

**Public Contracts Review Board  
Notre Dame Ditch  
Floriana FRN1601  
Malta**



**9 March 2026**

Dear Sirs,

**Re: Services Tender for the Customisation and Implementation of an Off-the-Shelf Courts Management Information System for the Court Services Agency (the Tender)**

1. We have been instructed by LexNova (TID 218920) (**LexNova**), an association of economic operators composed of (i) Grant Thornton Malta (Registration No. CPNOTIF-18/2011), (ii) Dakar Enterprises Limited (C-15809); and (iii) Synergy International Systems, Inc. (Registration No. 04819777), to lodge this reply in terms of Regulation 276 of the Public Procurement Regulations (the **PPR**) in response to the appeal filed by the European Dynamics consortium (**European Dynamics**) on 27 February 2026.

**A. EXECUTIVE SUMMARY**

2. This appeal is the latest chapter in a long line of procurement challenges brought by European Dynamics before national and international judicial fora. European Dynamics's litigious reputation in procurement disputes precedes it. That fact alone is not objectionable. However, a discernible pattern emerges from its litigation history: when faced with an unfavourable outcome, European Dynamics adopts a disruptive strategy, seeking either to reverse the result of the evaluation or, failing that, to bring down the curtain on the procurement procedure altogether.

3. The present appeal begins by embarking on a fishing expedition and seeking extensive disclosure of nothing but short of the whole procurement file.<sup>1</sup> European Dynamics's wide-ranging and indiscriminate requests include the evaluation report, the identities of the Tender Evaluation Committee (TEC) and the contents of LexNova's bid, including, the technical offer, the financial offer, demonstration materials—which include LexNova's tightly guarded commercially sensitive and proprietary secrets. EU jurisprudence has repeatedly cautioned against such indiscriminate disclosure and the potentially chilling repercussions it may have on future competitions.
4. Once that attempt is set aside, the appeal ultimately reduces to a simple disagreement with the scoring attributed by the TEC.<sup>2</sup> European Dynamics seems to have relied on an exceptionally low financial offer to carry it through the day and compensate for the potentially inferior of its technical offer. It submitted a financial offer of €5,874,470.70, which is approximately 41% below the estimated procurement value of €10,000,000.
5. While such a low-balling financial offer might have succeeded in procedures where price is the dominant factor, this Tender was expressly structured around the Best Price Quality Ratio, with 70% of the weighting attributed to technical quality and only 30% to price. In such circumstances, an offer relying primarily on price could not reasonably be expected to prevail where the competing offer demonstrably performed better on the decisive technical criteria.
6. But, European Dynamics's core appeal is inadmissible<sup>3</sup> because even if European Dynamics is right and is awarded more technical points, its offer should in any case have been disqualified because it is technically non-compliant. Therefore, European Dynamics's core grounds of appeal, namely the second and the third, simply have no utility on the outcome of the appeal.

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<sup>1</sup> Section C.

<sup>2</sup> Section E, Section F.

<sup>3</sup> Section D.

7. In any case, and on the merits, European Dynamics's challenge can only succeed if it demonstrates that the technical evaluation itself was affected by a manifest error of assessment. Despite its assertions to the contrary, European Dynamics does not demonstrate any manifest error of assessment.
8. Instead, it invites this Honourable Board to reopen the technical evaluation and substitute its own judgment for that of the evaluators, or even to undertake the evaluation itself.
9. In essence, European Dynamics is not seeking the resolution of genuine grievances. Rather, it seeks to create an environment in which it effectively acts as judge, jury, and executioner. Such an environment would inevitably be hostile to competing bidders and can lead to only one result, a result which will surely appeal to European Dynamics.
10. By way of a parting shot, European Dynamics attempts to win the Tender by eliminating its competition and mudsling LexNova. Its fourth and last grievance seeks the disqualification on LexNova.<sup>4</sup> But, European Dynamics's expectation that LexNova is disqualified is based on a fundamental misunderstanding of how Malta has transposed the EU Directives on public procurement.
11. From the outset, LexNova wishes to humbly make one thing clear: for the reasons expounded in this reply, European Dynamics's aggressive strategy should not be allowed to prevail.
12. LexNova will set out its reply as follows:
  - B. FACTUAL BACKGROUND.**
  - C. FIRST GROUND OF APPEAL: COMMERCIALLY SENSITIVE AND CONFIDENTIAL INFORMATION CANNOT BE DISCLOSED.**
  - D. PRELIMINARY PLEA: EUROPEAN DYNAMICS'S SECOND AND THIRD GROUNDS OF APPEAL ARE INADMISSIBLE AT LAW BECAUSE THEY HAVE NO UTILITY TO THE OUTCOME OF THIS APPEAL.**

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<sup>4</sup> Section G.

- E. **SECOND GROUND OF APPEAL: EUROPEAN DYNAMICS DOES NOT MERIT A HIGHER SCORE ON CRITERION C.1.**
- F. **THIRD GROUND OF APPEAL: EUROPEAN DYNAMICS DOES NOT MERIT A HIGHER SCORE ON CRITERION C.2.**
- G. **FOURTH GROUND OF APPEAL: LEXNOVA IS NOT BLACKLISTED, AND IN ANY CASE, CANNOT BE EXCLUDED.**
- H. **DISAGREEMENT WITH THE TEC'S SCORING IN TERMS OF CRITERION I.1 AND CRITERION J.2 DO NOT CONSTITUTE IRREGULARITIES OR EVEN GRIEVANCES.**
- I. **THE DEPOSIT SHOULD NOT BE REFUNDED.**

**B. FACTUAL BACKGROUND**

- 13. The present appeal arises from **Tender CT3021/2024 for the Customisation and Implementation of an Off-the-Shelf Courts Management Information System** which was published on 5 September 2024 with an estimated procurement value of €10,000,000.
- 14. This is not an ordinary procurement process. The system to be procured will underpin the digital operation of Malta's law courts for years to come, supporting the daily work of judges, lawyers, court registrars, clerks, and administrative staff, while also facilitating access to justice for members of the public. The project therefore concerns the technological infrastructure through which court proceedings will be initiated, managed, and followed until judgment.
- 15. For that reason, the Tender deliberately placed greater weight on quality than on price. The contract was to be awarded on the basis of the Best Price Quality Ratio, with 70% of the weighting attributed to technical quality and 30% to price.
- 16. The Contracting Authority therefore made a conscious choice: the decisive factor in the evaluation would be the completeness, reliability, and operational readiness of the solution offered, not merely the price attached to it.
- 17. It is against this background that the present appeal must be examined.

18. LexNova threw its proverbial hat in the ring. Its offer was deemed the qualitatively best offer submitted by the TEC and was, after computing the Best Price Quality Ratio (**BPQR**) methodology, recommended the award of the Tender.
19. LexNova is backed by partner Synergy International Systems. Synergy is an American information technology and consulting company that provides web-based software to international development agencies, country governments, NGOs and private sector partners. Founded in 1997, Synergy has worked in over 80 countries. Its flagship product is Synergy eCase—an intelligent case management solution for an improved justice system.
20. LexNova bid together with Dakar, a leader in software solutions in Malta since 1991, and Grant Thornton's Malta office.
21. LexNova firmly contests the grievances raised by European Dynamics. As will be demonstrated in the sections that follow, the appeal identifies no manifest error of assessment and no irregularity capable of affecting the outcome of the procedure.
22. Rather, it seeks to reopen a technical evaluation carried out in accordance with the Tender rules simply because European Dynamics did not achieve the result it had hoped for. For this reason and others which will be explored in this reply, European Dynamics's appeal should be dismissed in its entirety.

**C. FIRST GROUND OF APPEAL: COMMERCIALLY SENSITIVE AND CONFIDENTIAL INFORMATION CANNOT BE DISCLOSED**

23. By means of its first ground of appeal, European Dynamics has requested the disclosure of nearly all of the procurement file.
24. LexNova categorically contests the information requests by European Dynamics. This is so for four reasons: essential and sufficient information has already been provided to European Dynamics (i); each information request should be rejected (ii); in any case, the

requests are a fishing expedition and are not targeted and proportionate (iii) and this is a case of double standards: European Dynamics is hoisted by its own petard (iv).

**(i) ESSENTIAL AND SUFFICIENT INFORMATION HAS ALREADY BEEN PROVIDED**

25. By means of its first ground of appeal, European Dynamics alleges that the Contracting Authority or the Department of Contracts's decision not to reply to its request for information on 18 February 2026 constitutes a breach of its right to a rapid and effective remedy.
26. This allegation could not be further from the truth. European Dynamics has already been provided with sufficient information to enable it to determine whether it should exercise its right to a rapid and effective remedy in the letter of rejection that it received a day earlier on 17 February 2026. Indeed, LexNova is presently replying to an appeal which raises three substantive grievances and spans no fewer than 37 pages.
27. If European Dynamics were truly facing a situation where the so-called 'deprivation of information' is to such an extent that it cannot utilise its remedy, its appeal would be grounded on a solitary grievance of the Contracting Authority or the Department of Contracts's failure to provide **additional information**.
28. European Dynamics gives the false impression that it has not been provided with the essential information it needs to assess whether to exercise its right to an effective and rapid remedy.
29. This is not the case. In its letter of rejection, European Dynamics has already been provided with:
  - a. the reason for rejection;
  - b. the table setting out the scoring allocated to European Dynamics and to LexNova with respect to their technical and financial offers;
  - c. the successful tenderer and the reasons for its selection; and
  - d. the scoring table, including the TEC's comments / justifications, on European Dynamics's offer.

- e. European Dynamics has *also* been provided with the scoring table, **including the TEC's comments / justifications**, of LexNova as the preferred bidder.
30. As this Board will know, it is neither regular nor customary for the other bidders to be provided with the TEC's comments to the preferred bidder's offer.<sup>5</sup>
31. LexNova is raising this to the attention of this Honourable Board to stress that European Dynamics had already been provided with the essential and sufficient information to enable it to determine whether to exercise recourse to its procurement remedy—more than it is regular or customary in a letter of rejection.
32. The legal threshold is that a bidder must be provided with the information which is essential to enable it to seek effective review.
33. European Dynamics's grievance must therefore be assessed against this legal threshold. Otherwise, as seems to be the case, in highly competitive industries the price of an appeal to the Board to obtain sensitive information from competitors might be a really low price to pay to lay hands on such important information. In European Dynamics's case, lodging such sorts of appeals seems to be a distinct chapter of a business plan.
34. That said, and on the strict merits of this case, once European Dynamics has been provided with this information, it is wrong and unlawful for it to claim a breach of its right to a rapid and effective remedy on the basis that its request for information was—rightly, so—turned away by the Contracting Authority and the Department of Contracts.
35. The jurisprudence of the Court of Justice of the European Union (**CJEU**) makes it clear that contracting authorities and review bodies must refuse access to confidential aspects of competing tenders where disclosure would prejudice legitimate commercial interests or distort competition. In *Varec*,<sup>6</sup> the Court expressly cautioned that allowing such disclosure

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<sup>5</sup> The comments themselves might constitute commercially sensitive information. The Contracting Authority or the Department of Contracts's decision, in this instance, to disclose such justifications, regardless of whether it was done in good faith or otherwise, may potentially constitute a breach of LexNova's rights.

<sup>6</sup> C-450/06, *Varec SA vs Etat Belge*, para. 40 et seq:

would risk enabling bidders to obtain commercially valuable information about their competitors, and could even encourage the lodging of appeals for the sole purpose of gaining access to competitors' business secrets.

36. This is exactly the tactic employed by European Dynamics in an attempt to guilt-trip the Contracting Authority and the Department of Contracts into giving it information to which it is not entitled. It has framed its entire information request as being 'indispensable'. As this Board will understand, when everything is indispensable, then in truth, nothing is.

**(ii) EACH SPECIFIC INFORMATION REQUEST SHOULD BE REJECTED**

37. As has already been stated, European Dynamics is requesting information and/or documentation concerning the following categories of information. Despite its all-encompassing expedition, it has failed to substantiate or justify why it is requesting each specific piece of information, or even to outline the bare bones of an alleged grievance in relation to each.
- a. **Technical Offer (especially Award Criteria C.1 and C.2).** For obvious reasons, information on LexNova's technical offer cannot, and should not, be disclosed. It contains commercially sensitive and confidential information which, if it lands in the hands of a competitor on the same market, could very well give European Dynamics access to information which has a commercial value outside of this contract, and which could potentially and probably reduce its competitive edge vis-à-vis other calls for tenders and where its disclosure would undermine legitimate commercial concerns or fair competition.<sup>7</sup> If this information were to be disclosed, LexNova would invariably be less able to distinguish itself from its competitors, at least from European Dynamics and any other bidder who decides to participate or follow this process.

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*[...] such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors' business secrets.*

<sup>7</sup> C-54/21, *Antea Polska S.A. vs Polish National Water Management Authority*, para. 83.

- b. **Demonstration (Demo).** Any disclosure of the demo would give European Dynamics access to the ins and outs of its technical offer lock, stock and barrel, rendering negligible its ability to distinguish its product from that of its competitors in future calls.

European Dynamics itself acknowledges the ‘irreversible harm’ that such disclosure could cause to LexNova in these Tender proceedings. In its reply to an application for disclosure filed by another appellant in Case 2120, European Dynamics—as the recommended bidder for that tender—firmly rebuts an identical request made the appellant, claiming:

*if European Dynamics’ technical designs and tender, as well as its demonstration video, fall in the hands of [the appellant], they will cause to European Dynamics a serious and irreversible harm. [The appellant] argues in a very insincere manner that it could have access only to non-confidential parts of the information, when it very well knows that there is nothing “non-confidential” in what it is requesting.<sup>8</sup>*

- c. **Key Experts.** LexNova humbly submits that the details regarding its Key Experts are also confidential and should not be disclosed. The disclosure of the identity of these key experts will place European Dynamics in a position to poach them. Furthermore, these key experts have inside knowledge of the product offered by LexNova to the Contracting Authority and how it works.

Even European Dynamics acknowledged this risk and that it would be, to say the least, untoward for the identities of the key experts to be disclosed.<sup>9</sup>

Just as LexNova is not privy to the details of the key experts which European Dynamics has proposed in its offer, European Dynamics should not be privy to the details of the key experts proposed by LexNova. This is how equal treatment is assured and guaranteed.

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<sup>8</sup> **Exhibit R-2**, European Dynamics’s Reply on the Application for Disclosure in Case 2120 of 29 May 2025, para 15.

<sup>9</sup> *ibid.*, para. 19.

- d. **Financial Offer.** The financial offer should not be disclosed for the same reason that LexNova's technical offer should not be disclosed. How the preferred bidder structured its financial offer is of no concern to European Dynamics, especially where the appellant has failed to put forward and substantiate a single allegation of a manifest error assessment in this respect.
  
- e. **GDPR Questionnaire.** The GDPR Questionnaire, even though it was requested as part of the selection criteria, contains confidential and commercially sensitive information about internal data processing policies and strategies of LexNova. This should be evident from the detailed information provided by LexNova as expressly requested by the GDPR Questionnaire. Yet again, European Dynamics has failed to put forward and substantiated a single allegation of a manifest error assessment in this respect.
  
- f. **Evaluation Reports.** The evaluation report necessarily discusses confidential and commercially sensitive aspects of a bidder's offer. Nor is it necessary or essential for the appellant to exercise its procurement remedy. It should not be disclosed, especially when European Dynamics has failed to justify or substantiate its request in this regard.
  
- g. **TEC Members and External Experts.** LexNova will defer to the Contracting Authority and the Department of Contracts's reply on this specific request. With that said, European Dynamics has not raised any allegation with regard to the composition of the evaluation committee. Nor is it correct for European Dynamics to request the disclosure of the individuals comprising the TEC without justifying such request.

In its reply in Case 2120, European Dynamics lambasted an identical request advanced by their competitor, stating that ordering disclosure would “convey a wrong message” and prevent future evaluation committees from exercising their duties with peace of mind.<sup>10</sup>

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<sup>10</sup> *ibid.*, para 20.

***(iii) THE RFI IS A FISHING EXPEDITION AND IS ANYTHING BUT TARGETED AND PROPORTIONATE***

38. European Dynamics's request for information smacks of not a fishing but a trawling expedition.
39. Any such disclosure would seriously prejudice the integrity and confidentiality of LexNova's business information, particularly if it is in the hands of a competitor such as European Dynamics which does not shy away from using previous business dealings to its advantage and against the very economic operators with whom it sought to strike a deal in the past—case in point—the submission in evidence of Annex 5.
40. Furthermore, LexNova submits that European Dynamics's assertion that its request for information was proportionate and limited to what it deemed to be indispensable to the exercise of its remedy is egregious.
41. European Dynamics requested no less than 8 categories of information, requesting access to all the information and documents submitted by LexNova as part of its bid, including the financial offer and the technical offer to boot, including the demonstration.
42. European Dynamics goes as far as to request the disclosure of the clarification and rectification requests sent by the TEC to LexNova and the latter's replies thereto, without even bothering to justify the reason behind this request.
43. European Dynamics is upfront about its motive for embarking on a trawling expedition. It wishes to conduct a reassessment of the bid submitted by LexNova so that it could find what, in its view, could pass for a manifest error in the TEC's assessment, and argue for the reduction of points, or worse, disqualification of its competitor.
44. European Dynamics uses 'verification' or a variant of the term a combined 13 times in its request for information and first grievance. The verb is used in relation to the Contracting Authority's evaluation.

45. As this Board knows, the *raison d'être* of this procurement remedy is not to carry out a verification or a re-evaluation of the TEC's assessment. According to established jurisprudence,<sup>11</sup> neither the Board nor the Court of Appeal possesses the requisite expertise to undertake this exercise.

**(iv) A CASE OF DOUBLE STANDARDS: EUROPEAN DYNAMICS IS HOISTED BY ITS OWN PETARD**

46. At this stage, LexNova respectfully invites this Board to take a trip down memory lane. It is indeed striking that in Case 2120, where the roles were reversed and the appellant in that case asked for information on similar, if not identical, aspects of the bid submitted by European Dynamics—albeit the scope of the information requested was significantly narrower, European Dynamics's response was that “[the appellant] argues in a totally unfounded and disrespectful manner that the evaluator did not do their job correctly”.<sup>12</sup>
47. European Dynamics went as far as to claim that the request for information in Case 2120, which included exactly the same pieces of information that European Dynamics now wants to elicit from the Contracting Authority or the Department of Contracts, “exceeds any tolerable limit of decency and audacity”.<sup>13</sup>
48. European Dynamics, specifically with respect to a request for information for *specific parts* (and not the whole—as is being requested in this case) of its technical offer, claimed that it “is confidential and could not be disclosed, since they constitute the “core” of our technical

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<sup>11</sup> The following judgements by the Court of Appeal confirm this line of jurisprudence:

(a) 2015 02 06, *Cherubino Limited vs Direttur (Generali) tal-Kuntratti et* (426/2014/1);  
(b) 2019 07 12, *X-Clean Ltd vs St. Vincent de Paul Long Term Facility et* (Ref. No. 98/19); and  
(c) 2022 03 07, *Executive Security Services Ltd vs Aгенzija Servizzi.Gov* (Ref. No. 205/21/1).

<sup>12</sup> **Exhibit R-2**, European Dynamics's Reply on the Application for Disclosure in Case 2120 of 29 May 2025, para 22.

<sup>13</sup> *ibid.*, para 20.

*solution offered and have been the outcome of efforts of many years*<sup>14</sup> and that its business would be “*irremediably destroyed*”.<sup>15</sup>

49. European Dynamics went as far to claim that the appellant in that case “*argues in a very insincere manner that it could have access only to non-confidential parts of the information, when it very well knows that there is nothing “non-confidential” in what it is requesting*”.<sup>16</sup> This submission exposes European Dynamics’s double standards and hypocrisy. While when defending a disclosure request on a specific part of its technical offer, it argued that *everything* is confidential, in this case, European Dynamics have no qualms to be “insincere” and to request *all* of LexNova’s technical offer, in so far as it serves its objectives.
50. LexNova will object to European Dynamics’s request for its technical offer and financial offer tooth and nail.
51. By way of a concluding point, European Dynamics’s actual request for information of 18 February 2026 is not included as a supporting document. LexNova will rely on the text to the information request as reproduced by European Dynamics in its reply, reserving its rights to raise additional pleas and to make further submissions following the production of the actual information request in full by European Dynamics.

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<sup>14</sup> **Exhibit R-1**, European Dynamics’s Reply on the Merits in Case 2120 of 10 March 2025, para 5.7.

<sup>15</sup> *ibid.*, para 5.9 and 5.13.

<sup>16</sup> **Exhibit R-2**, European Dynamics’s Reply on the Application for Disclosure in Case 2120 of 29 May 2025, para 15.

**D. PRELIMINARY PLEA: SECOND AND THIRD GROUNDS OF APPEAL ARE INADMISSIBLE AT LAW BECAUSE THEY HAVE NO UTILITY TO THE OUTCOME OF THIS APPEAL**

52. In brief, and by means of the second and third grounds of appeal, European Dynamics is claiming that its bid should have been given a higher technical score. European Dynamics claims that if it obtains a mere 4 points, then it would rank first.
53. LexNova submits that, even if *in arguendo*, European Dynamics were right (which it is not), its bid should have been disqualified because on at least 3 criteria it should have received a nil score and deemed technically non-compliant. On this basis, the second and third ground of appeal, if upheld, would not change the recommendation of the Tender to LexNova, and therefore, those grounds have no utility to the outcome of this appeal.
54. Clause 6.1 of the Tender provided that the award criteria will be based on the BPQR with a weighting ratio of 70% to the technical aspect of the offer and a weighting ratio of 30% to the financial aspect of the offer. Clause 6.2 of the Tender clearly and unambiguously stated that:

*Bidders may be allotted a range of scores from '0' up till 100% based on the content of the said documentation/write-up. The content of the documentation must meet all minimum requirements as detailed within the Tender document.*

*In view that criteria are set as MANDATORY, it is compulsory that bidders submit all relevant documentation for each criteria listed here below. If a score of '0' shall be allotted to a mandatory criterion the bid shall be disqualified. **If the minimum requirements are not met, the offer will be deemed as Technically non-Compliant and disqualified.***

55. Now, with respect to the following 3 mandatory criteria:

- a. "J.2. Provide how the Bidder is exploring and integrates emerging technologies such as artificial intelligence, machine learning, and blockchain for enhanced efficiency and security." which carried a maximum of 2 points.
- b. "B.4. Provide a complete testing program to ensure efficient and complete User Acceptance Testing. (Article 4.4.4)" which carried a maximum of 4 points.
- c. "B.1. Provide a detailed project plan outlining tasks, responsibilities, and timelines" which carried a maximum of 4 points.

European Dynamics should have received a nil score because it appears that it did *not* meet the minimum requirements, and therefore, should have been disqualified.

56. This is so for the following 3 reasons.
57. First, with respect to criterion J.2, it appears<sup>17</sup> that European Dynamics's write-up did *not* address *at all* the minimum requirements detailed in this criterion, namely, "*how the Bidder is exploring and integrates emerging technologies such as artificial intelligence, machine learning, and blockchain for enhanced efficiency and security*". On this basis, European Dynamics should have been given a 0 score, and hence, its offer should have been deemed technically non-compliant and disqualified.
58. Second, with respect to criterion B.4., it appears<sup>18</sup> that European Dynamics did not submit a write-up which complied with the minimum requirements detailed in Article 4.4.4 of the Terms

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<sup>17</sup> European Dynamics's Letter of Rejection dated 17 February 2026. TEC's justification on J1:

*"The bidder, in contrast with the actual writeup provided, did not demonstrate any actual or future readiness for innovation technologies such as artificial intelligence, machine learning, and blockchain or automation features in supporting business and judiciary decisions and future innovation as requested."*

<sup>18</sup> European Dynamics's Letter of Rejection dated 17 February 2026. TEC's justification on B4:

*"In the clarification reply submitted, the bidder directed the evaluators to Document 1.6 B Plan & Methodology and 1.3 B PLAN & METHODOLOGY. With reference to Article 15.6, Acceptance Test Plan - point 2d. The bidder did not provide any example or template of the test progress report, bidder only provided minimal details of the tasks required to*

of Reference and Article 15.6 of the Special Conditions. The criterion at issue specifically required a “**complete** testing programme”. On this basis, European Dynamics should have been given a 0 score, and hence, its offer should have been deemed technically non-compliant and disqualified.

59. Third, with respect to criterion B.1, it appears<sup>19</sup> that European Dynamics’s write-up did *not* address the minimum requirements detailed in this criterion, namely, “a detailed project plan outlining [...] responsibilities”. European Dynamics appears to have only outlined the responsibilities of 2 out of 10 key experts. European Dynamics appears to have omitted any detail on the allocation of responsibilities to:

- a. Key Expert 2: Business Systems Analyst / Legal Expert
- b. Key Expert 4: IT Infrastructure and Security Architect
- c. Key Expert 6: Two (2) Software Developers
- d. Key Expert 7: Two (2) Technical Support Specialist
- e. Key Expert 8: Training Specialist

On this basis, European Dynamics should have been given a 0 score, and hence, its offer should have been deemed technically non-compliant and disqualified.

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*produce the actual progress report. With reference to Article 15.6, Acceptance Test Plan - point 2e. The bidder did not provide any process details for the review of test issues and progress on a timely basis, bidder only provided minimal details of the tasks and timelines. With reference to Article 15.6, Acceptance Test Plan - point 2f. The bidder provided very basic and minimal details about the re-test procedure, the timetable and the resources which would be required for re-testing. With reference to Article 15.6, Acceptance Test Plan - point 2g. The bidder provided only minimal details about the software tools and the human resources that will be used for testing purposes. With reference to Article 15.6, Acceptance Test Plan - point 2h. The bidder provided very minimal details about the input required by the contracting authority.”*

<sup>19</sup> European Dynamics’s Letter of Rejection dated 17 February 2026. TEC’s justification on B1:

*“The information provided in the clarification response, about responsibilities is still very minimal, the information provided in response to question 1.1 A1, document “Technical-Q 1.3 B\_PLAN & METHODOLOGY-ED.pdf” only outlined the responsibilities of the Project Manager and the Solutions Architect regarding Risk Mitigation. The other document quoted in the clarification response “Technical Q1.3B” provided the Gantt Chart (Figure 2 to 6) that only outlined the tasks and the timelines, and not the responsibilities assigned to specific key experts.”*

60. In a *hypothetical* scenario where, European Dynamics is given additional points on its technical score because the second and third grounds of appeal are upheld (*quod non*), European Dynamics's offer would still be deemed technically non-compliant and therefore be disqualified. LexNova would still be re-confirmed as the first ranking bidder.
61. Therefore, this Board's decision on the second and third grounds of appeal will have no utility to the outcome of this appeal.
62. The requirement of "utility" of a ground of appeal is founded in both EU and Maltese procedural law.
63. In *Logos Societa Cooperativa vs Direttur Generali tal-Kuntratti*,<sup>20</sup> the First Hall Civil Court held as follows when the claimant's standing (*locus standi*) was challenged in a procurement appeal:

*The basis of any civil action which should serve as the point of departure is the juridical interest of the parties. [...] The interest materialises in the **final utility which the cause has for the plaintiff**. [...] to hear the case, the Court must therefore be convinced that the plaintiff has the purpose of recovering the object or benefit of any right given to him by law, and which in its view has been violated [...].<sup>21</sup>*

64. Further, the Court of Appeal has consistently declined to consider grounds of appeal which are not of any utility to the appeal (see *Sandro Caruana v. Kunsill Lokali Marsa*).<sup>22</sup>

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<sup>20</sup> (11 December 2014) [Ref. 1030/2009].

<sup>21</sup> *ibid.*, office translation from: "Il-bazi ta' kull azzjoni civili li minnha ghandu jiddipartixxi kull dibattiment huwa l-interess guridiku tal-partijiet. [...] L-interess jimmaterjalizza ruhu fl-utilita' finali li l-ezitu tal-kawza jkollu ghall-attur. [...] Sabiex tiehu konjizzjoni ta' kawza, il-Qorti trid ghalhekk tkun konvinta li l-attur ikollu l-iskop li jirkupra l-oggett jew beneficcju ta' xi jedd moghti lilu bil-ligi, u li fil-fehma tieghu jkun gie vjolat [...]".

<sup>22</sup> (25 February 2021) [Ref. 292/2020/1].

65. Similarly,<sup>23</sup> and where the rejection of the ground of appeal is fatal to the viability of the appellant's bid, the Court of Appeal has also refused to consider subsequent grounds of appeal because it would not change the outcome of the award. In *Specialist Group Cleaners Limited et vs CPSU et*,<sup>24</sup> the Court of Appeal held:

*22. Since this is sufficient to reject the appellant's offer, it is no longer necessary to consider the other grounds of appeal; even if these are accepted, the tender cannot be considered valid since essential documents are missing.*<sup>25</sup>

66. The CJEU has taken a similar position with respect to procurement challenges. In *Proof IT SIA vs EIGE*,<sup>26</sup> the General Court considered that the appellant's argument for a higher score on award criteria was ineffective because "it would not have affected the assessment of its tender".<sup>27</sup> The CJEU took a similar approach in a case filed by European Dynamics.<sup>28</sup>

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<sup>23</sup> See also *Associated Drug Company Limited vs CPSU et*, Court of Appeal (23 February 2022) [Ref. 361/2021/1]:

*"30. Dan l-aggravju hu għalhekk miċhud. Dan hu biżżejjed biex jiġi miċhud lappell, għax l-aggravji l-oħra fil-meritu huma msejsa fuq il-premessa illi lftehim kontestat kien kuntratt ġdid u mhux estensjoni tal-kuntratt oriġinali, u għalhekk huma msejsa fuq premessa ħażina."*

Conversely the other way round: *FM Core Limited et vs Minister ta' Ghawdex et*, Court of Appeal 25 January 2023 [Ref. 374/2022/1]:

*"Dan huwa biżżejjed biex jintlaqa' l-appell, u ma hux meħtieġ li nqisu l-aggravji l-oħra tal-appellanti"*.

<sup>24</sup> (25 February 2021) [Ref. 320/2020/1].

<sup>25</sup> *ibid.*, "22. Billi dan huwa biżżejjed biex titwarrab l-offerta tal-appellanti, ma jibqax meħtieġ li nqisu l-aggravji l-oħra; ukoll jekk dawn jintlaqgħu, xorta l-offerta ma tistax titqies li tiswa la hemm dokumenti essenzjali nieqsa."

<sup>26</sup> T-914/16 (4 October 2018).

<sup>27</sup> *ibid.*, paras 182 – 185.

<sup>28</sup> In T-279/06 *Evropaiki Dynamiki vs ECB* (2 July 2009):

*97. It follows that, even if one or more of the first seven pleas were well founded, that cannot profit the applicant. [...] 98. In accordance with settled case-law, an applicant cannot have a legitimate interest in the annulment of a decision where it is already*

67. In view of the above, LexNova submits that, in any case, European Dynamics is *not* harmed by the allegations made in the second and third grounds of appeal because the outcome of the evaluation would not change even if European Dynamics is right on those grounds—which it isn't.
68. Therefore, the second and third grounds of appeal should be dismissed as inadmissible, irrespective of the merits.

**E. SECOND GROUND OF APPEAL: EUROPEAN DYNAMICS DOES NOT MERIT A HIGHER SCORE ON CRITERION C.1**

69. On the merits, by means of the second ground of appeal, European Dynamics argues that it should have been given a higher score on Criterion C.1. European Dynamics claims that the Contracting Authority applied undisclosed or changed award criteria. LexNova submits that European Dynamics's grievance is unfounded. This is so for the following reasons.
70. European Dynamics put forward 2 key arguments to sustain this second ground of appeal. First, European Dynamics argue that the Tender provided for a maximum word limitation of 2,000 words for each write-up, and therefore, European Dynamics was constrained from submitting a comprehensive detailed submission on Criterion C1. Second, European Dynamics argue that the demonstration should not have been used by the TEC for BPQR scoring.
71. **LexNova disagrees because: the Tender's BPQR methodology exceed the minimum requirements in the law and was clear and unambiguous on the award criteria and their application (i); the Tender provided for an approximate word count and not a**

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*certain that that decision which concerns it cannot be other than reconfirmed [...]. Accordingly, it must be held that the applicant, following the rejection of its plea alleging that the ground for exclusion is unlawful, no longer has a legitimate interest in putting forward other pleas in order to obtain the annulment of the decisions rejection its tender and awarding the contract to other tenderers [...].*

This was confirmed on appeal by the CJEU C-401/09 P (9 June 2011).

maximum threshold (ii); the Tender expressly allowed the use of the demonstration in the BPQR scoring (iii); and European Dynamics is attempting to shift the blame for its own deficient submission on the evaluation and the award criteria (iv).

***(i) THE BPQR METHOD IN THE TENDER WAS CLEAR AND UNAMBIGUOUS AND EXCEEDED MINIMUM REQUIREMENTS IN THE LAW***

72. The Tender was clear and unambiguous on how scoring on all criteria, in particular, Criterion C1, was to apply:
- a. First, Bidders were requested to submit write-ups, charts and, or designs for *each* criterion.
  - b. Second, “[t]he content of the documentation must meet all minimum requirements as detailed with in the Tender document”.
  - c. Third, “[t]he scoring shall take place across a range of points from ‘0’ to 100%”.
  - d. Fourth, “If the contents of the documentation meet and exceeds all minimum requirements thus, offering a higher quality bid, higher points will be allotted up till 100% (Full Score). Such points shall be awarded in such a manner to reflect in a proportionate manner the level of effort undertaken to exceed the minimum requirements.”
73. Therefore, European Dynamics, as any other reasonably well-informed and normally diligent tenderer,<sup>29</sup> was put on notice that it cannot obtain a “Full Score” if its offer did not “meet and exceed all minimum requirements” and did not offer “a higher quality bid”.
74. In any case, it must be said that, as a matter of EU and Maltese public procurement law, there is *no* obligation on a contracting authority to disclose a detailed, granular scoring methodology for each criterion as European Dynamics suggests.

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<sup>29</sup> Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42.

75. The BPQR award methodology in the Tender complies with the requirements of the law which only require:
- a. The disclosure of the **relative weighting (score) for each criterion**<sup>30</sup>—while in this case the Tender went further and detailed the scoring methodology. This is not a strict requirement, in fact, where weighting is not possible for objective reasons, the Tender may indicate the criteria in decreasing order of importance without assigning any weighting.<sup>31</sup>

The law permits further flexibility, specifically, **weightings may be expressed by providing for a range with an appropriate maximum spread.**<sup>32</sup> Even though there is no legal obligation to do so, the Tender provided a range of “0 to 100%” for each weighting (score).
  - b. The criteria are **linked to the subject-matter of the public contract in question**<sup>33</sup>—the criteria are linked to the subject-matter to the Tender, and in any case, no claim has been raised in this regard.
  - c. The criteria **do not confer unrestricted freedom of choice on the tender evaluation committee and comply with the general principles of public procurement.**<sup>34</sup>
76. On this last requirement, the Court of Appeal has already made it clear in ***Cateressence Limited et vs Direttur tal-Kuntratti et***<sup>35</sup> that the BPQR criteria on the technical aspect “*necessarily involves subjective opinions*”<sup>36</sup> and that what is important is that “*bidders know*

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<sup>30</sup> PPR, Regulation 239 (7).

<sup>31</sup> PPR, Regulation 239 (9).

<sup>32</sup> PPR, Regulation 239 (8).

<sup>33</sup> PPR, Regulation 239 (2) and (5).

<sup>34</sup> PPR, Regulation 239(6).

<sup>35</sup> (14 February 2017) [Ref. 380/16].

<sup>36</sup> “*Dan l-aħħar aspekk jinvolvi neċessarjament opinjonijiet soġġettivi.*”

which are the elements which need to be included in their offer [as indicated in paragraph b above] and that bidders are given an indication of which elements are most important for evaluation purposes [as indicated in paragraph a above]".<sup>37</sup> The Court of Appeal concluded that:

*However, all of this does not mean that for the MEAT process [today BPQR] to be fair it must quantify in an exact and concrete manner how one gets each mark. Indeed, there are cases when the functional duty includes the use of discretion of the person on whom the duty is imposed. There are circumstances where one cannot make objective norms because the circumstances are so fluid and changing that they do not allow the necessary rigidity of the objective norm. In such cases the evaluation must necessarily be subject to the prudent and diligent judgment of the evaluators.*

*It is not this Court's task to examine whether, for any particular item, the appellant consortium deserved a point or two more. Rather the Court of Revision must contemplate whether the Evaluation Committee adhered to the established criteria and abided by the parameters outlined in the call for tenders.*<sup>38</sup>

77. The BPQR scoring methodology certainly did not confer unfettered and unrestricted discretion on the TEC, but in line with *Cateressence*, the TEC's justifications on the scoring

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<sup>37</sup> "Hu importanti li l-offerenti jkunu jafu liema huma l-elementi li bilfors iridu jiffurmaw parti mill-offerta tagħhom, u jingħataw indikazzjoni ta' liema elementi ser ikunu l-aktar importanti waqt l-evalwazzjoni".

<sup>38</sup> "Dan kollu, però, ma jfissirx illi biex il-proċess tal-MEAT [illum BPQR] ikun wiehed ġust wiehed irid jikkwantifika bl-eżatt u b'mod konkret kif wiehed iġib kull marka. Tabilhaqq ikun hemm każijiet meta d-dmir funzjonali jikkomprendi l-użu ta' diskrezzjoni tal-persuna li fuqha huwa impost dover. Hemm ċirkostanzi fejn wiehed ma jistax jagħmel normi oġġettivi minhabba li ċ-ċirkostanzi jkunu tant fluwidi u kanġjanti li ma jippermettux ir-rigidita` neċessarja tan-norma oġġettiva. F'każijiet bħal dawn levalwazzjoni ta' bilfors trid tkun soġġetta għall-ġudizzju prudenti u diligenti tal-evalwaturi. [...] Mhux kompitu ta' din il-Qorti li tidhol biex teżamina jekk, għal xi oġġett partikolari, il-konsorzju appellanti kienx haqqu xi punt jew tnejn aktar. Din hi Qorti ta' revizjoni li dak li trid tara huwa jekk il-kumitat evalwattiv segwiex il-kriterji stabbiliti u jekk mexiex mal-parametri indikati fis-sejha għall-offerti."

allocated to European Dynamics would corroborate that they “*adhered to the established criteria and abided by the parameters outlined in the call for tenders*”.

78. Therefore, European Dynamics’s claim that the TEC applied undisclosed or altered award criteria or have committed a manifest error of assessment in applying the award criteria is without merit.

**(ii) THE TENDER PROVIDED FOR AN APPROXIMATE WORD COUNT AND NOT MAXIMUM THRESHOLD**

79. It is not the case that the Tender imposed a strict word count for the write-ups. The Tender provided that write-ups had to be “*approximately between 1000 to 2000 words*”. This was restated in Clarification Note 17 which spoke of “*approximate word counts*” and reconfirmed in Clarification Note 19.
80. In any case, European Dynamics could have deployed “*chart (e.g. Gantt Charts) or/and designs to elaborate better the presented write-ups*”. These charts or designs were not to be counted as part of the word count. Presumably, European Dynamics did not do so, or at best, did not use them effectively.

**(iii) TENDER EXPRESSLY ALLOWED THE USE OF THE DEMONSTRATION IN THE BPQR SCORING**

81. The Tender expressly allowed the TEC to refer to the demonstration as part of the BPQR scoring. The Tender, in Clause 6.3 of Section 1, made it clear that “*[a]part from the documentation provided, when assigning points, consideration will also be given to: [...] the extent of ease of use (user friendliness) of the various functions within the proposed system, which will be verified during a demonstration*”. Therefore, European Dynamics’s claim that the demonstration could not be used for evaluation purposes is wrong.
82. In any case, at worst, there is *no* provision in the Tender which barred the TEC from referring to the demonstration in its BPQR scoring. This is so for a good reason. The TEC

could not carry out the BPQR scoring in a vacuum and ignore the demo. Had the TEC ignored the demonstration, it would have been accused of acting contrary to the principles of public procurement.

***(iv) EUROPEAN DYNAMICS IS ATTEMPTING TO SHIFT THE BLAME FOR ITS OWN DEFICIENT SUBMISSION ON THE EVALUATION AND THE AWARD CRITERIA***

83. European Dynamics conveniently attempts to shift the blame for its inability to provide a detailed submission on Criterion C1 on this non-existent word count. This is not the first time European Dynamics has attempted this argument.
84. In *T-477/15 European Dynamics Luxembourg SA and others vs European Chemicals Agency (ECHA)*,<sup>39</sup> European Dynamics was aggrieved, amongst other things, with the TEC's low scoring on a criterion because European Dynamics submitted a scant submission which did not contain a sufficient number of examples. European Dynamics argued that the justifications made by the TEC on the sufficient number of examples was an altered and undisclosed award criteria. Very much like it is doing so here.
85. The General Court of the European Union rejected European Dynamics's arguments. The General Court held that: "*it must be recalled that an evaluation committee must be able to have some leeway in carrying out its task*" and that the evaluation committee "*may, without amending the contract award criteria set out in the tender specifications or the contract notice, structure its own work of examining and analysing the submitted tenders*".<sup>40</sup>
86. It then concluded that the evaluation committee's "*comments relating to insufficient examples or details in the tender submitted by the European Dynamics consortium are indissociably linked to the assessment of the award criteria (see, to that effect, the judgment of 12 December 2012, *Evropaïki Dynamiki v EFSA*, T-457/07, not published, EU:T:2012:671, paragraph 122)*".<sup>41</sup>

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<sup>39</sup> T-477/15 delivered by the General Court on 19 March 2018.

<sup>40</sup> *ibid.*, para 130.

<sup>41</sup> *ibid.* para 131.

87. European Dynamics never appealed this decision before the Courts of Justice of the European Union, and therefore, LexNova will infer that it agrees with it.
88. SANCHEZ-GRAELLS has commented the following on case T-477/15:<sup>42</sup>

*Thanks to the **never-ending litigation efforts of European Dynamics**, the EU Courts have recently added two decisions to the growing *acquis* on the duty to state reasons in the context of public procurement.*

*[...]*

*In my view, the GC's Judgment in [T-477/15] should be welcome. Mainly for two reasons. First, **it avoids the dangerously prescriptive approach** that would have underpinned a consideration that each example (or the number of examples) needs to be linked to a specific award criterion--**which would have made the design of award criteria and tender formats impossibly complex and constraining**. Second, because it recognises that, **regardless of the break-up of criteria into sub-criteria, evaluation committees can (and I would say should) carry out the evaluation on the basis of their overall or holistic assessment of the tenders**. Again, the opposite approach would be excessively constraining, and would result in an artificial split of the tenders into different sub-dimensions in a manner that could rend the evaluation process moot or exceedingly complicated. **So, on the whole, this is a good example of pragmatic approach by the GC.***

89. European Dynamics's arguments are recycled and, just like in case T-477/15, completely without merit and ought to be rejected.
90. On a concluding note, LexNova notes that it is not privy to the evaluation carried out by the TEC. It is for the Department of Contracts and the Contracting Authority to address

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<sup>42</sup> Prof. Albert Sanchez-Graells, *Tender evaluation & risk of illegally introducing new award criteria via comments (C-677/15 P & T-477/15)* published on [howtocrackanut.com](https://www.howtocrackanut.com) on 5 February 2018 <<https://www.howtocrackanut.com/blog/2018/2/5/two-more-cases-on-duty-to-state-reasons-in-procurement-c-67715-p-t-47715>>.

European Dynamics's allegations on the evaluation. On this basis, LexNova reserves the right to raise additional arguments or defences once details, if any, on the evaluation are made known to it.

91. Therefore, save for LexNova's plea of inadmissibility, this second ground of appeal is unfounded on the merits and should be rejected.

**F. THIRD GROUND OF APPEAL: EUROPEAN DYNAMICS DOES NOT MERIT A HIGHER SCORE ON CRITERION C.2**

92. On the merits, by means of the third ground of appeal, European Dynamics argues that it should have been given a higher score on Criterion C.2. European Dynamics again claims that the Contracting Authority applied undisclosed or changed award criteria. LexNova submits that European Dynamics's grievance is unfounded. This is so for the following reasons.
93. By means of its third ground of appeal, European Dynamics alleges that the evaluation of Criterion C.2 was conducted in breach of the principles of equal treatment, transparency and self-limitation, and that the score attributed to its tender is arbitrary and disproportionate. In particular, European Dynamics challenges the fact that its offer obtained a score of three points out of ten under this criterion, whereas the offer submitted by LexNova obtained eight points.
94. European Dynamics contends that the deduction of seven points from its score is excessive and seeks to portray the functionality it classified as "will be available" as a minor enhancement which did not justify such a deduction.
95. **LexNova disagrees because: the TEC allocated points on Criterion C.2 in accordance with the hierarchy of readiness in the Tender (i); the allocation of points on Criterion C.2 was proportionate (ii); European Dynamics's self-serving assertion that its offer was more out-of-the-box ready is false (iii).**

**(i) TEC ALLOCATED POINTS IN ACCORDANCE WITH THE HIERARCHY OF READINESS IN THE TENDER**

96. European Dynamics's third ground of appeal rests on a misunderstanding of the structure and purpose of the evaluation framework established in the Tender.
97. Criterion C.2 required bidders to choose 1 out of 3 types of operational statuses for each functionality, that is, whether that functionality was: (a) already available within the proposed solution, (b) available with customisation, or (c) would only become available following future development.
98. Any solution that failed to include even one of the mandatory functionalities, where such functionality could not be developed or implemented, would be disqualified. The Contracting Authority therefore established a clear and unambiguous rule. It was immaterial whether only one out of forty-eight functionalities would not be available. The absence of a single mandatory functionality would suffice to trigger the disqualification of the offer.
99. The Tender established a clear hierarchy of readiness. The scoring attributed by the TEC must have reflected this hierarchy.
100. First, Clause 6.3 of the Tender provided that "*when assigning points, consideration will also be given to: [...] whether the requested functionality is fully available within the solution or still needs to be developed*".
101. Second, and specifically with respect to Criterion C.2, the Tender provided:

*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** (emphasis added).*

*If any single functionality is not available will receive zero points and be disqualified.*

102. The evaluation established that European Dynamics had at least one mandatory functionality that was not yet available and was instead classified as “will be available”. By contrast, all the functionalities mandatorily required in the Tender are already available within LexNova’s system, albeit a few require customisation.

***(ii) THE ALLOCATION OF POINTS UNDER CRITERION C.2 WAS PROPORTIONATE***

103. European Dynamics further seeks to invoke the principle of proportionality in order to argue that the deduction of seven points from its score was excessive. LexNova humbly submits that this principle offers no solace to bidders whose grievance lies in their disagreement with the score attributed to their offer by the TEC.

104. The allegation of disproportionate scoring by the TEC is rooted in a misunderstanding of how proportionality operates in procurement.

105. This Board will know that to measure proportionality, the act or omission in question must be assessed against the rationale of the Tender, that is, the subject-matter of the procurement.<sup>43</sup> The subject-matter of this Tender is the acquisition of an “*off-the-shelf courts management information system*” and its customisation and implementation.

106. The hierarchy embedded in the Tender reflects the underlying objective of the procurement procedure. Solutions offering functionalities already available out-of-the-box were preferred, solutions requiring customisation were acceptable but less optimal, whereas functionalities that would only become available at a future stage represented the lowest degree of operational readiness.

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<sup>43</sup> 31 May 2013, *Ballut Blocks Services Limited vs. Direttur tal-Kuntratti et* (Ref. No. 440/2012/1), para. 15:

*As regards the principle of proportionality, the Court has held that, in order to establish whether a provision of Community law complies 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.*

107. The act complained of is the fact that the TEC attributed fewer points to European Dynamics's offer under Criterion C.2, in accordance with the Tender's hierarchy of readiness and its stated preference for functionalities that are available out-of-the-box or through customisation over functionalities that would only become available at a future stage.
108. Therefore, it is difficult to understand how European Dynamics can claim that the TEC acted arbitrarily and disproportionately. On the contrary, LexNova submits that it would have been disproportionate and unfair to the other bidders for the TEC to be more lenient with European Dynamics in the allocation of points to its offer in terms of Criterion C.2.

***(iii) EUROPEAN DYNAMICS'S SELF-SERVING ASSERTION THAT ITS OFFER WAS MORE OUT-OF-THE-BOX READY IS FALSE***

109. European Dynamics nevertheless asserts that its solution is objectively more "out-of-the-box ready" than that of LexNova. This assertion is entirely speculative. The only persons who have examined and assessed both technical offers in their entirety are the members of the TEC. According to the scores recorded in European Dynamics's letter of rejection, the TEC concluded that LexNova's solution demonstrated a higher degree of readiness under Criterion C.2.
110. The scoring attributed by the TEC – eight points for LexNova and three points for European Dynamics – therefore constitutes the only objective comparative assessment available in these proceedings. European Dynamics's contrary assertion amounts to nothing but a self-serving disagreement with that assessment.
111. European Dynamics also attempts to support its position by referring to alleged discussions between representatives of Synergy and European Dynamics which took place in or around 2022. These discussions are said to demonstrate that European Dynamics's solution was more "out-of-the-box ready". Such discussions—and their production before this Board whose only remit is to determine and decide on issues relating to procurement procedures—are entirely irrelevant in the context of this appeal.

112. Without prejudice to the foregoing, such discussions between Synergy International Systems Inc., one of the partners to the LexNova consortium, and European Dynamics, appear to have taken place in 2022. Nor do they even concern the parties to the relevant consortia, that is, the European Dynamics consortium and the LexNova consortium.
113. Furthermore, the correspondence which allegedly took place has absolutely nothing to do with the solutions proposed by LexNova or by European Dynamics within the context of this Tender.
114. LexNova invites this Board to treat and accord Annex 5 the probationary value that it deserves, that is to say, none.
115. On a concluding note, LexNova notes that it is not privy to the evaluation carried out by the TEC. It is for the Department of Contracts and the Contracting Authority to address European Dynamics's allegations on the evaluation. On this basis, LexNova reserves the right to raise additional arguments or defences once details, if any, on the evaluation are made known to it.
116. Therefore, save for LexNova's plea of inadmissibility, this third ground of appeal is unfounded on the merits and should be rejected.

**G. *FOURTH GROUND OF APPEAL: LEXNOVA IS NOT BLACKLISTED, AND IN ANY CASE, CANNOT BE EXCLUDED***

117. By means of its fourth ground of appeal, European Dynamics, in essence, argues that the Recommended Bidder should have been excluded because it has been found guilty of grave professional misconduct in terms of Article 57(4)(c) of Directive 2014/24/EU. LexNova submits that European Dynamics's grievance is unfounded. This is so for the following 5 reasons.
118. **First**, the Contracting Authority could not have excluded LexNova's bid because none of the economic operators forming part of the consortium are blacklisted in terms of Regulation 199 of the PPR. In *Bessui*, Malta's Court of Appeal held that "*according to our law, for an*

*evaluation committee to excludes a tenderer on the grounds of misconduct, it is necessary to that tenderer has been blacklisted".<sup>44</sup>*

119. **Second**, Article 57(4)(c) of Directive 2014/24/EU does not have direct effect and may not be invoked directly by European Dynamics.<sup>45</sup> European Dynamics may only invoke the provisions in the PPR. There is no provision in the PPR providing for mandatory or discretionary exclusion of an economic operator on the basis of grave professional misconduct, unless that economic operator is subject to a blacklisting decision.<sup>46</sup>
120. **Third**, it is for European Dynamics to prove that LexNova or any one of its members have been found guilty of professional misconduct. European Dynamics, to date, has only submitted uncorroborated press reports which do not constitute proof and fall short of the best evidence rule under Maltese civil procedural law.<sup>47</sup>
121. **Fourth**, even if (i) Article 57(4)(c) of Directive 2014/24/EU has direct effect any (ii) one of the members of LexNova has been found guilty of professional misconduct, *quod non*, the exclusion under that provision is discretionary and not mandatory. Further, the Contracting Authority cannot decide to exclude such an economic operator without, first, allowing that economic operator to clarify its position in line with the principle of proportionality, and second, allowing that economic operator to exhaust the self-cleaning process in Article 57(6) of Directive 2014/24/EU.

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<sup>44</sup> *Bessui JV vs Dipartiment tal-Kuntratti*, Court of Appeal, (15 January 2026) [Ref. 379/2025/1] para 107:

*"Ifisser dan li skont il-liġi tagħna, biex kumitat ta' evalwazzjoni jista' jeskludi lil offerent fuq il-bażi ta' kondotta ħażina serja, jeħtieġ qabelxejn li dak l-istess offerent ikun ġie blacklisted".*

<sup>45</sup> *Bessui JV vs Dipartiment tal-Kuntratti*, Court of Appeal, (15 January 2026) [Ref. 379/2025/1], para 103.

<sup>46</sup> PPR, Regulation 199.

<sup>47</sup> Code of Organisation and Civil Procedure, Article 559.

122. *Fifth*, European Dynamics's real intent behind this fourth ground of appeal is to defame and mudsling LexNova. This is European Dynamics's playbook in litigation. LexNova reserves all rights and remedies against European Dynamics and its directors in this regard.

123. Therefore, this fourth ground of appeal is unfounded and should be rejected.

**H. DISAGREEMENT WITH THE TEC'S SCORING IN TERMS OF CRITERION I.1 AND CRITERION J.2 DO NOT CONSTITUTE IRREGULARITIES OR EVEN GRIEVANCES**

124. In the final section of its appeal, European Dynamics advances a series of loosely formulated and gratuitous allegations under the heading "*Additional irregularities identified in the evaluation process and reservation for submission of additional grounds of appeal*".

125. These appear to constitute the low-hanging fruit which European Dynamics places before this Board in what can only be described as an opaque attempt to secure two additional points: one under Criterion I.1 (out of a maximum of two points) and another under Criterion I.2 (also out of a maximum of two points).

126. LexNova respectfully submits that this section of the appeal is procedurally and substantively deficient. European Dynamics does not formulate a concrete grievance capable of judicial determination.

127. Instead, it merely raises vague suspicions regarding the evaluation of certain criteria and purports to reserve the right to raise additional arguments at a later stage of the proceedings. This is incompatible with the procedural framework governing objections before this Honourable Board.

128. An appellant is required to set out, clearly and precisely, the alleged illegality affecting the contested decision together with the factual and legal grounds upon which the grievance is based. A mere reservation of unspecified grievances cannot serve as a substitute for a properly substantiated plea.

129. Moreover, European Dynamics simply alleges that the TEC erred in the assessment of its bid *vis-à-vis* Criterion I.1 and Criterion J.2 and expects the Board to take its word for it. It does not offer up a single shred of evidence to substantiate its allegation that it should have been accorded an additional point each in terms of these 2 requirements.
130. Instead, European Dynamics confines itself to expressing general dissatisfaction with the evaluation carried out under certain criteria, most notably Criterion I.1 and Criterion J.2. In doing so, European Dynamics appears to treat the procurement remedy as a vehicle for contesting any scoring outcome with which it disagrees. That, however, is not the purpose of this remedy. The right to seek review exists where a tenderer identifies a concrete and substantiated grievance affecting the legality of the evaluation, not merely where it disagrees with the score attributed to its offer.
131. Without prejudice to the foregoing, LexNova respectfully invites this Honourable Board not to entertain these alleged "additional grievances", since they do not form part of the grievances properly raised by European Dynamics in its appeal. In the alternative, should the Board decide to consider them on their merits, LexNova respectfully submits that they should be dismissed in their entirety. LexNova further reserves its right to raise additional pleas should these alleged irregularities be clarified during the course of the proceedings or should European Dynamics seek to adduce evidence in support of them.

**I. THE DEPOSIT SHOULD NOT BE REFUNDED**

132. European Dynamics also seeks the refund of the deposit by way of its last request for relief.
133. The refund of the deposit should follow the principle customarily applied by this Board, that is, that costs follow the event. If European Dynamics's appeal is not successful, the deposit should not be refunded.
134. On a concluding note, LexNova will not object to the refund of the deposit paid by European Dynamics if the appeal is withdrawn in good time before the hearing to be scheduled by this Board.

THEREFORE, LexNova requests this Board to:

- a. reject European Dynamics's appeal in its entirety; and
- b. order the deposit paid by European Dynamics not to be refunded;

subject to any declaration, decree or order that it deems fit and opportune.

Yours sincerely,

Ganado Advocates

  
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**List of Exhibits**

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|--------------------|---|
| <b>Exhibit R-1</b> | European Dynamics's Reply on the Merits in Case 2120 of 10 March 2025                   |
| <b>Exhibit R-2</b> | European Dynamics's Reply on the Application for Disclosure in Case 2120 of 29 May 2025 |

# DOCUMENT R-1



The Secretary  
Public Contracts Review Board  
Notre Dame Ditch  
Floriana  
FRN 1601



10th March, 2025

**Subject:** Tender for the Provision, Design, Implementation, Maintenance and Support of an Integrated Tax and Customs Administration System (ITCAS) for the Malta Tax and Customs Administration – Ref. CT2000/2024 (“the Tender”).

Dear Sir/Madam,

**Re:- Reply to the Appeal filed by Netcompany – Intrasoft S.A. (TID 210569)**

## Section A - Introductory Statements

### 1. Introduction

1.1. We (hereinafter “Respondents” and “We”) write in our capacity as Recommended Bidders bearing tenderer identification number (TID 210571) with reference and in reply to the appeal filed on the 28<sup>th</sup> February, 2025 by Ganado Advocates on instruction of Netcompany – Intrasoft S.A. (TID 210569) (“Appellants” or “Appellant”) against the award to us Respondents of the tender in caption.

1.2. It is Respondents’ main submission that there are no grounds on which the Public Contracts Review Board (“the Review Board”) may uphold Appellants’ pleas. On the contrary, there are clear grounds on which the appeal *de quo* should be rejected in its entirety and this for the reasons adduced below.

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## 2. Factual Background

2.1. The Appellants submit to the Review Board facts which are absolutely fallacious and misleading. The following submissions address the falsity in the Appellants' fact list and provides the proper information as to their declarations in the facts section of their Objection:-

(i) The Respondents are part of the international group of companies "EUROPEAN DYNAMICS" (ED), a leading IT solutions and services provider and a vendor of a wide range of products in the field of eGovernment, among others in the fields of eCustoms and eTaxation. ED employs as a group of over one thousand and two hundred (1,200.00) engineers and experts and operates through its subsidiaries in eleven (11) countries, serving government clients in more than forty (40) countries and four (4) different continents. ED's experts master many languages, but most importantly, they master successfully all modern programming languages and they use them to design, develop and deliver technology and products of superior quality that work to the full satisfaction of the clients.

In the case at stake, ED submitted to the Malta Tax and Customs Administration ("the Contracting Authority") a high quality technical offer, at a very competitive price. A potential award of the ITCAS contract to the Respondents, will be particularly beneficial for the taxpayer of Malta, since the offered product and services are not only of superior quality but also the financial proposal of the Respondents amounts to around thirty (30) million euros, while the one of the Appellant amounts approximately to forty-five (45) million euros, i.e. it is approximately fifteen (15) million euros higher.

(ii) The Appellant appears to imply in par. 5 of its appeal that the history, size, nationalities and/or linguistic skills of its staff should be taken into account in the course of the evaluation and influence it or eventually even replace or amend the award criteria. This line of argument is unfounded, since ED has, as described above, a long history in the provision of relevant services worldwide, but it rather seems to display further weaknesses, since the evaluation was made in the case at issue, as it should, according to the relevant CfT, only on the basis of the quality of the technical offer (70%) in conjunction with the financial offer (30%) and no other factor could have an impact on it.

(iii) The Respondents retain only one extract of par. 5, in the Appellant's appeal where the Appellant argues that it provides "*products and IT services of the highest quality*"(!). The Appellant appears to argue that the allegedly "highest quality" of its products and services is an element that needs to be taken into account to evaluate the tenders concerning ITCAS. Nevertheless, the Respondents undertook market research, which led to interesting results, known to the participants in the said market. In particular:

(iv) We first refer to the products that the Appellants offer to deliver ITCAS and to the best of our understanding, these are the so-called SOLON software for taxation and the ERMIS one for Customs. According to the Respondents' market research, the Appellant has never delivered anywhere in full production, any Taxation system based on SOLON or any other COTS product owned by the Appellant, and this will not change even in the following two (2) years. If the Appellant has a different point of view on the above, it is invited to provide the necessary evidence before your Board. The Appellant is also invited to present the references that it

included in its tender in order to demonstrate compliance with the corresponding requirement of the tender specifications and to explain which other client(s) use(s) today and under which circumstances, the COTS products that it intends to offer to MTCA for ITCAS.

(v) Things are much more worrying in the case of Customs. The Appellant claims that it has delivered an eCustoms solution to the Danish Customs, allegedly covering Import, Export and Transit and that Import is in production since June 2021, while Transit and Export since May 2023. The Respondents are very much familiar with the references presented by the Appellants in all similar tendering processes in the field of Customs and Taxation. One of them is the Danish eCustoms system (DMS), covering Import, Export and Transit

(vi) However, DMS Import has not yet been delivered and, therefore, is not yet in production. It is announced to enter into production sometime after September 2025, rather towards the end of 2025. The Appellants put in production in 2021 only the H7 message, which, as MTCA can also confirm, concerns a very limited and even insignificant portion of the functionality of an Import system. The Import activity of Denmark is continuously carried out by the old Import system, managed by a different contractor (CGI); and this will continue at least until the end of 2025. In the case of Export and Transit, the system entered into production only in June 2024. Until June 2024, the market was using the previous system. However, even after June 2024, the Export and Import system remains for many months and even up-to-date, totally unstable.

(vii) As proof of the above, we indicatively refer to the following articles in the press, but also official press announcements of UFST. According to the latter, even in November – December 2024, the operation of the Export system was disastrous<sup>1</sup>. Because of this malfunction, the Danish Economy was harmed seriously. We provide below an unofficial translation of some parts of the content of the said articles, where the words "kaos" and "eksport" have a dominant position.

*"Customs chaos paralyses Danish exports*

*It is nothing less than a disaster for Danish exports that the Danish Customs Agency's new DMS export system is affected by massive delays and errors, says Danish Freight Forwarders.*

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<sup>1</sup> See articles: (a) <https://www.computerworld.dk/art/289416/kaotisk-it-projekt-til-300-millioner-kroner-til-danske-skoler-afsluttes-efter-flere-aars-forsinkelse-har-mistet-overblik-over-oekonomien>

(b) [https://www.transportmagasinet.dk/article/view/1130424/brancheforeningtoldkaos\\_lammer\\_dansk\\_eksport](https://www.transportmagasinet.dk/article/view/1130424/brancheforeningtoldkaos_lammer_dansk_eksport)

(c) [https://www.transportmagasinet.dk/article/view/1130424/brancheforeningtoldkaos\\_lammer\\_dansk\\_eksport](https://www.transportmagasinet.dk/article/view/1130424/brancheforeningtoldkaos_lammer_dansk_eksport)

(d) <https://leman.com/news-and-insights/delays-in-customs-processing-at-the-danish-customs-agency/>

(e) [https://www.wood-supply.dk/article/view/1133795/eksportvarer\\_strander\\_pa\\_grund\\_af\\_fejl\\_i\\_toldsystemer](https://www.wood-supply.dk/article/view/1133795/eksportvarer_strander_pa_grund_af_fejl_i_toldsystemer)

(f) <https://www.danskindustri.dk/di-business/arkiv/nyheder/2024/11/eksportvarer-strander-pa-grund-af-fejl-i-toldsystemer/>

(g) <https://www.computerworld.dk/art/289494/melder-alt-klart-med-kaempe-it-projekt-budget-er-steget-med-naesten-30-procent-undervejs>

*This is what Danish Freight Forwarders says on the basis of an announcement from the Danish Customs Agency about 'challenges' with extended response times in the new system.*

*- Where a declaration in principle must be registered in less than 30 minutes, the processing time is now up to 3–4 hours and in some cases even longer, says Jakob Størling, who is the customs officer of Danske Freight Forwarders, and continues: -*

*- We even have examples of waiting times of up to a day.*

*According to Danske Speders, the delays mean that goods are locked in stock or loaded on trucks that are not allowed to drive, instead of being sent to customers outside Denmark. The result is not only disappointed customers and wasted resources, but also large financial losses that daily run up for the freight forwarders and their customers.*

*- And while Danish companies are struggling with the consequences of the system's limited capacity, we are still waiting for concrete answers and a durable solution from the Customs Agency, says Jakob Størling.*

*Danish Freight Forwarders have repeatedly moved the Danish Customs Agency and been in close dialogue to find out when we can expect clarification.*

*The Danish Customs Agency has most recently promised that it will send out a briefing on the situation and at the same time try to solve the problem of waiting times for the release of goods.*

*"We have to say that patience is exhausted. If the Danish Customs Agency's information does not contain a concrete, realistic solution, the Danish Freight Forwarders' Secretariat will consider the next step, concludes Jakob Størling, while he recalls that exports are a lifeblood for the Danish business community.*

*In 2025, DMS Import will be launched<sup>2</sup>, and this creates increasing nervousness in freight forwarders, because if the system today suffers from limited capacity, how will it not be when the import part also comes on, says the trade association.*

*The editorial board is working to get a comment from the Customs Agency."*

*(viii) Unfortunately, the situation remains equally unstable even in February 2025, and this is very well known to the market and the press. We indicatively refer to the following press article<sup>3</sup> and present below an unofficial translation:*

*"Published February 12, 2025 at 4:40 PM | Printed February 13, 2025*

*Danish customs system postponed just before the finish line: Netcompany not finished on time*

*The new customs system has been a long time in the making. It was supposed to be put into use in a little over a month, but now it has been postponed.*

*In a little over a month, Danish companies should have received smarter and easier solutions for handling customs and imports.*

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<sup>2</sup> Note: On the contrary to what the Appellant argues misleadingly, the whole market knows that the Import system will be delivered sometime in 2025.

<sup>3</sup> [https://www.computerworld.dk/art/290461/dansk-toldsystem-udskydes-lige-foer-maalstregen-netcompany-ikke-faerdig-til-tiden?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=daglige](https://www.computerworld.dk/art/290461/dansk-toldsystem-udskydes-lige-foer-maalstregen-netcompany-ikke-faerdig-til-tiden?utm_source=newsletter&utm_medium=email&utm_campaign=daglige)

But the Danish Customs Agency now states that the supplier, Netcompany, simply will not be able to finish the project by the agreed time.

"We are choosing to postpone the opening of DMS Import so that we are sure that the system is implemented in the quality agreed with the supplier, and that the system enables the best possible implementation for the business community and the Danish Customs Agency."

"The development of the system is well underway, but the supplier has stated that the system will not be ready in time. Therefore, we have chosen to postpone the opening until June 7," says Christian Lützen, Director of the Danish Customs Board, in a statement.

The current system will therefore also have its lifetime extended a little longer, the board says.

The budget slipped and the systems were not ready on time.

The Danish customs system, DMS, consists of three parts, DMS Export, DMS Import and DMS Shipping, all developed by Netcompany.

The problems with the project have practically been in a queue for the customs system. During the transition period, the country's freight forwarders suffered great difficulties, as the system was born with a number of errors.

"I will not hide the fact that the rollout of the new export system has caused deep frowns among freight forwarders," explained Martin Aabak, managing director of the Danish Freight Forwarders Association, to Mobilitywatch.

(ix) The above confirm that (a) the Export and Transit system was never put in operation before June 2024, and (b) that the Import system has not been ready yet. The Respondents underline that if the Appellant used this project as one (1) of the three (3) references required in order to qualify in the context of the present procurement process, as it attempted to do in other cases of similar procurements, its tender shall be rejected immediately, as non-complying with the relevant selection criteria. What is more, the Respondents have noticed in the case of another public procurement in Greece, that the Appellants use an "attestation" with misleading content, to put it mildly, regarding the operation of the above systems in Denmark. The Respondents invite your Board and the Contracting Authority, in case this DMS system has been used as reference and the Appellants submitted the relevant "attestation" to the Contracting Authority, to contact the Managing Director of the UFST (i.e. Mr. Jørgen Nygaard Nielsen), and ask him to confirm what UFST announced to the press officially and what is known by the market. More precisely, that DMS Export and Transit were put in production in June 2024, but remain unstable up-to-date, and that DMS Import will enter into production not earlier than September 2025.

(x) In this respect it is also to be noted that the Customs of Denmark terminated in 2022 a contract concerning Risk Management, initially assigned to the consortium of the Appellants. Upon the termination, the said project was assigned to the Respondents. Our understanding is that the termination of this contract would not have taken place if the product and services provided by the Appellants were indeed of the "highest quality".

(xi) However, since the Appellant insists so much on the allegedly "highest quality" of its products and services, we further extended our research and realised that it has faced r problems

not only in relation with the above eCustoms systems of Denmark, but also in the context of other contracts/projects. Very indicatively, we refer to one of them<sup>4</sup> (unofficial translation):

*"February 24, 2025*

*Three years after implementation of Netcompany system: Case processing times in the Municipality of Copenhagen are exceeded by up to 263 percent*

*Even though it has been three years since the Netcompany-developed professional system Domus was fully implemented, the system is still a contributing factor to citizens today being affected by greatly extended case processing times."*

(xii) The Respondents also invite your Board and MTCA to clarify if the Appellant presented its assignment under the title "Framework agreement for Debt Collection", contract no. 2017/S 082-158922, as one of the three (3) references required to qualify in the case of the present ITCAS procurement. If it did so, this constitutes another reason for disqualification, since this reference does not offer the functionality requested in the tender specifications, as clarified by the Contracting Authority's answers to the questions of the tenderers.

(xiii) The Respondents refer, indicatively, to Question 12: 5. Selection and Award Requirements as well as the answer provided by the MTCA:

*"(c) Technical and Professional Ability a. Performance of Service*

*We understand that projects initiated prior to the reference period (2017-2023) but concluded within this timeframe qualify for inclusion in the list of principal services. We also understand that projects that started during the reference period but are still ongoing also qualify for inclusion as long as the systems covered in the project have already been implemented. Could you please confirm our understanding?*

*Answer 12:*

*(i) A system started before the reference period (2017-2023) but concluded within the timeframe of 2017 and 2023 qualifies as long as it is fully implemented and in operation.*

*(ii) A system started between 2017 and 2023, is fully implemented but is still ongoing in terms of functionality and enhancements, qualifies. The system must cover the whole Taxations Domain (with or without Customs), must be in full operation and is still ongoing in terms of having enhancements rather than implementation of standard functional requirements of business domains (for example Direct Tax Returns implemented but VAT Returns not yet implemented)."*

It is clear from the above that the contract no. 2017/S 082-158922 assigned to the Appellant, which concerns merely a Debt Collection system, does not cover all the functionalities of a Tax System and thus could not be presented as reference of qualification in the procurement at issue.

(xiv) Apart from the validity of the required references, another important aspect to consider in public procurement has to do with business ethics. According to various articles in the international and Greek press, the Appellant and around ten (10) other companies also

<sup>4</sup> [https://www.computerworld.dk/art/290520/tre-aar-efter-implementering-af-netcompany-system-sagsbehandlingstider-i-koebenhavns-kommune-overskrides-med-op-til-263-procent?utm\\_source=newsletter&utm\\_medium=email&utm\\_campaign=daglige](https://www.computerworld.dk/art/290520/tre-aar-efter-implementering-af-netcompany-system-sagsbehandlingstider-i-koebenhavns-kommune-overskrides-med-op-til-263-procent?utm_source=newsletter&utm_medium=email&utm_campaign=daglige)

operating in Greece (the Respondents are not included in them), are subject to very serious investigations by the European Prosecutor (EPPO) and the Greek Competition Commission. The article of Politico, dated 10.04.2024, explicitly mentions the above and raises concerns<sup>5</sup>.

(xv) Despite the above and the fact that, as it is shown, it is the Appellant, which does not meet the selection criteria on the technical ability for the present procurement and not the Respondents, the Appellant unfoundedly claims in par. 18 of the Appeal completely the contrary. In particular, the Appellant argues that the Respondents have “*little to no experience in the implementation and operation of national tax administration systems*”. First we note that as explained in our tender, the Respondents work for many years in the field of taxation and have delivered various contracts for national and international clients in that area, which remain active even today. These contracts were presented and referred in the tender, but they were not used as references, because, according to the tender specifications, the tenderers were allowed to provide only three (3) references. Second, we note that according to the tender specifications, in any case, the selection criteria are to be fulfilled by all consortium partners and sub-contractors. In Question 10 of Clarification Note 4 it is explicitly stated that:

*“Question: [5.1B (page 9) b. Subcontracting Proportion] We understand that MTCA will consider the experience of sub-contractor also in case of subcontracting. Please confirm. Answer: The experience of the subcontractor will be considered in line with the criteria where the experience is being applied for in the Eligibility Criteria as stated in Pages 7, 8, 9 and 10. Prospective bidders are to be further guided by Clause 2.5 of the General Rules Governing Tenders:*

- 2.5 An economic operator may, where appropriate and for a particular contract, with regard to criteria relating to economic and financial standing and to criteria relating to technical and professional ability, rely on the capacities of other entities, regardless of the legal nature of the links which it has with them. With regard to criteria regarding educational and professional qualifications, or to relevant professional experience, economic operators may however only rely on the capacities of other entities where the latter will perform the works or services for which these capacities are required. Where an economic operator wants to rely on the capacities of other entities, it must in that case prove to the contracting authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect.”

The Respondents confirm that they provided such undertaking from their subcontractor. So, the above allegations of the Appellant are rather misleading and, in any case, completely unfounded.

### 3. Paragraphs 10-15 of the Appeal – Objections of the Appellant against Clarification Note 2, dated 22.03.2024, and Clarification Note 8, dated 18.04.2024, issued by the Contracting Authority

3.1. Further to the above, Appellants seem to want to state that, just because a clarification/amendment was carried out to the tender dossier (something which is customary in

<sup>5</sup> <https://www.politico.eu/article/fraud-busters-swoop-greece-contract-involve-e2-5-billion-eu-recovery-fund-cosmote-vodafone-nova/>

public procurement in the EU), the Contracting Authority was somehow lacking in the performance of its obligations. Indeed, nothing could be further from the truth.

3.2. First, it must be said that the Contracting Authority may clarify the procurement document as stipulated in Regulation 38(4) of the Public Procurement Regulations, 2016 (S.L. 601.03) (hereinafter "PPR"). Indeed, the above Regulation totally reflects the relevant provisions of EU Law, which also permit, if not impose in several cases, the amendment/clarification of the tender specifications, if requested by the potential tenderers. In particular, as explicitly stated in the preamble of Directive 2014/24/EU, par. 75: *"The technical specifications drawn up by public purchasers need to allow public procurement to be open to competition as well as to achieve objectives of sustainability. To that end, it should be possible to submit tenders that reflect the diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services. Consequently, technical specifications should be drafted in such a way as to avoid artificially narrowing down competition through requirements that favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator. Drawing up the technical specifications in terms of functional and performance requirements generally allows that objective to be achieved in the best way possible. Functional and performance-related requirements are also appropriate means to favour innovation in public procurement and should be used as widely as possible. Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by contracting authorities. [...]"*<sup>6</sup>.

3.3. Given the above, and taking into consideration that a restrictive interpretation of the Technical Selection Criteria under (iii) and (v) would lead to the favouring of a specific economic operator by mirroring key characteristics of a sole contract of the latter and, thus, to the significant distortion, or even total elimination, of competition, the Contracting Authority clarified, through Clarification Note 2, dated 22.03.2024, and Clarification Note 8, dated 18.04.2024, in order to allow this public procurement to be open to competition and achieve objectives of sustainability, that the said criteria should be read as permitting the project quoted to have been an IT system, alternatively and not cumulatively, of Direct Taxation, VAT or Customs and that two (2) of the three (3) projects should satisfy the requirement of a national tax administration system. The said Clarification Notes were known by all the interesting parties, the Appellant included.

3.4. Second, if, despite the above, the Appellants had anything to object in the manner in which these clarifications were made, they could have objected in terms of Regulation 262 of PPR. What Appellants do not say is that they themselves did not object to such amendments to the tender dossier during the tendering period, as they should, if indeed they had any objections against the above clarifications provided by the Contracting Authority. They could, if they wanted to, lodge an application before your Board or not submit a tender at all. The above is also confirmed by the legal counsels of the Appellant in their Article "Public procurement review proceedings in Malta",

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<sup>6</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26th February, 2014 on public procurement and repealing Directive 2004/18/EC of 26 February 2014 on public procurement and repealing Directive 2004/18/EC.

dated 17.07.2020, according to which, "An interested party *may lodge an application before the PCRB within two-thirds of the time allocated in the call for competition for the submission, if the objection relates to the procurement documents and the procedure up to that point.*".

3.5. The Appellants did not proceed in the filing of such an application. And yet, they submitted the tender, which means that, given that they did, they also accepted the procurement document unconditionally. Therefore, the Appellant cannot at this stage lawfully raise an argument against the tender specifications and the Clarification Notes provided by the Contracting Authority and, therefore, this Board should disregard completely this observation because it is completely unfounded in fact and at law.

#### Section B – Inadmissibility of the present Appeal filed by the Appellants

4. Lack of legitimate interest for the filing of the Appeal in case of failure of the Appellant to present valid references

4.1. It is clear from the above (see Section A, 2. Factual Background, par. iv - xiii) that (a) the Export and Transit system of Denmark, assigned to the Appellant, was never put in operation before June 2024, as well as that the Import system of Denmark, also assigned to the latter, has not been ready yet, and (b) the contract no. 2017/S 082-158922 assigned to the Appellant, which concerns a Debt Collection system does not cover all the functionalities of a Tax System, as required in the tender specifications of the present procurement. With this in mind, none of the above assignments could be proposed as a valid reference by the Appellant in order to qualify as tenderer. For this reason, should the Appellant have presented the said assignments as project references, its tender is to be disqualified. In this case, the Appellant suffers no harm by the award decision at issue, since the contract could in no case be assigned to the latter and, consequently, the Appellant has no legitimate interest to appeal against it.

4.2. Indeed, as explicitly mentioned by the authors of the Article *"Public procurement review proceedings in Malta"*, dated 17.07.2020, "In the case of an application filed before the close of a call for competition, any interested person has standing to file the appeal, since no offers or tenders were submitted by that stage. In the case of an appeal filed against a decision of the contracting authority, the interested person must show that it has or had an interest in, or it has been harmed or risks being harmed by, a decision of the contracting authority."<sup>7</sup>.

4.3. In the case at issue, the Appellant did not show, as it should in order for this Appeal to be admissible, that it has met the selection criteria described in the tender specifications in order to qualify for the said procurement, and, therefore, in which way it was harmed by the award decision of the contracting authority and which is its interest in appealing. At least one (eventually two) of the references of the Appellant, is not valid and thus its tender is to be rejected.

<sup>7</sup> See Article of Antoine G. Cremona and Clement Mifsud Bonnici with the title: *"Public procurement review proceedings in Malta"*, dated 17.07.2020, published in Lexology, <https://www.lexology.com/library/detail.aspx?g=56882d27-b412-4456-a6fb-75a402b99444>

<sup>8</sup> See reply to the Question: *What are the admissibility requirements for an application to review a contracting authority's decision?* <https://www.lexology.com/library/detail.aspx?g=56882d27-b412-4456-a6fb-75a402b99444>

What is more, the mere fact that the Appellant "*disagrees*" with the award of the contract to the Respondents does not suffice to provide it with the required *locus standi* to file the said Appeal. In this respect, it is also to be said that the Appellant, while engaging in detailed analyses of the alleged "non-compliance" of the tender of the Respondents with the tender conditions, it makes no reference either to the tender submitted by itself or to the reasons why the latter should be preferred as recommended bid.

4.4. Given the above, the Appellants do not even have the legitimate interest to proceed with the present appeal, since, in any case, they do not qualify in the context of the present ITCAS procurement. So, this Appeal has to be considered as inadmissible and thus be rejected by your Board foremost for the said reason.

### Section C - Submissions on the Grievances

In any case, even if, despite the above, your Board considered that this Appeal was admissible, quod non, the latter should be also rejected for the following reasons:

#### 5. Reply to the First Ground of Appeal: Principle of Confidentiality and the legitimate interest of the Respondents to protect their "business secrets".

5.1. The Appellant is claiming that the failure to provide the relative documentation by the Contracting Authority has deprived it of its right to a rapid and effective remedy and "*breaches the principle of transparency*".

5.2. It must be stated, first of all, that the principle of transparency is not absolute and it cannot be divorced from another very important principle – the principle of proportionality.

5.3. The proportionality principle is key in Maltese<sup>9</sup> and EU Public Procurement Law<sup>10</sup>. Furthermore, the principle of transparency does not mean that the Contracting Authority is to hand over to the Appellant (in this case) all the documentation provided by the Respondent Preferred Bidder. In itself, this approach would be disproportionate because of the confidentiality of the information itself.

5.4. Indeed, Article 21 of Directive 2014/24 states clearly that:- *unless otherwise provided in this Directive or in the national law to which the contracting authority is subject, in particular legislation concerning access to information, and without prejudice to the obligations relating to the advertising of awarded contracts and to the information to candidates and tenderers set out in Articles 50 and 55, the contracting authority shall not disclose information forwarded to it by economic operators*

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<sup>9</sup> Regulation 39(1) of the Public Procurement Regulations state that:- "Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner."

<sup>10</sup> Directive 2014/24/EU of the European Parliament and of the Council of 26<sup>th</sup> February, 2014 on public procurement and repealing Directive 2004/18/EC of 26 February 2014 on public procurement and repealing Directive 2004/18/EC. Article 18(1) of the Directive states the following:- "*Contracting authorities shall treat economic operators equally and without discrimination and shall act in a transparent and proportionate manner*" which enunciation is transposed into Maltese Law by above-mentioned Regulation 39(1) of the Public Procurement Regulations.

which they have designated as confidential, including, but not limited to, technical or trade secrets and the confidential aspects of tenders. Contracting authorities may impose on economic operators requirements aimed at protecting the confidential nature of information which the contracting authorities make available throughout the procurement procedure.

5.5. The above is also confirmed by other relevant provisions of EU Law, applicable in completely similar cases with the present case. Indeed, according to Regulation (EC) 1049/2001 art 4. 2 of the Regulation (EC) 1049/2001:- "*The institutions shall refuse access to a document where disclosure would undermine the protection of: – commercial interests of a natural or legal person, including intellectual property... unless there is an overriding public interest in disclosure*". In order for the said Article 4(2), first indent, of Regulation 1049/2001 to apply, it is necessary to demonstrate that the documents to which access is requested contain information which, if disclosed, could harm the commercial interests of a legal entity. This applies when, among other things, the requested documents contain commercially sensitive information related, in particular, to the commercial strategies of the companies concerned or to their commercial relationships, or when these documents contain information that is specific to the company and highlights its expertise (see, to that effect, judgment of 9 September 2014, *MasterCard and others v Commission*, T-516/11, not published, EU:T:2014:759, paragraphs 82 to 84).

5.6. The same applies also in case of request for disclosure of information by national authorities. It is precisely for this reason that the request for access to technical specifications of our tender was partially refused by the Contracting Authority.

5.7. The information requested for disclosure by the Appellant, i.e. among others, our Organisation and Methodology submissions in terms of the technical offer, including our submission for the Planning, Project Governance and Methodology (category 1), specifically under criterion 1.1. entitled "*Resource Planning and Strategic Project Management*", the documentation submitted to corroborate our technical compliance in the terms of the requirements of category 1, our submissions for category 3, including all the recommended features and capabilities of the ITCAS by the Respondents (applied technology, system architecture and software architecture, data access etc.), the documentation submitted to corroborate our technical compliance in the terms of the requirements of category 3, our demo submission, the identity of our "key experts" (natural persons) etc., include technical and personal information, which is confidential and could not be disclosed, since they constitute the "core" of our technical solution offered and have been the outcome of efforts of many years. All these documents analyze in detail all the actions to be completed by the Respondents, indicate the steps to be followed for the implementation of the system describe the methodology of the Respondents during the execution of the project, the mode of operation of the system and each platform etc. Consequently, this documentation includes information, which constitutes "*business secrets*" of the Respondents and as such cannot (and should not) be disclosed in their entirety, according to Article 21 of Directive 2014/24/EU in conjunction with the above provision of Regulation (EC) 1049/2001.

5.8. More precisely, given the dynamic nature of Respondents' activities, the know-how, the high level of investments made for the execution of the project, etc., it is obvious that the requested documentation can objectively be used for competitive purposes, since any of the Respondents'

competitors, the Appellant included, could exploit it for its own scientific purposes and commercial needs. Therefore, if this information is disclosed, it can be used for anti-competitive purposes and cause harm to Respondents. Thus, disclosure of this information should be avoided at all costs because it could, literally, destroy the Respondents' business.

5.9. Indeed, the possibility that Respondents' business may be dealt a fatal blow financially as a result of such future exploitation of the exposure at issue by their competitors cannot be characterized as purely hypothetical. On the contrary, it is foreseeable with a sufficient degree of probability that the vulnerable situation in which Respondents would find themselves in the event of disclosure of this exposure would become a situation that would involve financial loss to Respondents (see, to this effect, Case T 718/15 R, PTC Therapeutics International Ltd vs European Confederation of Pharmaceutical Entrepreneurs (Europe) and order of September 1, 2015 in the case of Pari Pharma v EMA, T-235/15 R, EU:T:2015:587, paragraph 98).

5.10 In this respect, as it was held *ad hoc* by the General Court in the joint cases T-339/10 – 532/10, regarding the interpretation of the exception to the right of access, according to Article 4 par. 2 a of Regulation (EC) 1049/2001, "That tender is structured in such a way as to respond specifically to EFSA's call for tenders, is based on a specific presentation and contains information particular to the undertaking which enables it to exhibit its expertise. In that context, it must be found that, as a result of their specific terms, the presentation used and the expertise exhibited, the tenders in question bear witness to the specific skills of the tenderers and contribute to the individual nature and appeal of the tenderer's bids in procedures such as that at issue, the purpose of which was to select a bid at the conclusion, inter alia, of a comparative examination of the bids submitted (see, to that effect, concerning a call for proposals, the judgment of 21 October 2010 in Case T 439/08 Agapion Joséplidès v Commission and EACEA, not published in the ECR, paragraph 127). Moreover, as EFSA also pointed out in its decision, the services at issue in the present case may be offered to other bodies, including EFSA itself, since the contract concluded with the successful tenderer is for a fixed period. The possibility cannot therefore be ruled out that the applicant will once again be in competition with the other tenderers, in particular the successful tenderer, in connection with a new call for tenders launched by EFSA relating to similar services. The tenderers' bids, in particular that of the successful tenderer, cannot therefore be disclosed to actual or potential competitors, as EFSA correctly observed in its decision".

5.11. Similarly, in the *Antea Polska SA* ruling, the CJEU has clearly supported limitations to the principle of transparency in procurement justified by the information economics in the field of procurement. The CJEU has been clear that 'the principal objective of the EU rules on public procurement is to ensure undistorted competition, and that, in order to achieve that objective, it is important that the contracting authorities do not release information relating to public procurement procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Since public procurement procedures are founded on a relationship of trust between the contracting authorities and participating economic operators, those operators must be able to communicate any relevant information to the contracting authorities in such a procedure, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to those operators''; *Antea Polska* (C-54/21, para 49). Without perhaps explicitly saying so, the CJEU has stipulated the protection of competition and the fostering of trust in procurement procedures as important characteristics necessary for the proper functioning of public procurement.

5.12. The Court has recognised that 'it is permissible for each Member State to strike a balance between the confidentiality [of procurement information] and the rules of national law pursuing other legitimate interests, including that ... of ensuring "access to information", in order to ensure the greatest possible transparency in public procurement procedures'; Antea Polska (C-54/21, para 57). However, in that regard, the exercise of such Member State discretion cannot impinge on the effectiveness of the EU procurement rules seeking to align the protection of competition and the trust necessary for economic operators to tender with the aim of safeguarding both private interests (of competition) and public interest (of public procurement). Consequently, the CJEU emphasized that '[u]national legislation which requires publicising of any information which has been communicated to the contracting authority by all tenderers, including the successful tenderer, with the sole exception of information covered by the [narrowly defined] concept of trade secrets [in the Trade Secrets Directive], is liable to prevent the contracting authority ... from deciding not to disclose certain information pursuant to interests or objectives [such as the protection of competition or commercial interests, but also the preservation of law enforcement procedures or the public interest], where that information does not fall within that concept of a trade secret'; Antea Polska (C-54/21, para 62). Therefore, it is clear that the maximum transparency or transparency-at-all-costs approach is not advocated by the CJEU, but it also looks at the fundamental elements of trust and free competition which are also the heart of the procurement process.

5.13. This is exactly the present case. It is undeniable that if the Contracting Authority were to disclose the information requested, as discussed above, the business of the Respondents would be, effectively, irremediably destroyed. Therefore, the information requested by the Appellant shall not be provided.

5.14. The same applies for the information requested by the Appellant in relation with the Tender Evaluation Committee (TEC). In particular, the Appellant requests the disclosure of the identity (!) of the members of the TEC and of the technical advisors to the TEC together with their academic and professional qualifications. Despite the fact that the above information constitutes personal data of the natural persons concerned, and thus their process is, in any case, also subject to GDPR, the Appellant fails to explain in the Appeal on which grounds should the disclosure of the identity of the said persons be based and why this information constitutes a *conditio sine qua non* for the protection of its interests, *a fortiori* given the fact that the anonymity of the above persons is necessary in order to ensure that they will not be influenced by the tenderers, i.e. it serves the purpose of ensuring objectivity and impartiality.

5.15. In light of the above, there is absolutely no legal or factual basis on which this ground of appeal should be acceded to and Respondents request humbly that such ground of appeal and all related requests and claims brought forward by the Appellants be denied.

## **6. Reply to the Second Ground of Appeal: Contradictory and, in any case, unfounded allegations regarding the principal services offered by the Respondents.**

6.1. Even this second ground of appeal is unfounded in fact and at law.

6.2. First of all, it must be said that this ground of appeal contradicts the first one, which seems to imply that no information has been given to the Appellants as regards our technical offer.

6.3. In reality, from the Appeal itself, it is clear that the evaluation committee did give the Appellants documentation and information in order for the Appellant to be in the position to file the Appeal. Otherwise, the latter could not refer to the information that the Contracting Authority provided it with.

6.4. The level of detail provided to the Appellants on the 26<sup>th</sup> February, 2025 is unknown to Respondents so they cannot comment on same. However, what Respondents can submit upon is that the Contracting Authority provided all necessary information in its response and hence Appellants have no valid reason or ground of appeal and this is because the information was indeed provided as stipulated hereunder:-

- i. For the Danish project as part of the online questionnaire;
- ii. For the Tajikistan Project and Zimbabwe Project as part of the ESPD document of the subcontractor.

In all three (3) cases, the value, period, certificate, role of the partner/subcontractor and description of activities in the particular reference project were presented.

6.5. This is yet another ground of appeal which is completely devoid of factual or legal foundation and should be (it is humbly submitted) rejected.

#### 7. Reply to the Third Ground of Appeal - The Recommended Bidder's Projects Do Satisfy the Technical Selection Criterion.

7.1. It must be also stated that even this third ground of appeal is completely unfounded in fact and at law.

7.2. Indeed, contrary to what is stated in the appeal application, Respondent's project did satisfy the technical selection criterion.

7.3. The contents of paragraph 49 of the Appeal are false. Indeed, the Tax System quoted has been delivered in production, according to the terms of the contract and it covered the following functionalities:

- Supply, installation and configuration of Server systems for Main and Disaster recovery data-centers of ZIMRA (status - completed and in production),
- TIN Registration (including e-registration) (status - completed and in production),
- Registration of all tax types (status - completed and in production),
- Return Filing (all tax types) (status - completed and in production),
- Payment processing (all tax types) manual and e-payments (status - completed and in production),
- Tax Refunds (all tax types) (status - completed and in production),
- Revenue Accounting (all tax types) (status - completed and in production),
- Taxpayer Accounting (all tax types) (status - completed and in production),
- Debt Management (MVP) (status - completed and in production),
- User Management (status - completed and in production),

- Interfacing with external systems (status – completed and in production),
- Integration with other internal systems (status – completed and in production),
- Tax Agents Module (status – completed and in production).

7.4. These are the core functionalities of a Tax System. They were delivered and they entered into production, as explicitly mentioned above. The contract in question also concerned four (4) additional accessory functionalities which are presented and which are not directly related with a core Tax System. These additional functionalities were delivered later, in line with the terms of the contract. The fact that the Tax System entered into full production confirms this. In particular, the following accessory features were delivered later in line with the timeplan of the contract:

- Revenue Forecasting,
- Case Management,
- Debt Management Auditing, Compliance and Risks Management,
- Integration with targeted government agencies.

7.5. We reiterate that the components that have been put in production refer to a complete Tax System that is used to allow the Government to collect taxes, as stipulated in the CFT. With an aim at certifying whether the contract in question constitutes a valid reference, one can verify if the stand-alone system, which entered into production, as explained above, before 31.12.2023, fulfils the requirements of the tender specifications. The answer is “yes”. In other terms, if the contract through which the quoted project was assigned to the Respondents did not require the above extra accessory features, it would still be a valid reference. It is important to underline that the requirement for the references in the tender specifications of the MTCA, was for a Tax System and not of specific functionality beyond those of a core Tax System. The quoted project, therefore, was absolutely and clearly compliant. In this sense, we make reference to page 9 of the tender specifications, in which it is described, under point (c), regarding the Technical and Professional Ability of the tenderers, the following, in so far as the prerequisites for the validity of the references is concerned:

(i) The reference must concern a *“COTS or implemented system that can be configured into an integrated Tax Administration system, with or without Customs Related Software Development which have been implemented (designed, developed, tested and in production) and are in operation”*.

(ii) Be a *“project quoted should be in the business domain of Taxation, namely Direct Tax, VAT, or customs”*.

7.6. Respondents reiterate that the point in question concerns a selection criterion. Selection criteria cannot be used for award purposes. Even if one reference could be perceived as inadequate, quod non, the contracting authority should have asked ED to rectify. This was clearly reminded in page 9 of the tender specifications, in which it is explicitly mentioned that: *“Bidders 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”*.

7.7. Furthermore, it must be clarified that the aim of selection criteria is to determine eligibility to participate in the tendering process and the selection criteria need to be proportionate and fair.

7.8. The aim of selection criteria is to ensure that a candidate has the ability to undertake the work required by the Contracting Authority, and thus that it is eligible to participate. This means that a previous contract is a valid reference when:-

(a) it comprises functionality described in the tender specifications, which characterizes it as a Tax system, and

(b) when it is in full production before 31.12.2023.

7.9. Moreover, it must be stated that most of these extra accessory features in Zimbabwe, were not even requested by the Contracting Authority in Malta and even those which were requested, they were not mandatory and hence cannot form the basis of a disqualification or rejection of a tender offer.

7.10. This is also clear because as part of the evaluation of the technical proposal, the tender specifications present that (for functional requirements):

- three (3) marks will be given, if already implemented in another tax administration, out of box and requires minor configuration and in line with the plan (bidder to provide screenshots)
- two (2) marks will be given, if not implemented in another tax administration, out of box with configuration and in line with plan (bidder to provide screen shots) and
- one (1) mark will be given, if function has to be coded from scratch and in line with plan.

This shows that it is absolutely acceptable that certain functions may not be already implemented for another Tax Administration. This previous non-implementation could only affect the marks to be granted to each technical offer and not the eligibility of a tenderer.

7.11. More specifically, the tender specifications of the MTCA indicate the following in relation to these four (4) extra accessory features:

- Revenue Forecasting: This is not required by the MTCA at all. The only reference to revenue forecasting is on page 148 under "3.5.5.4.12.1 Revenue management functions" which states that "These accounts will be linked to the Government accounting system to support the revenue forecasting process."
- Case Management: It is referenced once in the context of audit and verification (page 301, item 45.f): "Provide high level information on how case management for audit and verification is implemented in ITCAS."
- Debt Management Auditing, Compliance and Risks Management: This is referred in the tender specifications, but again it is not mandatory that it pre-exists and it can be developed from zero for the first time in the context of this ITCAS.
- Integration with targeted government agencies: This refers to extra integrations with third systems which are not related to taxation and which differ from one country to another.

Actually, the above referred back-office functionalities were not even part of the demonstration scenario requested by the MTCA. However, it is worth noting that during the demonstration of our product, these functionalities were visible while we were navigating through the system and they were video-recorded. The video was delivered to the MTCA, who made an overall assessment of our technical offer, including the said features to be provided. Thus, it is clear that these features are part of the product that we offer and presented to MTCA.

7.12. In addition, Appellants' submission, that the Zimbabwe project allegedly has not been implemented and in operation by 2023 (in paragraphs 49-50), is also untrue, since the said system is in production and this is certified by the competent contracting authority. The fact that this system entered in production was announced officially in the context of a ceremony<sup>11</sup>, which took place in September 18, 2025. So, once again, the Appellants try to smear Respondents' submission in a baseless fashion.

7.13. The same applies to the contentions contained in paragraph 51 of the Appeal. It must be said that the project value is currently two hundred eighty-six million one hundred twenty-four thousand Danish kroner (286,124,000.00 DKK), of which one hundred twenty-nine million five hundred forty-nine thousand and four hundred eighty-seven Danish kroner (129,549,487.00 DKK) are specifically for the requested period. The equivalent in Euro is approximately seventeen million three hundred sixty-five thousand and nine hundred euros (€17,365,900.00).

7.14. Paragraphs 52-53 of the Appeal also contain a host of falsities. First of all, it must be said that the Respondents present as a reference, the Tajikistan Project. The Project was completed through two (2) consecutive contracts, as it is customary in the public sector. As it is clearly stipulated, the second contract is merely an upgrade of the same system. The name of the second contract is self-explanatory "*upgrading and expanding the ITMIS system*". The first part of the project was funded by the World Bank and, after expiration of the funds, the local government continued enhancements of the same system (ITMIS) within the scope of another assignment.

7.15. Even in paragraph 55 of the Appeal, the Appellants are again continuing their campaign of misinformation. The fact remains that total budget for the reference period for all three (3) projects is more than thirty-four million euros (€34,000,000.00, i.e. 17.4 million euros for the project in Denmark, 9.9 million euros for the project in Zimbabwe and 7.6 million euros in total for the project in Tajikistan, i.e. approximately 4.7 million euros by virtue of the main contract and approximately 2.9 million euros for its upgrade). Even if only one of the two contracts of the Tajikistan project is to be considered, the total remains still significantly above the threshold of twenty-five million euros (€25,000,000.00). Therefore, the specific selection criterion is undoubtedly in any case satisfied.

7.16. Last but not least, the Appellants do not have and are unable to present one single reference that they delivered before 2023 or up to date or even in the next two (2) years a Tax System based on a COTS product of their own, which is in production anywhere. This explains why in this Appeal they make no specific reference to their technical and professional ability and

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<sup>11</sup> The video of the ceremony is available here:

<https://www.facebook.com/ZIMRA.ZW/videos/845317237250236/?fs=e&cs=TIeQ9V&mibextid=wwXifr&rdid=IYW03IRO9De7BiNO#>

focus only on a misrepresentation of our relevant references. This also verifies the hypocritical and pretentious character of the said claims of the Appellant.

7.17. To sum up, it is clear that the Appellants' submissions are completely baseless in fact and at law. There is no one single argument which is substantiated in fact or at law. Not even one. The submissions underlying this ground of appeal are weave of misrepresentations, misinterpretations and misleading statements. In view of the above, therefore, Respondents humbly submit that there is absolutely no basis of fact and of law in any of the submissions in relation to this ground of appeal (or indeed any other) advanced by the Appellants. So, this ground of appeal shall also be rejected by your Board.

**8. Reply to the fourth Ground of Appeal:- No inexplicable or unjustified ex post facto decrease of the Financial Offer of the Respondents but an arithmetical revision recommended by the Contracting Authority to all tenderers through the EPP System due to an arithmetical error in the Financial Offer Excel Template.**

8.1. This ground of appeal is also undoubtedly presented in bad faith. There is no reason justifying this ground of appeal purely because even Appellants themselves were affected by the reason underlying the price reduction.

8.2. As is clearly evidenced by the documents hereto attached and marked Doc. ED 1 and Doc. ED 2, there was an arithmetical error in the Financial Offer Excel Template which was communicated to all tenderers through the online EPP system. The way the ground of appeal submissions have been drafted seems to imply misleadingly that there was something untoward in the manner in which the actual arithmetical revision was carried out by the Contracting Authority. This cannot be further from the truth and it is ignoble on the part of the Appellants to draft this ground as they did. There was nothing untoward in the revision. In fact the Contracting Authority informed all tenderers, before the deadline for the submission of tenders, that they should use the template for the financial offer as it was and that their offers would be amended by MTCA. This is exactly what happened. The MTCA took into account the arithmetical error, it amended the financial offers and it notified them to the tenderers. Each tenderer had the right to verify the amended financial offer and approve it. Since the Appellants, like all tenderers, approved their financial offer in tempore non suspecto, they demonstrate bad faith when they question it now, with an obvious aim. The same applies even if the Appellants decided not to approve such amendments, since, in any case, they were granted with the said option.

8.3. Without any prejudice to the above stated, it must be submitted that this ground of appeal is in any case irrelevant, since, even if the price had remained the one tendered originally, i.e. the price of thirty-two million twenty-two thousand four hundred ninety six euros and twenty-three cents (€32,022,496.23), nothing would have changed. The competition landscape between the tenderers, the transparency element, the non-discrimination principle and any other consideration underpinning the lawfulness and validity of the tendering procedure would have completely remained unchanged, even if the financial offer were to be, just for the sake of argument, whimsically reduced. However, this was not the case at all. It may have very well been that the Appellants did not give the matter enough weight at the time when the notification was

sent to all the tenderers, but that is not, in any manner, imputable to the Contracting Authority or, indeed, to the Respondents.

8.4. It is, therefore, the humble opinion of Respondents that this Review Board deny and reject even this fourth ground of appeal.

**9. Reply to the fifth Ground of Appeal: The Technical Evaluation was carried out diligently, in good faith and in full observance of good governance and the PPR.**

9.1. It is humbly submitted that this is yet another baseless attempt to try to quash the decision of the Technical Evaluation Committee.

9.2. It must be stated at the outset, very respectfully, that this Board cannot replace the technical evaluation carried out by the technical evaluation committee. It is indeed the evaluation committee, with its technical expertise, which is competent to carry out the evaluation of offers on the basis of the specifications set out in a tender dossier, following the strict rigours prescribed by the PPRs and all other applicable laws and regulations. It must be said that this Board and the Courts are vested with the legal power to determine whether an evaluation of a bid (or of a number of bids) was performed in terms of the stipulations of Public Procurement Law. Indeed, neither the Courts nor this Board are tasked with evaluating any tender and with substituting itself the role of the evaluation committee by themselves evaluating a tender. This has been a fundamental principle which proved to be at the core of a number of decisions of this Board. Purely indicatively:-

Case 1026:

*"This Board would also like to point out that it is not its jurisdiction to assume doubt on the decision taken by the Evaluation Board but rather to verify that the correct and proper procedures were adopted in awarding the Tender."*

Case 1084:

*"As stated on numerous occasions, the remit of this Board is to review the Evaluation Process carried out on this particular Tender and to ensure that it has been carried out in a fair, just and transparent manner."*

Case 1119:

*"For clarity's sake, the Jurisdiction of this Board is to establish whether the procedure in the award of this Tender was appropriately carried out and whether the Evaluation process was executed in accordance with the Regulations, as laid out in the Public Procurement Regulations."*

9.3. Additionally, the Honourable Court of Appeal has also *expressis verbis* declared as follows<sup>12</sup>:-

*Mlurx kompitu ta' din il-Qorti li tidhol biex teżamina jekk, għal xi oġġett partikolari, il-konsorzju appellanti kienx haqqu xi punt jew tnejn aktar. Din hija Qorti ta' reviżjoni li dak li trid tara luwa jekk il-kumitat evakentiv segwiex il-kriterji stabbiliti u jekk mexiex mal-parametri indikati fis-sejha għall-offerti. Din il-*

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<sup>12</sup> *Cateressence Limited ET vs Id-Direttur tal-Kuntratti noe. Et.*, dec. by the Honourable Court of Appeal on the 14th February, 2017, Rik. Nru. 380/2016.

*Qorti ma listax ifettaq dwar kif inthallaw il-marki individwali, speċjalment meta tqis li l-offerta tal-konsorzju appellanti ġja ġie ezaminat u mistharreg għal darbtejn<sup>13</sup>.*

9.4. Furthermore, the CJEU has also ruled that an evaluation committee must have some leeway in carrying out its obligations and, thus, it may, without amending the contract-award criteria set out originally in the tender dossier or contract notice, and it can “*structure its own work of examining and analysing the submitted tenders*”<sup>14</sup>. The key question, therefore, is not how the evaluation committee allotted marks and took notes. The key question is whether it observed the proper procedure for doing so. Appellants fail to explain in their appeal how they have arrived to the conclusion that the leeway, which the technical evaluation committee have in evaluating a tender (in terms of the Law, needless to say), has been abused in the evaluation of the tender in caption. Appellants seem to extrapolate from the way that the evaluation was documented that the evaluation was not done diligently and appropriately. This is, clearly, a quantum leap. There is **nothing** in the whole procedure, including in the Appellant’s appeal, that somehow gives the impression that the technical evaluation committee did not perform its obligations well. If the Appellants failed to read properly the information submitted to them or any other element of the procedure, that is certainly not imputable to the technical evaluation committee.

9.5. Ironically, and additionally to the above, it is this ground of appeal which is certainly ambiguous and unclear and not the evaluation carried out by the TEC. Particularly in paragraphs 72 to 74 of the Appeal, but throughout the whole ground of appeal, really, Appellants fail to explain the reasons underlying their real grievance. They say in paragraph 72, that the technical evaluation committee gave “scant details” without making any reference thereto. In paragraph 73, they make reference to “inaccuracies and inconsistencies” in a general and abstract way, without specifying them. The Appellant just mentions in this paragraph the numbers of some of the evaluation criteria stating that they were not evaluated properly without any further clarification. And in paragraph 74 of the Appeal, the Appellants take a snapshot of a few words of the technical evaluation committee and project unto them inefficiency and lack of good governance without really explaining why.

9.6. Indeed, this ground is bereft of any details which could, somehow, at least attempt to substantiate this ground of appeal and Respondents object to the Appellants’ bringing forward more submissions on this point (or any other, for that matter) short of the closing arguments. Not

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<sup>13</sup> Translation into English: “It is not the duty of this court (i.e. the Court of Appeal) that it examines whether, for one item or another, the appellant consortium deserved one or two more points. This is a court of review and it has to verify whether the technical evaluation committee followed the established criteria and whether it observed the parameters indicated in the call for tenders. This court cannot scrutinise in detail how the marks were given individually particularly when in this case the appellant’s tender was evaluated twice.”.

<sup>14</sup> The CJEU stipulated that: “For that purpose, it must be considered that an evaluation committee must be able to have some leeway in carrying out its task. Accordingly, it may, without amending the contract award criteria set out in the contract documents or the contract notice, structure its own work of examining and analysing the submitted tenders.” (Case C-252/10, *Evropaiki Dynamiki – Proigmena Systemata Tilepikoinonion Pliroforikis kai Tilematikis AE vs. European Maritime Safety Agency (EMSA)* ) Para. 35. (<https://curia.europa.eu/juris/document/document.jsf?text=&docid=107930&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=53479>).

providing details at this stage, effectively deprives Respondents from their right to effectively filing a reply on same but also does not permit your Board to make any substantial review of the relevant claims of the Appellant.

9.7. It must be emphasized, however, that no amount of detail would render this ground of appeal substantiated because it is clear that the technical evaluation committee carried out its obligations diligently, in good faith and in full observance of good governance and the PPR.

9.8. It is, therefore, the humble opinion of Respondents that this Review Board should deny and reject even this fifth ground of appeal.

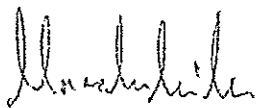
#### 10. Conclusion

10.1. In view of the above, Respondents respectfully request the Honourable Board to:-

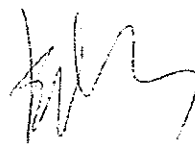
- (i) reject *in toto* the appeal filed by Appellants and all requests of the Appellants contained in same; and
- (ii) furthermore, to confirm that the Contracting Authority was correct in its decision to award the relative contract to Respondents;

10.2. Without any prejudice to any further submissions that Respondent may be allowed to make during the relative hearing and to make any further submissions in relation to any other information which may become available to it during any stage of the Appeal proceedings in question.

Sincerely,



Leonidas Bardis  
Managing Director  
EUROPEAN DYNAMICS SA



Constantinos Velentzas  
Managing Director  
EUROPEAN DYNAMICS Luxembourg SA





**CFT - CT2000/2024 -TENDER FOR THE PROVISION DESIGN, IMPLEMENTATION, MAINTENANCE AND SUPPORT OF AN INTEGRATED TAX AND CUSTOMS ADMINISTRATION S/STEM (TCAS) FOR THE MALTA TAX AND CUSTOMS ADMINISTRATION (STATUS: EVALUATION)**

Clarifications

**View Published Clarification**

<b>Title</b>	EO Clarification following an inquiry adjustment
<b>Deadline</b>	20/11/2024 14:30
<b>Request for</b>	Clarification
<b>Description of the clarification</b>	All clarification refers to 10.14 of the tender in question. An adjustment adjustment was made to our financial table attached. Financial table with updated value in version of "G3203 (L4-Busi-4-6-10-1-2024)" and in the field "Quantity" in column "G3203" from 4 to 20 as explained in the clarification note. This adjustment also affected a number of other important items being indicated in the same attachment. With the adjustment the Grand total of the financial table and CT2000_14-Summary of Prices now aligns exactly with the total cost of procurement in Table in work sheet "CT2000_14-000 (L4-Busi-4-6-10-1-2024)" as was expected. Any clarification accepted.
<b>Attachment for the question</b>	EO Clarification Financial Table.pdf
<b>EO Response (1)</b>	Dear Madam, In response to your request, we confirm acceptance of the adjustment you provided in our financial table. We remain at your disposal. Best regards, Leif Gunnarsson
<b>Response Date (1):</b>	20/11/2024 15:37

## DOCUMENT R-2

In the Public Contracts Review Board

In the records of case numbered 536  
in connection with the procurement  
procedure with reference number  
CT2000/2024 (the "Tender") in the  
names of:-

Netcompany S.A.

Versus

Department of Contracts et

Sitting: 12 June 2025

**Reply of European Dynamics consortium (TID 210571, "European Dynamics") to the application for disclosure (hereinafter "Disclosure Application") filed by NetCompany S.A.[formerly NetCompany-Intrasoft S.A. ("Netcompany")]**

### I. Introduction

1. In its application, NetCompany requests the following:-

- a. the bid submitted by the European Dynamics;
- b. the procurement procedure; and
- c. the Tender Evaluation Committee's (the "TEC") evaluation of Netcompany's bid.

2. Essentially, NetCompany wants to substitute the TEC and allocate unto itself the duty of awarding the tender to itself. This is, ultimately, its real goal. NetCompany is trying to hide its real intentions under the guise of "*transparency*" and "*effective judicial protection*" when, in truth, no prejudice to such principles and rights are at stake and hence, European Dynamics submit at the outset that the application for disclosure should be rejected by this Honourable Board for being unfounded both in fact and at law.

2. NetCompany also argues in its application (e.g. par. 16), that it "*is aware of the capabilities and capacities of ED*". Likewise, European Dynamics is also aware of the capabilities and capacities of NetCompany and it knows very well that while it praises itself for allegedly being a "leading", experienced in taxation systems company, providing IT services of "*high quality*", all three references it presented in its own tender for ITCAS, have nothing to do with a national taxation system. In addition, none of these references uses any COTS tax product owned by NetCompany. Most importantly, two out of these

three references are **not valid** and NetCompany does not even qualify to participate in the present RFI. The reference concerning a debt collection system in Denmark is not in line with the ITCAS tender specifications, because this system does not comprise all the functions of a tax system, as also submitted in European Dynamics' reply, dated 10.03.2025. The other reference concerns an eCustoms project for the Danish Customs. Again this reference is **not valid**, because on the contrary to what is referred in an attestation presented by NetCompany, this system was never ready before June 2024 (even today it is not yet ready in full production). More evidence substantiating this will be provided at the hearing.

3. It is, therefore, clear that NetCompany is trying to substitute the TEC with the clear awareness that its bid is inadequate. If it were convinced that its bid were adequate, it would not have asked for the information requested – it only does so because it knows that its bid is inadequate. Indeed, it is also clear that NetCompany is on a warpath - it audaciously (and brazenly) accuses all parties involved in the evaluation, it advances claims and requests, it questions the professionalism, experience, capacity and even the “integrity” of the evaluators (par. 54), and, in a nutshell, makes it clear that it should be doing the evaluation and this despite the fact that, in reality, it does not even qualify to be part of this process.

4. European Dynamics will address all these points in detail during the hearing and reserves to produce all evidence and make all the necessary submissions at the appropriate juncture.

## **II. PRELIMINARY OBSERVATIONS**

5. NetCompany admits in its application that it asks to obtain detailed information (actually the whole file of the evaluation!) from the Contracting Authority, because it does not trust that the latter is capable of doing its work, and with an aim of replaying the evaluation on its own, substituting the TEC.

6. This approach is unacceptable and completely subverts the whole point of having a TEC. Unsuccessful tenderers cannot substitute the evaluators of a Contracting Authority and replay on their own the evaluation, or even ask the evaluators to do so. The evaluation takes place **only** by the authorized Evaluation Committee, which according to the applicable EU / national law and case law, disposes of a broad discretion of assessment. On numerous points NetCompany makes it clear that it does not have any concrete evidence to claim that an error of assessment took place. It simply argues that it **suspects** (no evidence) that the evaluators did not do a good job and it wants to perform the evaluation in a different manner. This is not acceptable<sup>7</sup>. NetCompany cannot ask for extra information because the contracting authority did state reasons and did justify its decisions. The evaluation report contains details on every award criterion. The fact that NetCompany does not like some of the comments of the evaluators is, frankly, irrelevant and immaterial. The decision is very well documented, and thus no plea related to an alleged failure to state reasons can be advanced here. Even in cases where the evaluators make a comment on European Dynamics's tender, this comment comes with

the respective technical score. This means that the evaluators considered the merits of each tender and awarded the corresponding score at their discretion.

8. Therefore, since the award decision is well motivated, the only plea that NetCompany could possibly advance, should concern potential manifest errors of assessment. However, if NetCompany argues that there are manifest errors, the burden of proof lies with NetCompany. So far, NetCompany has not presented the slightest evidence demonstrating a manifest error anywhere. And this will not change even if NetCompany accesses to additional information, clearly because the evaluators have a **broad discretion of assessment**. It does not matter and does not count how a frustrated unsuccessful tenderer would have evaluated and scored its tender and the one of its competitor, because the scores are awarded by the evaluators at their discretion.

9. It has to be noted here that if the application for disclosure of NetCompany were to be endorsed by the PCRB, this would create a disastrous precedent. Each frustrated tenderer would have from such a moment onwards, the right to take over the file of the evaluation and undertake its own evaluation, leading to a chaos.

10. Last but not least, NetCompany does not even demonstrate that any of the information requested has a concrete aim. In par. 8. Of the application NetCompany admits that it "*must be given access to information which **may be useful** to its appeal*". It also admits in par. 15 that it "*seeks to establish and to prove [...] European Dynamics's **lack of experience***". However, there is no such criterion in the tender specifications. According to the selection criteria, the "experience" is confirmed when tenderers can present three valid specific references. In addition, NetCompany argues that it needs the information to demonstrate European Dynamics' "***inability** to provide what the Contracting Authority is asking for in terms of Category 1 and Category 3*". However, Category 1 and Category 3 concern the award phase. During the award phase, no one is entitled to question the ability of a tenderer and thus no matter what information is provided, it cannot possibly serve the purpose advanced by NetCompany.

### **III. NetCompany's 6<sup>th</sup> – 10<sup>th</sup> requests**

11. European Dynamics would like to highlight that it is in constant competition with NetCompany all around Europe in many areas, including those of Customs and Taxation, and thus it is obliged to protect its commercial / technical secrets, its know-how and IPRs. The aim of NetCompany's 6<sup>th</sup> – 10<sup>th</sup> requests, describe precisely all the confidential information it would like to have on the products of its competitor. More particularly, NetCompany asks for the following information.

- **6<sup>th</sup> request**: the submissions for Category 1 – Planning, Project Governance and Methodology, specifically with respect to sub-category 1.1 entitled 'Resource Planning and Strategic Project Management'.

- **7th request:** the documentation submitted, including technical literature, to prove technical compliance of the submissions for Category 1 – Planning, Project Governance and Methodology.
- **8th request:** the submissions for Category 3 entitled 'ITCAS Features and Capabilities'.
- **9th request:** the documentation submitted, including technical literature, to prove technical compliance of the Category 3 submissions.
- **10th request:** the demo submission in terms of Clause 3.5.2 as per Annex 1 marked 'Demonstration List'.

12. In other terms, NetCompany asks for a copy of the tender of European Dynamics, with all the methodological and technological documentation, describing European Dynamics product from a functional and architectural and technological point of view as well as the video of the demonstration, showing the graphical user interface, all the screens and the processes / concepts involved. These requests shall be rejected for the following reasons:

13. The principal objective of EU law rules in the field of public procurement is the opening-up to undistorted competition in all the Member States (see, to that effect, Case C-26/03 Stadt Halle and RPL Lochau [2005] ECR I-1, paragraph 44). In order to attain that objective, it is important that the contracting authorities do not release information relating to contract award procedures which could be used to distort competition, whether in an ongoing procurement procedure or in subsequent procedures. Furthermore, both by their nature and according to the scheme of EU legislation in that field, contract award procedures are founded on a **relationship of trust between the contracting authorities and participating economic operators**. Those operators must be able to communicate any relevant information to the contracting authorities in the procurement process, without fear that the authorities will communicate to third parties items of information whose disclosure could be damaging to them. Accordingly, Article 15(2) of Directive 93/36 provides that the contracting authorities "***are obliged to respect fully the confidential nature of any information furnished by the suppliers***". In the specific context of informing an eliminated candidate or tenderer of the reasons for the rejection of his application or tender, and of publishing a notice of the award of a contract, Articles 7(1) and 9(3) of Directive 93/36 give the contracting authorities the discretion to withhold certain information where its release would prejudice the legitimate commercial interests of particular undertakings, public or private, or might prejudice fair competition between suppliers. Admittedly, those provisions relate to the conduct of the contracting authorities. It must nevertheless be acknowledged that their effectiveness would be severely undermined if, in an appeal against a decision taken by a contracting authority in relation to a contract award procedure, all of the information concerning that award procedure had to be made unreservedly available to the appellant, or even to others such as the interveners. In such circumstances, **the mere lodging of an appeal would give access to information which could be used to distort competition or to prejudice the legitimate interests of economic operators who participated in the contract award procedure concerned**. As it has been also by the European Court of Justice in the case

Varec SA vs. État belge (Decision of the Court of 14 February 2008, C-450/06, ECLI:EU:C:2008:91, p. 41-43), “*such an opportunity could even encourage economic operators to bring an appeal solely for the purpose of gaining access to their competitors’ business secrets”.* Accordingly, it is all the more important to provide for mechanisms which will adequately safeguard the interests of such economic operators.

14. In a review, the body responsible for the review procedure assumes the obligations laid down by Directive 93/36 with regard to the contracting authority’s respect for the confidentiality of information. The ‘*effective review*’ requirement provided for in Article 1(1) of Directive 89/665, read in conjunction with Articles 7(1), 9(3) and 15(2) of Directive 93/36, therefore imposes on that body an obligation to take the measures necessary to guarantee the effectiveness of those provisions, and thereby to **ensure that fair competition is maintained and that the legitimate interests of the economic operators concerned are protected**. It follows that, in a review procedure in relation to the award of public contracts, the body responsible for that review procedure must be able to decide that the information in the file relating to such an award **should not be communicated to the parties or their lawyers**, if that is necessary in order to ensure the protection of fair competition or of the legitimate interests of the economic operators that is required by EU law. In the case at issue, as NetCompany knows very well, all this is strictly confidential and constitutes commercially sensitive material, also covered by IPRs.

15. It is reminded here that European Dynamics has at its disposal a real Tax product already in production. Thus, if European Dynamics’ technical designs and tender, as well as its demonstration video, fall in the hands of NetCompany, they will cause to European Dynamic a serious and irreversible harm. NetCompany argues in a very insincere manner that it could have access only to non-confidential parts of the information, when it very well knows that there is nothing “*non-confidential*” in what it is requesting.

16. It has to be noted, and this arises from European Dynamics’ offer concerning ITCAS, its competitive price and history in the provision of IT services and products to over ten (10) Tax and Customs administrations in Europe, including in Malta, that European Dynamics’ offering is far more competitive than the one of NetCompany. Therefore, the case at stake before the PCRB cannot be used as an excuse for NetCompany to access all the commercial secrets and competitive advantages of European Dynamics, because the former allegedly does not trust the findings of the evaluation committee and the professionalism and “integrity” of the evaluators. If any unsuccessful tenderer could successfully advance arguments of this kind and use them to take over the know-how of its competitors, this would annul the notion of free and fair competition.

17. **In its par. 31 to 36**, NetCompany once more tries to mislead the PCRB on European Dynamics’ reference concerning the Tax system of Zimbabwe. As clarified in the attestation provided in European Dynamics’ tender and as it is well known in the public domain, the system in question is in production long ago. The tender specifications of ITCAS clarify the features that a system presented as reference must have in order to be accepted as a national tax system and all these features are covered by the reference in

question. The fact that other features which are not directly related to the tax system itself, were delivered later, does not change the valid character of this reference. All this is thoroughly explained in the Reply of European Dynamics. Again NetCompany tries to change the rules. A project reference is valid when it complies with the tender specifications of ITCAS. For example, as European Dynamics explained in its Reply, the Debt collection project in Denmark, that NetCompany presents as reference, is not valid because it does not comprise the functionalities of a Tax system. TEC's comment referred to **in par. 37** concerns the award phase, it makes a comment on the demo and does not confirm the absurd allegations of NetCompany. It is reminded that the references of the tenderers were verified during the selection phase and that only those who passed the selection phase participated in the award phase. Thus, during the evaluation of the demo the evaluators were not considering compliance with the selection phase and nothing in the demo could possibly serve in such a direction.

18. **In its par. 40 to 48**, NetCompany attempts through a particularly fanciful misinterpretation of the law, to argue that the key experts of European Dynamics are in fact sub-contractors and that the Contracting Authority has to disclose their names to it. The rationale behind is that "*Netcompany formally contends that ED does not have the necessary experience to satisfy the Tender requirements*", and that it has "*reason to believe that the same applies to the qualifications of its key experts*". This is simply absurd and even deplorable.

19. European Dynamics objects to any such claim. The real motive of such a request is not indeed to "*reveal the lack of experience*" of our experts to NetCompany. This is not the case here. On the contrary, the real purpose is totally different. By disclosing such information to NetCompany, this would allow NetCompany to poach our experts in order to unlawfully access to our know-how. Therefore, disclosure of such information would not only constitute a breach of the GDPR, but also be harmful for our commercial interests, since any information on the composition of our team forms integral part of our commercial secrets.. It is to be noted in this respect that NetCompany continuously targets European Dynamics' key experts with an aim of hiring them away and obtain both crucial confidential information about our products as well as our exclusion from the market. This unfair practice should not be allowed and, in any case, facilitated.

20. In its par. **49 to 83**, NetCompany exceeds any tolerable limit of decency and audacity. It wants to obtain the names, CVs and qualifications of the members of the TEC, and all the minutes of the evaluation. European Dynamics has never had or been faced with any claim of this kind during the last thirty (30) years of its professional activity. This request, which is clearly not in line with article 36 of the FOI (as will be discussed hereunder) has obviously a threatening character embedded in it. Indeed, NetCompany clearly accuses the evaluators and attempts to exert pressure on them in order to amend the outcome of their evaluation (e.g. in **par. 54-55**). If this request is accepted, then the evaluators will all of a sudden need to defend themselves as well as their assessment directly towards a private company and supplier and this will convey a wrong message to contracting authorities and evaluators who will not be any more in position to exercise their functions in an impartial manner. NetCompany makes also a very provocative comment in **par. 62**.

It argues that *"it is not for the Contracting Authority to determine what information may be useful to a bidder's remedy or otherwise"*. If this argument is accepted by the PCRB, then Contracting Authorities will be deprived from its discretion to decide on the material to be disclosed or not to unsuccessful bidders and this will once more lead to a chaos and to the breach of legitimate interests of the winning bidder. Indeed, on the contrary to what is alleged in **par. 75** of the application, the information requested by NetCompany, will certainly and obviously *"prejudice the legitimate commercial interests"* of the winning tenderer and *"fair competition"*. What is more, its request that it be provided with the minutes of the evaluation of its bid is also unacceptable. In the Antea Polska case, for example, it was made amply clear that the right to an effective remedy cannot obfuscate other considerations including public interest and the information provided to the tenderers in any communications. In this case, the TEC completely fulfilled its obligation to state reasons by clearly communicating the grounds for rejection or otherwise and hence, NetCompany knows – or should know – the reasons for rejection so that to base its appeal upon – which it did- and, therefore, to effectively exercise its rights to judicial protection. Indeed, its appeal application belies the statement that its right to an effective remedy has been prejudiced. It is absolutely not the case, as this Board can appreciate.

21. In its **par. 84 to 91**, NetCompany once more reiterates that it does not trust the ability of the evaluators to verify the material presented by European Dynamics to comply with the selection criteria and for this reason it requests access to this information to replay the evaluation on its own. In addition, on the contrary to what is argued in par. 86 of NetCompany's application, the ESPD provided by European Dynamics contains all the information requested. Apparently NetCompany is confused because European Dynamics submitted its ESPD using the on-line facility of the eProcurement system, while European Dynamics' subcontractor submitted it, in line with the instructions of the Contracting Authority, to the tenderers, in a pdf format. Thus, nothing is missing and the request of NetCompany is void. Therefore, it shall be rejected.

22. In its **par. 92 to 99**, NetCompany argues in a totally unfounded and disrespectful manner that the evaluators did not do their job correctly. It questions again their professionalism and the validity of the attestations provided by European Dynamics. We reiterate that this logic is absurd and totally insulting.

23. More particularly, in its **par. 95**, NetCompany continues with its unfounded accusations regarding the technical aspects of our tender. It argues unfoundedly that *"the Zimbabwe and Tajikistan projects purportedly were national tax systems"*, and it claims that *"ED did not cite any direct experience in the implementation of a national tax administration system and had to rely on the capacity of another entity to cite projects involving national tax administration systems"*. However, (i) Zimbabwe and Tajikistan are clearly national tax systems (it is the debt collection system of NetCompany which is not a tax system, not these ones), (ii) in line with the tender specifications, tenderers were allowed to present **only three (3) references** to demonstrate compliance with the selection criteria, and thus European Dynamics selected three (3) out of many more relevant references it had, (iii) according to the tender specifications, tenderers were perfectly allowed to rely on the capacity of other partners and subcontractors and this is

a corner stone of the public procurement law and practice, (iv) as explained in its tender, European Dynamics has directly and indirectly more references related to taxation in Europe and internationally. Of course, European Dynamics is not obliged, nor willing, to disclose its experience and commercial strategies and agreements with its partners (which also fall within the scope of commercial secrets and are, therefore, protected), to its competitors. The fact that NetCompany is not aware of this, or so pretends in its application, is out of place here and cannot be used as a ground to advance any valid claim.

24. In its par. **100 to 102**, NetCompany once more attempts to discredit the evaluators and to argue that they did not contact the clients concerned in relation with our three (3) references presented in our tender. With an aim of arguing that the evaluators allegedly erred while verifying the references of European Dynamics, NetCompany contacted all these clients. To illustrate the sense of “*objectivity*” of NetCompany and the kind of replay of the evaluation it has in mind, we will refer to the case of European Dynamics’ client in Denmark. NetCompany contacted directly this client submitting purposely a cunning request for information. It asked from European Dynamics’ client (UFST) to inform it not on the total value of the services delivered by European Dynamics until 31/12/2023 and accepted by our client by such date and thus invoiced, as it should, but, with a pure misleading purpose, on the amounts that our client had **paid** to European Dynamics before 31/12/2023. . However, according to the tender specifications, what counts to qualify a reference is not the amounts “*paid*” by a certain date (this reflects the cash flow element), but the amounts corresponding to the total **value** of the services offered by such date. In this respect, we refer to section 5 Selection and Award Requirements of the tender specifications, which explicitly states under point (c) Technical and Professional Ability, “*ii. One of the projects listed is to have a minimum **value** of €15,000,000*”. Fortunately, European Dynamics’ client suspected the intentions of such a request for information and notified it to European Dynamics. We attach in Annex I the attestation in question, which clarifies the above.

#### **IV. FURTHER CONSIDERATIONS**

##### **“Essential Content in a Neutral Summary Form”**

25. NetCompany is also making ample reference to be provided with “*essential content [of the RF] in a neutral summary form*”. NetCompany assumes that this is, indeed, possible but European Dynamics contends that it is impossible to provide the “*essential content in a neutral summary form*” because the essential content **is the heart** of the RFI and this cannot be provided in a neutral summary form.

26. Hence, European Dynamics insists that any disclosure of the information requested will seriously prejudice the integrity and confidentiality of its business information, RPI’s, trade secrets and highly sensitive business information.

## **V. Freedom of Information Act**

27. The bad faith of NetCompany becomes even more blatant in paragraph 63-72. First of all, the Disclosure Application is a whole meshing of concepts and submissions which, frankly, beggar belief.

28. The main arguments of NetCompany are the following:-

(a) The FOI Act (hereinafter referred to as "FOI") does not apply to public procurement and even the Court of Appeal says so (according to NetCompany);

(b) Even if it did apply, the main principle in any case is disclosure;

(c) Therefore, there must be disclosure

29. This is an argument that is fallacious as it is flawed.

30. The first contention is that *"the FOI Act does not apply to public procurement"* and there is the submission that *"Article 36(1) of the FOI Act limitedly applies to: (i) requests for information submitted under the FOI Act; and (ii) judicial proceedings governed by the Code of Organisation and Civil Procedure<sup>1</sup>".*

31. Article 36(1) of the FOI Act states the following:-

*"36.(1) Subject to article 35 and to sub-articles (2) and (3) hereof, a document is an exempt document if its disclosure under this Act would disclose matter in the nature of, or relating to, opinions, advice or recommendations obtained, prepared or recorded, or consultation or deliberation that has taken place, in the course of, or for the purposes of, the deliberative processes involved in the functions of the Government or another public authority."*

32. Furthermore, articles 36(2) and (3) of the FOI Act state the following:-

*(2) Subarticle (1) shall not apply to a document by reason only of purely factual information contained in the document.*

*(3) Subarticle (1) shall not apply to:*

*(a) reports (including reports concerning the results of studies, surveys or tests) of scientific or technical experts, whether employed by a public*

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<sup>1</sup> Paragraph 67

authority or not, including reports expressing the opinions of such experts on scientific or technical matters; or

(b) the record of, or a final statement of the reasons for, a final decision given in the exercise of a power or of an adjudicative function.

33. There is no reason to state that Article 36(1) excludes public procurement.

34. Even more serious is the bad-faith reference to the judgment of the Court of Appeal in the names *Hitachi Zosen Inova AG – Terna S.A. v. Dipartiment tal-Kuntratti et* delivered on 20 June 2024 (Ref.122/2024/1) because **the extract quoted in the Disclosure Application has absolutely nothing to do with the FOI requests made in the context of public procurement.** Nothing. No connection whatsoever. On the other hand, the matter related purely to the applicability of Article 734 and 738 of the Code of Organisation and Civil Procedure (that is the procedure regulating the recusal of judges and magistrates) to the disqualification of members of the Public Contracts Review Board.

35. Indeed, what NetCompany is saying in its Disclosure Application is that if the Honourable Court of Appeal stated that for the application of Article 734 and 738 to this Board, there has to be a specific reference thereto (hence, the words “*Fejn ried il-leġislatur semma fir-Regolamenti dwar l-Akkwist Pubbliku fejn għandhom jgħoddu d-dispożizzjonijiet tal-Kodiċi tal-Organizzazzjoni u Proċedura Ċivili [...]*”) and proceeded to give examples, therefore had the Legislature wanted the FOI Act to apply to the Public Procurement Procedure, then the legislator would have said so. However, this is a very feeble attempt at creating an argument where there is none. Indeed, *ubi lex voluit lex dixit*. However, and this is the important point here, the Public Procurement Regulations do not exist in a vacuum and in isolation of all those laws which are not mentioned in them. In other words, and simply put, just because a law is not referred to in the Public Procurement Regulations does not mean that there is no relationship between the Public Procurement Regulations and such other Law. Some laws are applicable because their application is not excluded in the law itself – and not by inclusion in the Public Procurement Regulations. Indeed, by analogy, Public Procurement Regulations are not subject to the Constitution and the Constitution is automatically excluded from its applicability to the Public Procurement Regulations because no mention is made of the Constitution in these Regulations. Also, since there is no mention of the criminal code under the Public Procurement Regulations, no crime can be committed whilst one is acting in one’s capacity under the Public Procurement Regulations. In other words, one cannot view a law in a vacuum, but one needs to read it, apply it and interpret it in the context of the laws of the land. The Constitution of Malta and the Criminal Code are but two blatant examples of the weaknesses of the argument of NetCompany.

36. The worst submission, however, is the following:- “*Furthermore, the legislator’s intention is markedly clear in Article 35(2): “a document may be withheld [...] only if”. The general rule remains that documents must be disclosed. The exception remains non-disclosure*”. First of all, with extreme dishonesty, the legislator’s intention has to be read in conjunction with the whole article which is being reproduced here:-

35. (1) This Part shall apply subject to the provisions of Part V.

(2) A document may be withheld in accordance with the provisions of this Part only if it contains matter in relation to which the public interest that is served by non-disclosure outweighs the public interest in disclosure.

37. It is clear that the Legislator's intention is to set the basic principle of **non-disclosure** if a set of conditions are met, including falling under Part V (which is outside the scope of this particular submission) and **only if the public interest is served**. In paragraph 71, NetCompany tries to conjure a public interest of sorts by saying the following:- *"The Contracting Authority's reply to the RFI does not make reference to any such exercise. Had this exercise been carried out, it would have been clear to the Contracting Authority that the public interest in favour of disclosure outweighs non-disclosure in this case."* However, NetCompany does not, in any manner, specify how this "disclosure" is in the public interest. The notion of public interest cannot be presumed but it has to be proven. In fact, the only purpose of such a request by NetCompany is to gain sensitive commercial information of European Dynamics, which is one of its competitors and, thus, this requested disclosure serves purely private interests of the latter, while, on the other hand, non-disclosure manifestly serves the public interest and, in particular, free and fair competition. So, contrary to the claims of NetCompany, in this case, non-disclosure outweighs disclosure, since only the first indeed serves the public interest.

38. This has also been confirmed by the European Court of Justice in its ruling in the case Varec SA vs. État belge (C-450/06, p. 50), in which it was explicitly held that: **"the maintenance of fair competition in the context of contract award procedures is an important public interest, the protection of which is acknowledged in the case-law"**<sup>2</sup>.

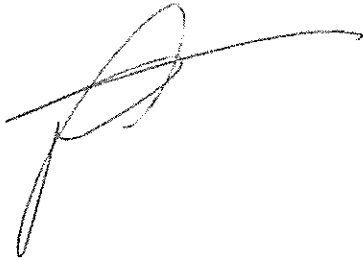
39. Hence, the submissions in paragraph 63-72, as stated, are completely unfounded in fact and at law and should be rejected by this Board.

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<sup>2</sup> See also in this respect, Rowe and Davis v The United Kingdom [GC] no 28901/95, §61, ECHR 2000-II, and V v Finland no 40412/98, §75, ECHR 2007, in which it was also held that it is necessary for certain information to be withheld from the parties in order to preserve the fundamental rights of a third party or to safeguard an important public interest.

## **Conclusion**

In view of all the submissions abovemade, European Dynamics formally requests that the Disclosure Application filed by NetCompany be rejected in its entirety.

A handwritten signature in black ink, consisting of a large, stylized initial 'L' followed by a horizontal line extending to the right.

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Avv. Lorna Mifsud Cachia  
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KOPI

Sendt til European Dynamics

Sourcingsekretariat og Forvaltningsjura

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2000 Frederiksberg

Telefon 72 22 11 11  
Skat.dk

Vores sagsnr. 25-1709798  
22. maj 2025

## Decision regarding request for information

*You can read the full decision in Danish below.*

On 19<sup>th</sup> March 2025 the Danish IT and Development Agency (Udviklings- og Forenklingsstyrelsen) received your request for the following information:

*" I request access to the following information:*

- The total amount in EUR or DKK paid by Udviklings- og Forenklingsstyrelsen to European Dynamics from the time of the award up to and including December 31, 2023, under the ICS2-Contract.*
- If possible, a brief breakdown of the paid amounts into general service categories, such as:*
  - o Implementation/development of the IT solution*
  - o Operations, support, and maintenance*
  - o License fees,*
  - o Change requests".*

On 25<sup>th</sup> April 2025 you informed us that you waived the second part of the request regarding break down of the total amount into general service categories.

Your request is processed according to the Danish Access to Public Administration Files Act (Offentlighedsloven)<sup>1</sup>.

### Decision

The Danish IT and Development Agency has generated a data extraction, cf. section 11 of the Danish Access to Public Administration Files Act, and hereby grants you access to the requested information regarding the total amount paid to European Dynamics under the ICS2-Contract up to and including 31<sup>st</sup> December 2023.

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<sup>1</sup> Offentlighedsloven Bekendtgørelse nr. 145 af 24. februar 2020 af lov om offentlighed med senere ændringer

Unfortunately, we are not able to generate the extraction in other currencies, with few and simple commands, and therefore provide the information in DKK.

Please note that the data presented is subject to several reservations, including that services may have been delivered and invoiced in one fiscal year, but paid the following year, e.g. due to general processing times, “regnskabsperiodisering” or delays in payments from The Danish IT and Development Agency.

Furthermore, the data extract does not include any contractual provisions (“hensættelser”) meaning that parts of the services may have been provided in 2020-2023, but not paid until later in the contact period or at completion.

In accordance with the reservation above we have added the amount paid in 2024 to the data extract on “amount paid”, cf. section 14 of the Danish Access to Public Administration Files Act.

*Total amounts paid to paid to European Dynamics under the ICS2 contract from 2020-2024:*

Period	Amount paid to European Dynamics ex VAT
2020	-
2021	24.330.774,28 DKK
2022	38.581.066,00 DKK
2023	41.516.986,00 DKK
2024	64.588.534,00 DKK

## Appeal

This decision can be appealed to the Danish Tax Appeals Agency.

The appeal must be submitted to the Danish IT and Development Agency, Osvald Helmuths Vej 4, 2000 Frederiksberg, Att.: Sourcing Sekretariat Forvaltningsjura or to the e-mail address [UFST-Aktindsigt@ufst.dk](mailto:UFST-Aktindsigt@ufst.dk)

If the appeal does not give the agency reason to change the decision, your appeal and the case files, including the decision, will be forwarded to the Danish Tax Appeals Agency no later than seven working days after the complaint is received, cf. section 37, subsections 1 and 2 of the Danish Access to Public Administration Files Act.

Best regards,

Louise Knudsen  
Senior legal advisor

Danish version

## Afgørelse om aktindsigt

Udviklings- og Forenklingsstyrelsen har den 19. marts 2025 modtaget din anmodning om aktindsigt med følgende ordlyd:

*" I request access to the following information:*

- *The total amount in EUR or DKK paid by Udviklings- og Forenklingsstyrelsen to European Dynamics from the time of the award up to and including December 31, 2023, under the ICS2-Contract.*
- *If possible, a brief breakdown of the paid amounts into general service categories, such as:*
  - o Implementation/development of the IT solution*
  - o Operations, support, and maintenance*
  - o License fees,*
  - o Change requests".*

Udviklings- og Forenklingsstyrelsen har foretaget en høring af leverandøren, European Dynamics, som har oplyst, at de af hensyn til drifts- og forretningsmæssige forhold, mener at oplysninger om opdeling på beløb betalt fordelt på servicekategorier er undtaget fra aktindsigt.

Udviklings- og Forenklingsstyrelsen foretog den 10. april 2025 en partshøring af dig, jf. forvaltningslovens § 19, og du svarede den 25. april 2025, at du frafaldt den del af anmodningen.

Udviklings- og Forenklingsstyrelsen har behandlet din anmodning om aktindsigt efter offentlighedsloven.

### Afgørelse

Udviklings- og Forenklingsstyrelsen imødekommer hermed din anmodning om aktindsigt i beløb betalt til European Dynamics i forbindelse med ICS2 kontrakten.

Udviklings- og Forenklingsstyrelsen kan oplyse, at det på grund af varierende valutakurser eller med få og enkle kommandoer ikke er muligt at foretage et dataudtræk i euro, og dataudtrækket derfor alene er foretaget i danske kroner (DKK).

Det skal endvidere bemærkes, at dataudtrækket er behæftet med en række usikkerheder, som kan påvirke angivelse af det samlede beløb, betalt i den specifikke periode.

Udviklings- og Forenklingsstyrelsen kan oplyse, at dataudtrækket angiver udgifter som er regnskabsført i 2023. Det betyder, at ydelser kan være faktureret, men først betalt til leverandøren efter den 31. december 2023 (i den forlængede periode 12 eller periode 13 2023). Det er ikke muligt at adskille bogføringer i regnskabsårene ud fra,

om de reelt er betalt og der er foretaget en bankoverførsel til leverandøren senest d. 31. december 2023.

Udviklings- og Forenklingsstyrelsen kan endvidere oplyse, at eventuelle hensættelser, regnskabsperiodiseringer mv. vedrørende omkostningerne i de enkelte regnskabsår ikke er indeholdt i opgørelsen.

Udviklings- og Forenklingsstyrelsen har derfor medtaget beløb betalt til European Dynamics i 2024 i dataudtrækket, i medfør af offentlighedslovens § 14.

Periode	Beløb betalt til European Dynamics (excl moms)
2020	-
2021	24.330.774,28 DKK
2022	38.581.066,00 DKK
2023	41.516.986,00 DKK
2024	64.588.534,00 DKK

### **Begrundelse**

Det fremgår af offentlighedslovens § 11, at enhver kan forlange, at en forvaltningsmyndighed foretager og udleverer en sammenstilling af foreliggende oplysninger i myndighedens databaser, hvis sammenstillingen kan foretages ved få og enkle kommandoer.

Du kan finde de love og regler, vi henviser til, på [www.retsinformation.dk](http://www.retsinformation.dk).

### **Klagevejledning**

Denne afgørelse kan uden klagefrist påklages til Skatteankestyrelsen.

Klagen skal indsendes til Udviklings- og Forenklingsstyrelsen, Osvald Helmuths Vej 4, 2000 Frederiksberg, Att.: Sourcingsekretariat og Forvaltningsjura eller til e-mailadressen [UFST-Aktindsigt@ufst.dk](mailto:UFST-Aktindsigt@ufst.dk)

Hvis klagen ikke giver Udviklings- og Forenklingsstyrelsen anledning til at ændre afgørelsen, sender Udviklings- og Forenklingsstyrelsen din klage og sagens akter, herunder afgørelsen, til Skatteankestyrelsen. Dette vil som udgangspunkt ske senest syv arbejdsdage efter modtagelsen af klagen hos Udviklings- og Forenklingsstyrelsen, jf. offentlighedslovens § 37, stk. 1 og 2.

Der betales ikke gebyr ved en evt. klage.

Da din aktindsigtsanmodning er færdigbehandlet inden 7 arbejdsdage efter modtagel-

sen af din klage over sagsbehandlingstiden, videresendes din klage ikke til Skatteankestyrelsen, jf. offentlighedslovens § 39, stk. 2.

Venlig hilsen

Louise Knudsen  
Juridisk chefkonsulent