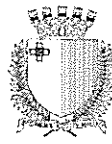


UFFIĊĊJU TAL-AVUKAT TAL-ISTAT  
CASA SCAGLIA, 16  
TRIQ M.A. VASSALLI  
IL-BELT  
MALTA



OFFICE OF THE STATE ADVOCATE  
CASA SCAGLIA, 16  
M. A. VASSALLI STREET  
VALLETTA  
MALTA

Public Contracts Review Board  
Notre Dame Ditch  
Floriana, FRN 1601



6<sup>th</sup> March, 2026

**Reply of the Department of Contracts to the appeal of European Dynamics Consortium re. CT3021/2024 Services Tender for the Customisation and Implementation of an Off the Shelf Courts Management Information System for the Court Services Agency**

By means of its application European Dynamics Consortium (the Appellant) raises four grievances:

- (i) That the failure of the Department of Contracts and of the Contracting Authority to disclose the information requested by the Appellant on the 18<sup>th</sup> February 2026 constitutes a breach of the Appellant's right to effective judicial protection under Art. 46 of the Charter of Fundamental Rights of the European Union, Art. 1(1)(3) of the Remedies Directive and Art. 55 of the Classic Procurement Directive;
- (ii) That in its evaluation of Criterion C1, the Tender Evaluation Committee applied undisclosed or modified award criteria in breach of the general principles of equal treatment, transparency and self-limitation as enshrined in Reg. 39(1) and (2) of the Public Procurement Regulations;
- (iii) That in its evaluation of Criterion C2, the Tender Evaluation Committee applied undisclosed or modified award criteria and committed a manifest error of assessment, resulting in arbitrary and disproportionate scoring, in breach of the general principles of equal treatment, transparency and self-limitation as enshrined in Reg. 39(1) and (2) of the Public Procurement Regulations;
- (iv) That the Preferred Bidder should have been excluded in terms of Art. 57(4)(c) of the Classic Procurement Directive.

The first grievance relates solely to access to information and should be dealt with by this Board as a preliminary issue in the same proceedings. By its last three grievance the Appellant seeks to challenge the decision of the 17th February 2026 to award the public contract in question to Lex Nova (the Preferred Bidder).

All four grievances are unfounded and ought to be dismissed.

**1. First Grievance: disclosure of requested information**

- 1.1. This grievance, of a preliminary nature, raises two distinct issues. First is the issue of whether the requested information should have been disclosed or not. And secondly is the issue of whether, in the case where the requested information should have been disclosed, the Appellant has been denied an effective remedy.
- 1.2. On the first issue, the point of departure must be to consider the objective which underlies the authorities' obligation to disclose certain information on the bid recommended for award. According to the judgment of the European Court of Justice (ECJ) in the *Antea Polska Case* (17 November 2022, C-54/21, EU:C:2022:888, para. 103) that objective is to “enable any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement to challenge effectively and rapidly decisions taken by contracting authorities”.
- 1.3. This objective is embodied in Art. 242(2) of the Public Procurement Regulations which, in particular, provides that a contracting authority must inform an unsuccessful tenderer of the reasons for the rejection of its bid and “the characteristics and relative advantages of the tender selected as well as the name of the successful tenderer”. In the present case, the relative best price/quality ratio (BPQR) scorings of the Appellant's own bid and of the Preferred Bidder's bid have been disclosed to the Appellant. This has allowed the Appellant to compare the relative characteristics and advantages of the winning bid with its own.
- 1.4. The proof that the objective underlying disclosure has been met in this case is the Appellant's second and third grievances. These grievances are precisely the result of that comparison which the Appellant was allowed to do with the information already disclosed.
- 1.5. The appeal application reveals the Appellant's true intention of conducting a full evaluation of the selected bid itself. The Appellant is not requesting access to information but it is rather requesting the power to conduct a full evaluation of the bids itself and to question the competence of the tender evaluation committee.
- 1.6. The ECJ has already made it clear in the *Ispas Case* (9 November 2017, EU:C:2017:843, para. 35-36) (albeit relating to defence in tax inspections), that a party's right to appeal or to defend oneself in litigation does not mean that it has a right to access whatever information it wants:

*“Indeed, according to settled case-law of the Court, the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question... such restrictions, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents.”*

- 1.7. The Advocate General's Opinion in the same *Ispas Case* (EU:C:2017:650, para. 116 and 121) also considered that:

*“First, access to file as such, understood as the complete set of documents and information in possession of the administrative authorities, should be clearly distinguished from the right to have access to the documents upon which the final administrative decision is based”; and*

*“Thus, there is no right to see the complete file, but rather to have access to the key information or documents that form the basis for the administrative decision.”*

- 1.8. Specific to the public procurement field, the ECJ has stated unequivocally in *Evropaiki Dynamiki v. European Commission* (20 September 2011, C-561/10 P, EU:C:2011:598, para. 25):

*“it does not follow... that, upon written request from an unsuccessful tenderer, the contracting authority is under an obligation to provide it with a full copy of the evaluation report.”*

- 1.9. Regarding the competence of the tender evaluation committee, while the assertion is firmly rejected, this is simply not relevant to any review of the award decision and should not be entertained by this Board. After all, a competent and expert committee may still, despite its qualifications, inadvertently take an unreasonable or arbitrary decision. Should that decision not, therefore, be quashed just because the committee was composed of competent persons to the Appellant’s liking?
- 1.10. In the same manner, if a tender evaluation committee lacking certain expertise or qualifications take a perfectly reasonable decision, should that decision be quashed just because the Appellant would have preferred it if that same decision was arrived at by more competent persons?
- 1.11. In this respect the Appellant’s appeal is premised on a fundamentally unsound attack *ad hominem*. It is the evaluation itself which is subject to review, not the character or qualifications of the tender evaluation committee members. It is only where suspicions as to the integrity or the possibility of a conflict of interests on the part of a tender evaluation committee member are raised that their identity becomes of any genuine use to the review of the award decision.
- 1.12. In the *Bavarian Lager Case* (29 June 2010, Case C-28/08 P, EU:C:2010:378, para. 78), in the context of an inquiry by the European Commission into the restrictions to the free movement of goods by a number of beer companies, the ECJ confirmed that the European Commission could refuse to divulge those names since Bavarian Lager *“has not provided any express and legitimate justification or any convincing argument in order to demonstrate the necessity for those personal data to be transferred, [therefore] the Commission has not been able to weigh up the various interests of the parties concerned.”*
- 1.13. In the specific context of public procurement, in its decision in **Case 393/2015/MDC** the European Ombudsman, relying on the *Bavarian Lager* judgement, held that in order to assess whether the identities of TEC members may be divulged:
- “The Ombudsman must therefore examine whether the complainant has at least established that there exist reasonably grounded suspicions of corruption, fraud, lack of impartiality or undue influence on the part of the members of the Evaluation Committee.”* (para. 62), and
- “a general reference to ‘transparency’ is not sufficient to substantiate a need to obtain personal data”* (para. 61).
- 1.14. For all the reasons explained above, the Appellant’s wish to simply double-check everything that has occurred in the procurement procedure is not an appropriate ground for disclosure.

In the Appellant's failure to properly substantiate the reasons why the disclosure of the information it requests is necessary for it to be able to seek an effective remedy, the Department of Contracts and the Contracting Authority were correct not to disclose the information.

- 1.15. As to the second issue, even assuming for the sake of the argument that the Appellant was entitled to access the information it requested, its claims that it has been, or will be, denied effective judicial protection are unfounded. The Appellant is presently challenging the non-disclosure of the information it has requested and, this being an administrative decision after the lapse of the tender publication period, is subject to this Board's review under Reg. 270 of the Public Procurement Regulations.
- 1.16. While the Department of Contracts reiterates that permitting the Appellant to access the whole procurement file in order for it to conduct its own evaluation is not in keeping with objectives justifying disclosure, should this Board's decision be unfavourable to this stance the disclosure of that information may be ordered by the Board within these proceedings. The Appellant's rights for an effective remedy are thus, in any case, safeguarded. Therefore, under no circumstance can this preliminary grievance be the basis for the review of the actual award decision.

## 2. Second Grievance: The evaluation of Criterion C1.1

### 2.1. Criterion C1.1 requested bidders to:

*Provide a comprehensive detail of the available functionalities in relation to the requirements as stipulated within the tender document. (Reference to Section 3 – Article 4.3 and 4.4).*

- 2.2. The Preferred Bidder obtained the maximum of five (5) points whereas the Appellant obtained one (1) point. The tender evaluation committee's decision to allot a single point to the Appellant is grounded on the following justification:

*The bidder did not provide comprehensive detail of the available functionalities, within the writeup the bidder only provided a brief description of the functionalities with very minimal detail. During the demonstration the bidder only provided a superficial overview of the available functionalities again failed to provide a comprehensive details of the functionalities. Furthermore, the bidder did not provide a demonstration to substantiate functionalities such as:*

*The Case management including the case life cycle is not an actual case journey for each action within the case lifecycle the user has to switch between modules and search for the specific case to edit the case.*

*The public portal user interface as demonstrated, is based on submission of a series of electronic forms for e-filing and not a direct in system e-filing service, the interface provided is manually quite laborious for e-filers.*

*The virtual sittings feature was presented as an autonomous module with minimal or no integration with the actual system where users have to manually upload data from the external module to the actual system.*

*The Criminal Records Management, bidder provide the very basic functionality and the bail management feature lacks functionalities such as bail history, temporary bail conditions and editing of bail conditions.*

- 2.3. The Appellant takes issue with this decision on two grounds. Firstly, it questions how any bidder could have provided extensive technical elaboration given the mandatory word limits of a minimum of 1,000 words and a maximum of 2,000 words, and whether the Preferred Bidder's write-up truly respected that word limit. Secondly, the Appellant contends that the technical online demonstration of the bidders' respective solution could be used as a basis for the allotment of the BPQR scores.
- 2.4. Regarding the word limit, this was imposed on all bidders equally. If the Appellant felt that the word limit made it extremely difficult for it to present its solution, that difficulty existed for all bidders in the same manner at the outset. The general principles of equal treatment, transparency and self-limitation, as enshrined in Reg. 39(1) and (2) of the Public Procurement Regulations, have thus been respected.
- 2.5. The allegation that the Preferred Bidder's writeup exceeded the 2,000-word limit is firmly rebutted. Unlike a 'cheapest technically compliant' award criterion, the BPQR award criterion inherently requires comparative qualitative evaluation to differentiate between compliant submissions and award marks proportionate to demonstrated quality, detail, and evidential strength. That the tender evaluation committee found the Preferred Bidder's bid to be more detailed and substantiated is not unreasonable in itself. It is worth noting, in fact, that the appeal application does not address the deficiencies of its bid which the evaluation committee's justification highlights.
- 2.6. Regarding the second issue in relation to the demo, the Appellant relies on this text on page 17 of the tender dossier – *"No qualitative score is associated with the demonstration"* – to argue that the evaluation committee could not take into account any consideration of the demo when allotting the BPQR scores. Based on this text, on the same page of the tender dossier – *"The Solution that will be used by the bidder during this demonstration must be identical to the one that the bidder is tendering with. If it is not this will result in the disqualification of the bid."* – the Appellant also argues that the sole purpose of the demo was to confirm that the solution presented in the demo matched the submitted documentation.
- 2.7. These contentions are unfounded.
- 2.8. The tender dossier also provides that: *"The list of features to be demonstrated for each of these modules will be the same features as listed in Section 3 of this document. The evaluating board will go through this list, on a one-by-one basis, to verify the compliance of the functionality of the solution being proposed."* Section 3 includes the Terms of Reference which detail the functionalities and upon which the bidders were allotted points. In fact, Criterion C1.1 cross-references to Art. 4.3 and 4.4 of the Terms of Reference.
- 2.9. The evaluation committee was correct to take into account the demonstration, or lack of, for a number of functionalities. That *"no qualitative score is associated with the demonstration"* means that demo was not scored in itself, but this does not exclude that the evaluation committee verify the bidders' write-up with their respective demos and allot scores accordingly. In fact, points were reduced not for any quality or deficiency in the Appellant's

demo but rather because the demo verified the lack of comprehensiveness of the Appellant's solution.

- 2.10. This method of evaluation was both disclosed in the tender dossier and applied equally to all bidders.

### 3. Third Grievance: The evaluation of Criterion C2

- 3.1. Criterion C2 requested bidders to:

*Provide customisation detail for each specified function within the tender document. (Article 4.3 and 4.4)*

*For each function the bidder shall indicate whether:*

- the function is available out of the box,*
- available with customisation,*
- will be available (and when)*
- not available - (0 points – disqualified).*

*Note: Points will be awarded based on the readiness of all functionalities. Each feature will be assessed individually, and the total score will reflect the overall completeness and operational status. If any single functionality is not available will receive zero points and be disqualified.*

- 3.2. While still permitting the evaluation committee to score within a range, the Note to this criterion makes it clear that more points were to be awarded the more the solution nears overall completeness and operational status. The criterion itself creates four categories of "readiness" of the solution, with the first being ready out of the box and last being not available. It was clear to all bidders that the points were to be allotted in this paradigm.
- 3.3. The Preferred Bidder obtained eight (8) points with the justification "*The bidder has functions with the status marked as available with customization*". The Appellant obtained three (3) points with the justification "*The bidder has a function with the status as will be available*". Given that the Preferred Bidder's solution is, overall, more "ready" necessitates a higher scoring.
- 3.4. The Appellant argues that its one functionality which was marked as "will be available" will not be required until a later stage in the project. While it is true that the project might be implemented in stages, the BQPR grid does not take this into account. To the contrary, Criterion C2 mandates that preference is given to solutions which are the most "ready" across the board without distinguishing between functionalities that may be required to be implemented earlier than others.
- 3.5. In terms of the tender dossier, it was not for the bidders to stagger the readiness of their solution according to the chronology of implementation. The tender dossier unambiguously gives preference to the solution which is, overall, the most "ready". Therefore, contrary to its claims, it is the Appellant itself which is attempting to introduce a new scoring methodology which did not exist in the tender dossier.

4. **Fourth Grievance: whether there exist grounds to exclude the Preferred Bidder**

- 4.1. The Appellant relies on Art. 57(4)(c) of the Classic Procurement Directive. The flaw in the Appellant's argumentation is that not only does Art. 57(4)(c), being a Directive provision, lack direct effect but it is also a discretionary ground which depends entirely on the respective Member State's transposition:

*"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:*

...

*(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable;"*

- 4.2. It follows that even if, for the sake of the argument, the Preferred Bidder is guilty of grave professional misconduct and even if Art. 57(4)(c) of the Directive is, incorrectly, given direct effect, the Contracting Authority is not obliged to exclude the Preferred Bidder.
- 4.3. Considering how that provision has been transposed to Maltese law, the Appellant's fourth grievance is even more baseless. Reg. 199(b) of the Public Procurement Regulations, which transposes Art. 57(4)(c) of the Directive, provides that:

*"The Director is empowered to black list an economic operator from participating in a procurement procedure where:*

*(b) the economic operator has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata in accordance with the laws of Malta, which renders its integrity questionable;"*

- 4.4. A number of consequences flow from this transposition.
- 4.5. Firstly, rather than give the discretion to the contracting authorities on a case-by-case basis, the Maltese legislature has opted to require the contracting authorities to exclude economic operators who are blacklisted by the Director of Contracts. As a matter of fact, the Preferred Bidder is not blacklisted.
- 4.6. Secondly, "*guilty of grave professional misconduct*" in Art. 57(4)(c) has been defined under the Public Procurement Regulations as meaning criminally guilty, that is where there has been a criminal conviction having the force of *res judicata*. The Appellant itself confirms in its appeal application that there has been no criminal conviction against the members forming the Preferred Bidder consortium or against or any natural person having powers of representation and/or control of those members. The information relied upon by the Appellant merely alludes to ongoing criminal proceedings.
- 4.7. Thirdly, the Director of Contracts is "*empowered*" to blacklist an economic operator having been convicted of such crime. Therefore, even where a criminal conviction having the force of *res judicata* exists, the Director of Contracts is not obliged to blacklist. The ground remains discretionary.

- 4.8. All of the above points have been confirmed by the Court of Appeal's judgment in *BESSUI JV konsorzju kompost minn (i) United Equipment Company (UNEC) Ltd (C10827) u (ii) ISD Company Limited (C67005) v. Dipartiment tal-Kuntratti et* (15 January 2026, appeal no. 379/2025/1).
- 4.9. Therefore, there exist no grounds to exclude the Preferred Bidder on the basis of grave and professional misconduct.

**For the reasons set out in this reply, the Department of Contracts submits that all of the grievances raised by European Dynamics Consortium are unfounded and should be rejected, and that the decision to award the contract to Lex Nova should be confirmed.**



**Av. Daniel Inguanez**  
[daniel.inguanez.2@stateadvocate.mt](mailto:daniel.inguanez.2@stateadvocate.mt)