-mod kief għe imfassal il-proċess ta’ din il-proċedura u li ma kienx hemm l-approvażżjoni tad-Direttur tal-Kuntratti għall-użu ta’ din il-proċedura.

Dawn it-tlett aggravji li abbàżi tagħhom il-kumpanija appellata Credorax Ltd pprezentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taht ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel id-data tal-gheluq ta’ sejba għall-kompetizzjoni u mhux, bħal fil-każ tal-lum, wara dik id-data, u sabansitra wara d-deċiżjoni dwar l-ghoti tal-kuntratt.

8. Saret referenza għas-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Ewropea tat-12 ta’ Frar, 2004 , fil-każ jil-ismijiet Grossman Air Service, Bedarfsluftfabrtunternehmen GmbH & Co. KG v. Republik Österreich (C-230/02, CJEU) fejn fost il-konklużjonijiet milbuqa jingħad is-segwenti: “1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory

specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract awarded.”

(Sottolinear ta’ din il-Qorti).

9. Jidber ċar mill-premess illi darba li, anke f’dan il-każ, il-kuntratt għe rakkomandat u s-soġjeta` Credorax Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-għeluq tat-terminu għall-preżentata tal-offerta, ma tistax aktar tappella biex tressaq l-aggravji tagħha.”

4.12 *In view of the above, it is submitted with respect that the Second Grievance should be discarded and rejected since it relates to matters which were known to IBM prior to closing date for submission of tenders and, therefore, could only be raised in accordance with Regulation 262.*

5 Conclusion

5.1 *In view of the above, Deloitte respectfully requests the Board to:*

- (i) reject the Objection filed by IBM;*
- (ii) confirm the Contracting Authority’s decision.*

5.2 *This reasoned reply is without prejudice to such further submissions that Deloitte may be allowed to make during the proceedings relating to the appeal forming the subject-matter of the Objection.:*

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

Considers;

This Board notes that the Appellant has brought forward two (2) grievances, the first that the Appellant believes that the Tender Evaluation Committee should have asked the Appellant to clarify its submission, and secondly that the Contracting Authority has failed to provide unambiguous tender requirements.

A. Evaluation Committee ought to have asked for a clarification on the Appellant’s submittal.

The Appellant on this grievance argues that on the basis of the Contracting Authority’s clarification⁵ the Appellant “considered the Field Officers Application to be out of scope of the Tender, and thus in the Technical Questionnaire it replied “NO” in the column Information on item being offered, adding that this requirement had been de-scoped.” The Appellant argues further that the Tender Evaluation Committee should have realised that the Appellant’s proposed software did in fact satisfy the requirements because the Preferred Bidder’s chosen software is identical. The Appellant argues further that given the fact that the Technical Questionnaire was listed as Note 3, then the Contracting Authority should have requested a clarification. The Appellant contends that the indication ‘no’ in its Technical Questionnaire was a *lapsus calami* due to the ambiguity created by the Contracting Authority.

⁵ Question 1 – Reply 1 of the Clarification Meeting dated 25th March, 2025.

The Contracting Authority on the other hand argues that the functional requirement was never removed but that only the pricing element was removed. The Contracting Authority relies on its replies to the clarification questions posed during the tendering process, and that the clarifications made it is obvious that the Contracting Authority expected to see evidence of this ability, reflected in the technical responses. The Contracting Authority further argues that once the Appellant stated “NO” to the questions within the Technical Questionnaire, the Tender Evaluation Committee could only seek clarifications on what was already declared, and could not invite the Appellant to revise its replies to a “YES” thereby altering the core content of a Note 3 reply.

This grievance revolves around the ‘Field Officers Application’, and whether it was completely out of scope or whether it remained required as part of the tender requirements. This Board has reviewed the entirety of the Tender Document, particularly the following clarifications resulting from the clarification meeting held on the 25th March, 2025:

“Question 1

Is the 'Field Officers Application' required, and do we need to include licenses for the 'Field Officers'?

Reply 1

ld Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the 'Field Officers Application' as described in tender dossier Section 3 Clause 4.2.1 point number 4.”

“Question 23

When it comes to the 'Field Service' application, how many licenses should be there?

Reply 23

Field Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the 'Field Officers Application' as described in tender dossier Section 3 Clause 4.2.1 point number 4.”

“Question 36

The field service application. Is there any requirement for route planning? So if I to have a route planner with distance and Potential traffic and things like this.

Reply 36

Field Officers Application is out of scope for this tender and field users licenses are not to be included. Tenderers should still show us and proof the ability to have the 'Field Officers Application' as described in tender dossier Section 3 Clause 4.2.1 point number 4.”

The Board determines that in view of the foregoing quoted clarifications, it was clear that the Contracting Authority de-scoped the Field Officers Application in financial terms as evidenced by their declaration not to include field users licences, however the Contracting Authority was clear in that it required a software **technically** able to have the Field Officers Application, and further that

tenderers must show and prove this technical requirement. This Board understands that the Contracting Authority wants to invest in a software which is able to support the Field Officers Application, so that if in the future it wishes to activate and license that module, it need not procure a separate or alternative software solution. This is completely justified and logical reasoning on the part of the Contracting Authority. Critically, this Board notes that the Field Officers Application is not described in the Tender Document as an optional or aspirational future element; it is expressly described as a Core Module forming part of the CRM architecture in Section 3, Clause 4.2.1 point 4 of the Technical Specifications. It therefore forms part of the present technical scope of the contract, irrespective of the fact that its associated licences are not being funded in this procurement cycle. The Appellant's contention, advanced by its legal representative at the hearing, that the Contracting Authority was in effect requiring IBM to be qualified for 'a potential future requirement that, might or might not happen in the future' is therefore factually incorrect. The ability to support the Field Officers Application is a current, specified technical requirement; what is deferred to the future is the activation and financing of the corresponding licences. These are distinct matters, and the Appellant's conflation of the two does not withstand scrutiny. In view of its 'de-scoping' from a financial aspect, the Contracting Authority made it clear once, twice and three times over that all tenderers must **"still show us and proof the ability to have the 'Field Officers Application'"**.

Therefore, this Board agrees with the Contracting Authority that there was nothing ambiguous in these clarifications, rather it emerged clear as day that the licences relating to the Field Officers Application were out of scope, but that all tenderers were to show and prove ability to have the Field Officers Application. The Appellant's negative replies in its Tender Questionnaire in this regard were a clear and unequivocal indication to the Tender Evaluation Committee that the software proposed by it did not possess this ability. The Tender Evaluation Committee was bound by the Appellant's own declarations in its Technical Questionnaire, and whether this was true or not was rightly so, irrelevant to the Tender Evaluation Committee. On the contrary, this Board holds that the Tender Evaluation Committee would have been incorrect if it had to continue assessing the Appellant's bid when the Appellant *ex admis* confirmed that it does not possess the abilities relating to the Field Officers Application.

The Appellant argued that the Evaluation Committee, having verified through the Preferred Bidder's demonstration that the Salesforce platform possessed the required Field Officers functionality, ought to have inferred that IBM's proposed Salesforce solution was equally capable. This Board rejects this argument for three reasons. First, the principle of equal treatment requires the Evaluation Committee to assess each tenderer exclusively on the basis of that tenderer's own submission. The Evaluation Committee cannot import compliance from one bidder's submission into another's. Second, it is a matter of record that different configurations, versions, and licensing arrangements of the same software platform can result in materially different technical capabilities; the Evaluation Committee cannot be required to assume identical capability based on a shared brand name alone. Third, and most fundamentally, even if the Salesforce platform used by IBM were technically identical in all respects, the Appellant was required to declare this capability in its own Note 3 Technical Questionnaire and failed to do so. A tenderer who declares 'NO' to a mandatory requirement cannot subsequently rely on a co-tenderer's 'YES' to render itself technically compliant.

On the matter regarding whether the Tender Evaluation Committee should have asked for a clarification or not, this Board must necessarily highlight the introductory note on Page 1 of the Technical Questionnaire:

"The information on item being offered in the table below fall under Note 3 (Notes to Clause 5, of Tender Dossier) and shall not be subject to rectifications"

This status as Note 3 is also confirmed at Page 9 of the Tender Document and defined within the 'Notes to Clause 5' as meaning:

*“No rectifications shall be allowed. **Only clarifications on the submitted information may be requested.** Tenderers will be requested to clarify the submitted information within five (5) working days from notification”. (Added emphasis of the PCRB).*

This Board must necessarily delve into the difference between a clarification and a rectification, and hereby refers to the recent judgment in the names **Krypton Chemists Limited (C-8933) v. Central Procurement and Supplies Unit et'** dated 13th November, 2025 delivered by the Court of Appeal (in its Superior Jurisdiction) which dealt with this distinction precisely:

“27. Ma bhemmx għalfejn ngħidu, il-prinċipju tal-proporzjonalità għandu jiġi applikat b'mod li jbhax l-għanijiet tal-proċess tal-akkwist pubbliku, jiġifieri, li l-kuntratt jingħata lil min jagħmel l-orbos u l-aħjar offerta, mingħajr ma jinkisru l-prinċipji ta' trattament ugwali u trasparenza. Tali prinċipju però m'għandux jintuża bhala pretest biex offerta irregolari tiġi salvata, jekk dan iwassal għal vantaġġ kompetittiv li mbux xieraq.

28. Hija rilevanti bafna wkoll f'dan il-qasam tal-liġi d-distinzjoni li teżisti bejn kjarifika u rettifika.

*29. **Kjarifika hija l-azzjoni li permezz tagħha l-awtorità kontraenti tista' titlob spjegazzjoni jew interpretazzjoni fuq informazzjoni li tkun diġà giet sottomessa mal-offerta.** Naturalment il-proċedura tal-kjarifika ma tistax tintuża biex dak li jkun idabbal informazzjoni għida jew biex ibiddel issustanza tal-offerta. Il-Qorti tal-Appell fis-sentenza *Rockcut Limited v. Direttur Ġenerali tad-Dipartiment tal-Kuntratti* deċiża fil-25 ta' Ġunju, 2018 stabbiliet li ma tistax tingħata kjarifika ta' taġhrif li ma jkunx ingħata għaliex il-kjarifika sservi biss biex tagħmel aktar ċar taġhrif li jkun diġà mogħti iżda li ma huwiex ċar biżżejjed. Kif ingħad fis-sentenza *Steelshape Ltd v. Direttur tal-Kuntratti* deċiża fis-7 ta' Anwwissu, 2013, dak li offerent għandu jgħid, għandu jgħidu mal-offerta u mbux jippretendi li jkun mistoqsi d-dettalji tal-modus operandi tiegħu. **Kjarifika, għalhekk hija limitata għal spjegazzjoni ta' elementi diġà preżenti fl-offerta,** mingħajr ma tinbidel il-kompożizzjoni tagħha.*

*30. **Rettifika, min-naħa l-oħra, hija l-azzjoni li tippermetti lill-awtorità kontraenti titlob korrezzjoni ta' żbalji jew ommissjonijiet. Tali rettifika hija permessa li ssir sakemm din ma tkunx giet espliċitament eskluża fiddokument tas-sejha. Ifisser dan, li jekk skont id-dokument tas-sejha ma tistax issir rettifika mela allura l-awtorità kontraenti tkun mizmuma milli titlob rettifika għaliex l-awtorità kontraenti hija marbuta mal-kundizzjonijiet tas-sejha, b'dana li jekk hija ma tharishomx hija tkun qiegħda tivvantaġġa offerent fuq iehor** (ara *Projekte Global Ltd v. Kunsill Lokali Marsaskala* deċiża mill-Qorti tal-Appell fis-7 ta' Ottubru, 2014 fejn offerta li ma kinitx akkumpanjata minn garanzija xierqa ma setgħetx tiġi rettifikata għaliex tali rettifika kienet projbita mill-kundizzjonijiet tas-sejha). Minbarra dan, irrettifika tista' ssir biss jekk l-ommissjoni jew żball ikunu manifesti, klerikali jew formali, u dawn la jaffettwaw il-kompetizzjoni u lanqas ma jbiddu ssustanza tal-offerta bħal b'dil fil-preżż, fl-ispeċifikazzjonijiet tekniċi, jew fl-elementi essenzjali, Hekk pereżempju fis-sentenza *AIB Insurance Brokers Ltd v. Awtorità dvar it-Trasport ta' Malta* deċiża fis-27 ta'*

Ottubru, 2021, il-Qorti tal-Appell aċċettat rettifika ta' dokument niegħes li ma kienx essenzjali u ma biddilx l-offerta.

31. Imbaddem dan kollu għall-każ tal-lum, din il-Qorti tqis li n-nuqqas fl-istampa tat-tikketta provdut minn Krypton ma taba l-ebda vantaġġ u ma holoq ebda preġudizzju għall-oblaturi l-obra. Il-problema fl-istampa kienet biss li din ma kinitx ċara biżżejjed u għalhekk ma setgħetx tingara faċilment. Nuqqas bhal dan seta' faċilment jiġi msewwi permezz ta' kjarifika għaliex kif rajna aktar kmieni, il-proċedura tal-kjarifika hija aċċettabbli li tintuża meta t-tagħrif mogħti mill-offerent ma jkunx ċar biżżejjed.” (Added emphasis of the PCRB).

It emerges clear from the acts of these proceedings and the procurement file, that for the Appellant's bid to succeed, it would have had to answer 'yes' instead of 'no' to all of the questions regarding the Field Officers Application in its Technical Questionnaire. Therefore, it results that this was not a matter of asking for an explanation or interpretation of already submitted information (i.e. a request clarification) but rather this was a matter of correcting of a mistake (i.e. a request for a rectification). Therefore, a clarification would have never 'saved' the Appellant's bid, because for the Appellant's bid to survive, a rectification to correct its mistakes in the Technical Questionnaire was necessary.

During final oral submissions at the hearing, the Appellant's legal representative placed reliance on the judgment of the Court of Justice of the European Union in Case C-599/10 SAG ELV Slovensko, a.s. et al. v. Úrad pre verejné obstarávanie (29 March 2012). This Board has taken full cognisance of that judgment. However, it does not assist the Appellant, and in important respects, it actively contradicts the Appellant's position. SAG ELV establishes that once economic operators have submitted their bids, those bids can in principle no longer be amended. It further establishes that there is no general duty on a contracting authority to seek clarification of tenders: a contracting authority may, exceptionally, seek clarification or correction of obvious material errors, but only where this does not amount to 'any amendment' of the tender, and only were applied equally and fairly to all tenderers. Crucially, the judgment expressly confirms that a contracting authority 'may reject those tenders without seeking any clarification', the very opposite of the duty that the Appellant sought to impose upon the Evaluation Committee. In this case, the Appellant's answers in the Technical Questionnaire were not unclear, imprecise, or the product of an obvious material error. They were unambiguous, consistent across twelve items, and each accompanied by the Appellant's own deliberate written explanation: 'Descoped in Tender Clarification by WSC'. There was nothing to clarify in the SAG ELV sense: no ambiguity, no imprecision, no obvious error. What the Appellant required was not clarification of something unclear, but the reversal of something clearly and deliberately stated. That is not clarification; it is rectification and rectification is expressly prohibited for Note 3 items in this Tender. The argument based on SAG ELV is accordingly rejected. This Board considers that jurisprudence on the matter is constant and clear, that a Contracting Authority may ask the economic operator for a rectification to correct mistakes (as in this case) or omissions only when the Tender Document allows for it. In this case, the Technical Questionnaire was classified as Note 3, and had the Contracting Authority asked the Appellant to rectify and correct its mistakes or *lapsus calami* as described by the Appellant in his appeal, it would have in fact been acting unjust in the face of other economic operators which submitted a Technical Questionnaire free from mistakes...

The Appellant characterised its twelve 'NO' answers as a *lapsus calami*. This Board cannot accept that characterisation. The Appellant's answers are consistent across twelve items and each is accompanied by the Appellant's own written annotation 'Descoped in Tender Clarification by WSC' explaining the reason for the negative reply. That annotation alone confirms that the answers were deliberate, not accidental. What the Appellant describes as a *lapsus calami* was in reality a considered, if mistaken,

interpretation of the clarifications. A deliberate answer, however well-intentioned, is not a *lapsus calami* and cannot be reversed through the clarification procedure. The Appellant's disqualification results from its own misreading of the tender requirements, not from any ambiguity on the part of the Contracting Authority.⁶

Therefore, the Appellant's grievance is being rejected as unfounded.

B. Contracting Authority failed to provide unambiguous tender requirements

Here, the Appellant raises issue with the tender requirements alleging they were ambiguous and in its opinion this led to a *"disproportionate, unfair, discriminatory and opaque procurement process."*

The Contracting Authority on the other hand contends there was no ambiguity, no disproportionate treatment and no room for interpretation.

Considering the considerations above, this Board finds that the Contracting Authority was amply clear in what it was expecting from economic operators. Whilst the Field Officers Application was de-scoped from a financial aspect, it was crucial for economic operators to show and prove the ability of the CRM solution to support the Field Officers Application.

Notwithstanding the above, this Board must necessarily refer to Regulation 262(1)(d) which is the remedy at law for prospective candidates and tenderers like the Appellant in a previous stage, in the event that they wish to *"remove ambiguities of a particular term or clause included in a call for competition"*:

"(1) Prospective candidates and tenderers may, within the first two-thirds of the time period allocated in the call for competition for the submission of offers, file a reasoned application before the Public Contracts Review Board:

*(d) to correct errors or **to remove ambiguities of a particular term or clause** included in a call for competition, in the contract documents, in clarifications notes or in any other document relating to the contract award procedure;"* (Added emphasis of the PCRB).

This Board refers to settled jurisprudence on the matter, as referred to in the recent judgment delivered on the 10th March, 2026 by the Court of Appeal (Superior Jurisdiction) in the names **'Camilleri Paris Mode Limited vs. Dipartiment tal-Kuntratti et'** where it was held that:

"19. Meta qieset il-fatti ta' dan il-każ, din il-Qorti tqis li dan l-aggravju ma jimmeritax li jiġi milqugħ u dan għal diversi raġunijiet. Qabel xejn, din il-Qorti sejra tissottolinja xi prinċipji korollari li għandhom jiġu meqjusa fl-isfond fattwali ta' dan il-każ.

⁶ Page 1 of the Contracting Authority's reply: *"The objection suggests that the Corporation "descope" the Field Officers Application entirely, and that IBM's "NO" answers in the Technical Questionnaire were therefore of no consequence. This is factually incorrect. The Corporation did not remove the functional requirement; it removed the pricing element only. This distinction was drawn expressly, repeatedly, and in identical language during the Clarification Meeting, where the Corporation made it abundantly clear that while bidders were not to include field-user licences in their financial offer, they were still required to show and prove the ability of their CRM solution to support the Field Officers Application. The wording used could not have been more direct, and the Corporation will quote it verbatim further below.*

The difficulty arises because IBM elected to interpret "out of scope" as meaning "not required", and consequently proceeded to respond "NO" to every technical requirement relating to the Field Officers Application in the Note 3 Technical Questionnaire."

Autorità kontraenti mhijiex moghtija l-jedd li tiddel jew timmodifika l-kriterji tal-ghoti ta' kuntratt matul il-proċedura talgħotja (vide Każ - 278/14 SC Enterprise Focused Solutions SRL vs. Spitalul Județean de Urgență Alba Iulia deciż mill-Qorti tal-Gustizzja tal-Unjoni Ewropea fis-16 ta' April, 2015).

20. Daqskemm awtorità kontraenti ma tistax twarrab offerta fuq raġunijiet li ma jkunux previsti fid-dokument tas-sejba (vide Labo-Pharm Ltd v. Il-Kummissarju tal-Pulizija nomine et deciża mill-Qorti tal-Appell fid-29 ta' Marzu, 2019), daqstant iehor ma tistax min-naba l-obra taċċetta offerta li ma tkunx toqghod ma' dak mitlub fis-sejba (vide Projekte Global Limited v. Ministru Għal Għawdex et deciża mill-Qorti tal-Appell fis-16 ta' Lulju, 2018).

21. Jaqa' fuq l-offerent stess li jogħhod ma' dak mitlub fis-sejha, b'dan li huwa ma jistax jogħhod jippretendi li l-awtorità kontraenti għandha toqghod issalvalu l-offerta jekk din tkun irregolari (vide J & J Gauci Granite Limited v. Grand Harbour Regeneration Corporation plc deciża mill-Qorti tal-Appell fl-20 ta' Marzu, 2023 u Steelshape Limited v. Direttur tal-Kuntratti et deciża mill-Qorti tal-Appell fis-7 ta' Anwissu, 2013).

22. Fil-każ odjern, l-awtorità kontraenti harġet sejba bi speċifikazzjonijiet partikolari. L-appellanta giet mitluba tagħmel kjarifika fil-15 ta' Lulju 2025 u dan sabiex tikkorrabora l-offerta teknika tagħha. Madanakollu, fit-tweġiba tagħha, l-appellanta naqset li tipprowdi spjegazzjoni li l-istandard mehtieg kien ser jintlahaq. Huwa inutli li jiġi argumentat li dak l-istandard ma kienx japplika għal prodott iżda għal bini u għalhekk għe skartat mill-appellanta. **Li kellha tagħmel l-appellanta semmai kien li tiehu l-passi li kellha a dispożizzjoni tagħha ai termini tarregolament 262 tal-Legislazzjoni Sussidjarja 601.03.**

23. Infatti, fis-sentenza mogħtija minn din il-Qorti hekk kif diversament komposta fl-10 ta' Jannar, 2023 fl-ismijiet All Clean Services Limited (C 39278) v. Ministeru għall-Edukazzjoni, l-iSport, iż-Żgħażaġh, ir-Ricerka u l-Innovazzjoni et intqal li:

*“6. Din il-Qorti ma taqbilx mal-aggravju tas-soċjetà appellanti. Largument li meqjus ir-rekwiżiti l-obra mitluba fis-sejba u n-natura tax-xogħol li kellu jittwettaq, din il-kundizzjoni “hi kompletament irrilevanti”, hija sfergħa u bla bażi. **Rilevanti jew le, dik il-kundizzjoni kienet tifforma parti mis-sejha, u jekk l-istess kundizzjoni ma avveratx ruhha, is-soċjetà appellanti ma tistax tilmenta fuq il-punti żejda li hadu l-oblaturi l-obra li wettqu dik ilkundizzjoni.***

7. Din il-Qorti taqbel ma' dak li osserva l-Bord li kull min kien interessat, jekk ma kienx jaqbel ma' xi kundizzjoni fis-sejha, skont ir-Regolamenti applikabbli, seta' aġixxa, bil-mezzi li jagħtuh l-istess Regolamenti, biex jipprova jimpunja dik jew daww il-kundizzjonijiet. Mhux leċitu li l-oblatur ihalli l-proċess għaddej, u wara, jekk jitlef il-kuntratt, jallega li kundizzjoni fis-sejha ma kellhiex tkun hemm għax “kompletament irrilevanti”.

8. Hu veru li l-kundizzjonijiet tax-xogħol tal-haddiema huma regolati b'liġijiet obra, u hemm regolamenti li jagħtu poter lill-awtorità kompetenti tissindika fuq daww il-kundizzjonijiet, però, dan kien ikun argument li kellu jittressaq fl-istadju preparatorju

ghall-proċess tal-ghażla tal-oblatur preferut. Jekk ir-rekwiżit ta' fehim kollettiv huwa parti mill-kundizzjonijiet li kellhom jiġu sodisfatti minn kull oblatur, is-soċjetà appellanti kellha taderixxi ruħha ma' dak rikjest. Din il-Qorti osservat diversi drabi li dak rikjest fid-dokumenti tas-sejba għall-offerti jridu jiġu kollha sodisfatti. Mhux regolari li tgħid li kundizzjoni partikolari kienet biss "add on" u oblatur jista' jinjoraba, għax min jipparteċipa jrid isegwi dak mitlub fiddokumenti."

24. *Fid-deċiżjoni tas-26 ta' Ottubru 2022 fl-ismijiet Koperattiva Għawdxija tal-Indafa Pubblika Limitata v. Kunsill Reġjonali Għawdex et gie sottolinejat l-importanza tar-regolament 262 tal-Legislażzjoni Sussidjarja 601.03 u ntqal:*

"Fi ftit kliem, dan ir-regolament jippermetti l-ksib ta' rimedju qabel lghelug tas-sejba għall-hames raġunijiet:

- (a) meta jirriżultaw klawsoli jew deċiżjonijiet li huma impossibbli li jittwettqu;*
- (b) meta jirriżultaw kwistjonijiet dwar offerti bil-mezz ta' teknici;*
- (c) meta jkun hemm speċifikazzjonijiet diskriminatorji;*
- (d) biex jitnehhew jew jiġu korreguti klawsoli żbaljati jew ambigwi; u*
- (e) meta s-sejba għall-kompetizzjoni hija kontra l-liġi."*

25. *Fil-kawża deċiża fit-30 ta' Gunju 2021 fl-ismijiet Truevo Payments Limited (C62721) v. Direttur tal-Kuntratti et inghad:*

"Mhux l-istess jista' jinghad fil-kuntest tal-aggravju l-iehor tas-soċjeta` issa appellanti, dak marbut mal-inammissibilita` tal-ażzjoni in vista tarrimedju ikkontemplat fir-Regolament 262 aktar qabel indikat. Hu ċar li lilmenti tas-soċjeta` Credorax Ltd huma diretti lejn il-proċedura wżata u ma humiex marbuta mas-sustanza tal-offerta. Din is-soċjeta` qed tilmenta mill-użu tal-proċedura tal-ghoti tal-kuntratt b'negozjati, fuq ilmod kif gie infassal il-proċess ta' din il-proċedura u li ma kienx hemm lapprovazzjoni tad-Direttur tal-Kuntratti għall-użu ta' din il-proċedura. Dawn it-tlett aggravji li abbażi tagħhom il-kumpanija appellata Credorax Ltd ppreżentat l-appell tagħha jirrigwardjaw materji illi kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taht ir-Regolament 262. Dawn l-ilmenti kellhom jittressqu qabel id-data tal-ghelug ta' sejba għall-kompetizzjoni u mhux , bhal filkaż tallum, wara dik id-data, u sabansitra wara d-deċiżjoni dwar l-ghoti tal-kuntratt.

8. *Saret referenza għas-sentenza tal-Qorti tal-Gustizzja tal-Unjoni Enropea tat-12 ta' Frar, 2004 , fil-każ fl-ismijiet Grossman Air Service, Bedarfsluftfabrtunternehmen GmbH & Co. KG v. Republik Österreich (C230/02, CJEU) fejn fost il-konkluzjonijiet milbuqa jinghad is-segventi:*

"1. Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, once a public contract has been awarded, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were

allegedly discriminatory specifications in the documents relating to the invitation to tender, but he did not seek review of those specifications before the contract awarded.”

9. Jidber ċar mill-premess illi darba li, anke f'dan il-każ, il-kuntratt gie rakkomandat u s-soċjeta` Credorax Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-gheluq tat-terminu għall-preżentata tal-offerta, ma tistax aktar tappella biex tressaq l-aggranji tagħha.”

26. Din il-Qorti taqbel pjenament ma' dawn il-prinċipji u la l-appellanta naqset li tfittex ir-rimedju opportun qabel l-gheluq tat-terminu għall-preżentata tal-offerta, ma tistax issa tingeda b'din il-proċedura f'dan listadju. Addirittura f'dan il-każ, mhux talli ma ġietx adoperatat il-proċedura ai termini tar-regolament 262 fuq riferit, iżda minkejja li l-appellanta nġhatat l-opportunita' li tressaq kejarifika dwar l-offerta tagħha, din xorta wabda ma kkonformatx rubha. Huwa prinċipju assodat li jekk ir-regoli tassejha jitolbu ċertu prodott b'ċertu speċifikazzjonijiet, l-offerenti għandhom joqogħdu għal dan ir-regoli u joffru prodott skont l-ispeċifikazzjonijiet hemm mitluba. Huwa dak li kellha tagħmel l-appellanta.” (Added emphasis of the PCRB).

It does not result to this Board that the Appellant utilised the remedy available to it under Regulation 262(1)(d) of the Public Procurement Regulations, therefore, it cannot now post-award complain of “ambiguous” tender requirements. If this Board were to decide otherwise, it would be unfair to all the other economic operators which have equally participated and accepted the tender requirements. Once an economic operator like the Appellant participates in a tender and submits its bid, it is thereby accepting the tender requirements as they are.

Therefore, for the reasons as explained above, this Board finds that the Appellant's second grievance is also unfounded.

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 as filed by the Appellant IBM Global Services España S.A. in its entirety.

The Board further decides not to re-imburse the deposit paid by the Appellant IBM Global Services España S.A..

Dr Ana Thomas
Chairperson

Ing. Dr Damien Gatt
Member

Mr Lawrence Ancilleri
Member

Monday 16th March, 2026.