

PUBLIC CONTRACTS REVIEW BOARD

Case 2255 – NLC/04/2025 – Tender for the Cleaning and Clearing of Non-Urban Roads and Sites in Naxxar using Environmentally Friendly Products and Practices

18th August 2026

The Board,

Having noted the letter of objection filed by Dr Darren Carabott acting for and on behalf of Mr Carmel Mifsud (hereinafter referred to as the "Appellant"), filed on the 14th May 2026;

Having also noted the letter of reply filed by Dr Larry Formosa acting on behalf of Cosyra Legal, acting for and on behalf of the Naxxar Local Council (hereinafter referred to as the "Contracting Authority"), filed on the 20th May 2026;

Having heard and evaluated the testimony of the witness Dr Christopher Deguara (ID No. 371982M), Mayor and Chairperson of the Evaluation Board, as summoned by Dr Darren Carabott for and on behalf of the Appellant during the first Hearing, 25th June 2026;

Having heard and evaluated the testimony of the witness Mr Paul Gatt (ID No. 19665M), Secretary of the Evaluation Committee, as summoned by Dr Darren Carabott for and on behalf of the Appellant during the first Hearing, 25th June 2026;

Having heard and evaluated the testimony of the witness Mr Carmel Mifsud (ID No. 181272M), as summoned by Dr Darren Carabott for and on behalf of the Appellant during the first Hearing, 25th June 2026

Having heard and evaluated the testimony of the witness Ms Sefora Debono (ID No. 527990M), Manager II (Compliance), Employment Agencies Unit, Department for Industrial and Employment Relations, as summoned by Dr Darren Carabott for and on behalf of the Appellant during the second hearing, 28th July 2026;

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

Having noted and evaluated the minutes of the Board sittings of the 25th June 2026 and 28th July 2026, hereunder reproduced:

Minutes

Case 2255 – 674 – NLC/04/2025 – Tender for the Cleaning and Clearing of Non-Urban Roads and Sites in Naxxar Using Environmentally Friendly Products and Practices.

The Tender was issued on the 20th of October 2025, and the closing date was 21st November 2025.

The estimated value of the tender, excluding VAT, was €95,000

On 14th May 2026, Carmel Mifsud, lodged an appeal against Naxxar Local Council – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations.

On the 25th of June 2026, the Public Contracts Review Board (PCRB), composed of Mr Kenneth Swain as Chairman, Dr Ing Damien Gatt and Dr Maria Cardona as members, convened a public hearing to consider the appeal.

A deposit of €475 was paid.

There were five bids.

The attendance for this public hearing was as follows:

Appellant – Carmel Mifsud.

- Dr Darren Carabott – Legal Representative.
- Mr Carmel Mifsud – Company Representative.

Contracting Authority – Naxxar Local Council.

- Dr Larry Formosa – Legal Representative (online)
- Dr Christopher Deguara – Mayor/Chairperson.
- Mr Paul Gatt – Executive Secretary.
- Ms Yanika Borg – Local Council Officer

Recommended Bidder -- Green Ivy Cleaning Services.

- Dr Thomas De Martino – Legal Representative.

Opening Statements

The Chairman welcomed the parties present and formally opened Case Number 2255 in the records of the PCRB. The Chairman identified the Appellant as Carmel Mifsud, the Contracting Authority as Naxxar Local Council, and the Recommended Bidder as Green Ivy Cleaning Services.

The Chairman stated that this case had to be heard on another date, as one of the witnesses was not present. He suggested the 28th of July 2026 at 9.00 a.m., and all parties agreed.

The Chairman invited the legal representative for the Appellant to make the initial submissions.

Initial Submissions

Initial Submissions by Dr Darren Carabott (for the Appellant)

Dr Carabott said that the first grievance concerned the incorrect interpretation of Regulation S.L. 452.130 regarding Employment Agencies. Clause 5(A) is clear that the law applies only to operators who qualify as Employment Agencies, and his client, Mr Carmel Mifsud, was not an Employment Agency.

The appellant did not bid for the recruitment of persons with the Local Council, but for employment services. The appellant does not fall within the category referred to in Clause 5(A), and the Contracting Authority's interpretation is legally incorrect. One cannot make a decision about a tender while relying on documentation that was never submitted as part of the tender process. Had this document been required, it would not have applied to his client, nor would his client have been required to hold the licence to be eligible to provide the services requested by the Local Council.

This decision fails to explain why the appellant's submissions were deemed insufficient.

Initial Submissions by Dr Larry Formosa (for the Contracting Authority)

Dr Larry Formosa, appearing online for the Contracting Authority, had no initial submissions to make but insisted that they would stand by the acts they had submitted.

Initial Submissions by Dr Thomas De Martino (for the Recommended Bidder)

Dr De Martino said that, regarding the merits of the cause, it concerned the procedure followed by the Local Council rather than the conduct of his client. They agreed that the licence was not a requirement in the tender, and the Recommended Bidder had another appeal on this point with the Contracting Authority. The facts of this case were not relevant to the Recommended Bidder.

Dr Carabott asked whether any documentation had been presented by Dr De Martino, and Mr Swain answered in the negative.

Witness Testimony

Mr Carmel Mifsud, ID No. 181272M, summoned by Dr Darren Carabott.

Mr Carmel Mifsud employs a number of people who are members of his family. Their work consists of cleaning gardens and open spaces. He objected because the licence did not apply to him. The reason given for his disqualification was that he had not presented the licence.

The witness sent an email to Ms Sefora Debono from DIER, and in their reply they stated that Mr Carmel Mifsud did not require this licence, as he did not qualify for it.

Cross-Examination by Dr Larry Formosa

Dr Formosa asked the witness why this issue had not been raised before the submission of the bid.

Dr Carabott objected, and Dr Formosa chose to call Mr Mifsud as his witness later during the hearing.

Dr Christopher Deguara, ID No. 371982M, summoned by Dr Darren Carabott.

Dr Christopher Deguara, the Mayor of the Naxxar Local Council, stated that the tender process was conducted quickly and the contract was awarded to the Recommended Bidder. He was the Chairperson of the Evaluation Board. The contract required authorisation enabling the contractor to employ workers.

Dr Deguara knew Mr Mifsud and was aware that the appellant had previously carried out work for the Naxxar Local Council.

Dr Deguara had asked the persons who drafted the contract documents and was informed that this was a requirement requested by the Department of Contracts.

Dr Carabott asked the witness whether the circular mentioned that tenderers had to possess this licence. The witness did not know the answer.

Mr Paul Gatt, ID No. 19665M, summoned by Dr Darren Carabott.

Mr Paul Gatt, the Secretary of the Naxxar Local Council and Head of Contracting Authority, was the Secretary of the Evaluation Committee in this case. The decision taken was based on the clause mentioned previously. The appellant was requested to provide clarifications, but he insisted that he did not require the licence and was therefore disqualified.

The witness knew the appellant professionally, as he had been a contractor with the Council for a number of years, carrying out beach cleaning and the cleaning of urban and non-urban roads. He had also seen some of the appellant's employees while they were carrying out the work.

The witness confirmed that the tender did not require employees to be engaged by the Naxxar Local Council. Rather, the Council was requesting a service consisting of a minimum of 40 hours to be provided by workers employed by the contractor.

Dr Carabott again asked whether the circular mentioned that the bidder had to possess a licence.

The witness stated that the circular does not mention the subsidiary legislation, but it refers to the list of works under Clause 5(A), which applies to the workers referred to in the circular.

Cross-Examination by Dr Larry Formosa

Dr Formosa asked the witness whether, in the clarifications submitted by Mr Mifsud, any objections had been raised.

The witness stated that the response given was that this licence did not apply to him.

Dr Darren Carabott verbalised:

“L-Avukat Darren Carabott, għan-nom tal-appellant, qiegħed jitlob lill-Onorabbli Bord sabiex, fis-seduta li jmiss, li għaliha hija mħarrka s-Sinjura Sefora Debono bħala rappreżentanta tad-DIER, jogħġobha ġġib magħha u tesebixxi kopji tal-korrispondenza li rċeviet u bagħtet dwar dak kollu li għandu x’jaqsam mal-liċenzja inkwistjoni, mertu ta’ dan l-appell u ta’ dan it-tender”.

Conclusion of the Hearing

The Chairman, Mr Kenneth Swain, thanked all parties present and formally concluded the hearing by reminding everyone that they were to reconvene on the 28th of July 2026.

Second Day – July 28th, 2026

On July 28th, 2026, at 09:00 am, the PCRB reconvened, following the first hearing held on the 25th of June 2026.

The Board was composed of:

- Mr. Kenneth Swain – Chairperson
- Dr Ing Damien Gatt – Member
- Dr Maria Cardona – Member

Attendance:

Appellant – Carmel Mifsud.

- Dr Darren Carabott – Legal Representative.
- Mr Carmel Mifsud – Company Representative.

Contracting Authority – Naxxar Local Council.

- Dr Larry Formosa – Legal Representative (online)
- Dr Christopher Deguara – Mayor/Chairperson.
- Mr Paul Gatt – Executive Secretary.
- Mr Duncan Hall – Evaluator.
- Ms Romina Perici Ferrante – Evaluator.
- Mr Arthur Perici – Evaluator.
- Ms Yanika Borg – Local Council Officer

Recommended Bidder -- Green Ivy Cleaning Services.

- Dr Thomas De Martino – Legal Representative.
- Dr Sheldon Micallef – DIER Legal Representative.

Opening Statements

The Chairman welcomed the parties present and formally opened the session, a continuation of Case Number 2255 in the records of the PCRB. The Chairman identified the Appellant as Carmel Mifsud, the Contracting Authority as Naxxar Local Council, and the Recommended Bidder as Green Ivy Cleaning Services.

The Chairman reminded the parties that this was the second hearing and invited Ms Sefora Debono to take the witness stand.

Witness Testimony

Ms Sefora Debono (ID no. 527990M), summoned by Dr Darren Carabott.

Ms Debono worked with DIER, and her role was to oversee the Employment Agencies Unit. She presented documents relating to correspondence regarding the contract.

The Chairman requested photocopies for all parties.

Dr Carabott was ready to exhibit documents consisting of the minutes of the Naxxar Local Council relating to the date of the tender. These were public documents, and he also had the correspondence to be exhibited by the witness.

The Chairman marked the witness's correspondence as CM1.

Dr Carabott noted that the correspondence shown consisted of the emails received by the witness, not those that were sent. The witness declared that no correspondence had been sent after the email.

Dr Carabott handed out his documents to clarify what the witness had just said. The Chairman marked these documents as CM2.

The witness said that the correspondence took place in October 2025 and was not related to this tender. The only common element between the email of June 17th, 2026, and the correspondence in question was "by Naxxar Local Council".

Dr Carabott referred to the DIER email dated October 20th, 2025, and quoted:

"When we queried the contracting authority on such clause, they have stated it is there for contractors that already have a licence".

He asked Ms Debono what she was referring to when she wrote *"on such clause"*.

She said that she was referring to employment agencies, where the tender requested a DIER licence for employment agencies.

Dr Carabott referred to the first email sent by Mr Mifsud on August 27th, 2025.

Ms Debono explained that, in the email, Mr Mifsud was asking about a provision in a public tender issued by the Balzan Local Council, and there was no indication as to which tender he was referring.

Dr Carabott referred to the reply to this email dated October 20th, 2025. The witness had spoken to the Naxxar Local Council, the Contracting Authority. He quoted from the email:

"When we queried the contracting authority on such clause, they have stated it is there for contractors that already have a licence".

He then asked for an explanation of the application of the clause.

The witness said that the clause, according to the Naxxar Local Council, was there for those who already had an employment licence. It was not her duty to decide who did not have this licence.

Cross-examination by Dr Larry Formosa

Dr Formosa told the witness that the DIER produced clauses for the Local Councils to adhere to. The witness did not agree.

The Chairman noted that Dr Formosa was not referring to Ms Debono personally, but to the DIER and whether this fell within its remit.

The witness said that she did not know the decision-making process.

Dr Thomas De Martino, for the Recommended Bidder, had no cross-examination.

Dr Darren Carabott exhibited a copy of the minutes, with no objection from the other parties, and these were marked as CM3. He had no further witnesses.

Dr Larry Formosa, for the Contracting Authority, declared that he was resting on the acts presented.

Final Submissions

Final Submissions by Dr Darren Carabott (for the Appellant)

Dr Carabott referred to a decision taken on May 11th, 2026, regarding Zabbar Local Council 3/25, Case 2237. He also referred to Subsidiary Legislation 452.130, Regulation 3(1)(a), and quoted:

"No person shall operate an employment agency or an employment business unless:(a) any employer who manages any employment agency or employment business connected to any employment in such employer's own undertaking or in any undertaking in which such employer participates in the day to day management as an active partner or for any company in which such employer's company has an interest as majority shareholder, provided that if any advertisement is placed for the filling of any vacancy, the identity of the employer shall be clearly specified in the advertisement".

The law honours this licence once a person is an employment agency or works in an employment business.

Dr Carabott said he could not understand how a bidder had to possess this licence as a requisite. The Contracting Authority was asking a bidder to procure a service. The employees of any preferred bidder were not to become employees of the Naxxar Local Council. His client was a gardener, and this licence was lawfully irrelevant, yet he was disqualified. The Naxxar Local Council was requesting a bidder to clean the streets while placing the burden of the employment agency requirement on his client.

The first grievance was that there had been an incorrect application of this subsidiary legislation.

The second point was that his client was disqualified based on a circular that was not part of the documents requested in the tender. Every bidder had to comply with the tender requirements, but it now appeared that all applicants also had to consult all the circulars binding the Contracting Authority issuing the tender, even though these had nothing to do with the bidders. At the very least, a reference to the circular should have been included in the tender documents.

The third grievance referred to this same issue. The final point concerned the lack of adequate reasoning, which is a basic principle.

Final Submissions by Dr Larry Formosa (for the Contracting Authority)

Dr Formosa noted that the appellant had emphasized whether this clause was binding or not. He argued that this was irrelevant to the Council. The correspondence exhibited showed that Mr Carmel Mifsud was aware of this clause, including in relation to other Councils.

The Councils had been given this clause to adopt in their tenders. If Mr Mifsud did not agree with this clause, which was also included in the Balzan Local Council tender, why did he participate in this tender? Why did he not seek a pre-contractual remedy? Why did he appeal only after knowing the prices and knowing that he was not the recommended bidder? Why did he not challenge this clause at the tendering stage?

The law gave him the right to contest any clauses before participating in the tender. He was now saying that the process was unjust. All the other tenderers complied with this requirement.

Final Submissions by Dr Thomas De Martino (for the Recommended Bidder)

Dr De Martino noted that these were two cases concerning the same tender but based on two different arguments. The Recommended Bidder had submitted a declaration stating that it would obtain the licence before the signing of the contract. They still believed that it was not a requisite because the work expected had nothing to do with employment agencies.

He quoted the decision in Case 2183:

"The obligation arises only for subcontracted services or where the economic operator functions as an employment agency. The legislative intent of S.L. 452.130, when read in conjunction with the tender provisions, is clearly to regulate intermediaries in the employment market, rather than individuals personally performing contracted services".

His client was self-employed with his own employees, and logically they did not see the relevance of this clause. This clause forms part of the Department of Contracts template and is included in every tender. The Board should provide guidance on this document, as the relevance of this clause is not always necessary.

Replica by Dr Darren Carabott.

Dr Carabott rebutted Dr Formosa's statement that the appellant had never informed the Naxxar Local Council. He referred to Mr Mifsud's letter dated November 14th, 2025, in which he explained that he was not eligible to obtain the licence, annexing the email from Ms Debono.

The Naxxar Local Council was aware of this. In minute 6.8, presented by Dr Carabott, there was an explanation by the Naxxar Local Council which he argued was materially incorrect. He quoted:

" Tali liċenzja hija applikabbli għall-kuntratturi li jagħtu s-servizzi tagħhom lill-entitajiet pubbliċi".

They voted on the basis of this explanation.

Conclusion of the Hearing

The Chairman, Mr Kenneth Swain, thanked all the parties present and formally concluded the hearing.

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 25th June 2026 and 28th July 2026.

Having noted the objection filed by Carmel Mifsud (hereinafter referred to as the "Appellant") on the 14th May 2026 and refers to the claims made by the same Appellant with regards to the tender of reference NLC 4/2025 listed as case No. 2255 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Darren Carabott
Appearing for the Contracting Authority:	Dr Larry Formosa
Appearing for the Recommended Bidder:	Dr Thomas De Martino

Whereby, the Appellant contends with respect to:

- a) ***First Grievance: The Contracting Authority was incorrect to determine that the Appellant's procurement proposal was non-compliant due to failure submit documentation pertaining to clause 5 of the instructions to tenderers***

The first ground of appeal is in relation to the ground for refusal stated by the Contracting Authority by means of which procurement proposal on the grounds that it was non-compliant due to failure on his part to submit documentation pertaining to clause 5 of the instructions to tenderers an extract of which was reproduced in the Contracting Authority's request for rectification dated 13th February 2026, whereby it is stated that: *"The set of specific Services listed in the Annually Contracts*

Circular in relation to the 'Award of Service Contracts and Pegged Rates' shall always be deemed as services forming part of the scope of the Employment Agencies Regulations S.L. 452.130. Accordingly, in such circumstances, the requirement of the licence to operate an Employment Agency or Employment Business shall be included automatically"

The Appellant humbly contends that the above-mentioned reason for refusal of the awarding tender is only a result of the Contracting Authority's own failure to properly interpret the Employment Agencies Regulations S.L. 452.130.

In this instance, reference is made to Clause 5(A) of the tender document which provides, inter alia, that: *"In line with the Employment Agencies Regulations S.L. 452.130, Economic Operators operating an Employment Agency or Employment Business shall be in possession of a Valid licence issued by the Department for Industrial and Employment Relations (DIER)"*

Therefore it is evident, that the above requisite is only operative toward economic operators operating an Employment Agency or Employment Business as provided for in Employment Agencies Regulations S.L.. 452.130;

It is evident and clear that the Employment Agencies Regulations S.L. 452.130 regulates the recruitment of persons for employment in Malta or outside Malta; as a temporary work agency; or as an outsourcing agency - with offering employment services which include the keeping of any register of applicants for employment or the referral of applicants for employment, the placing in employment of applicants for employment; the placing of advertisements for the filling of employment vacancies, the interviewing and selection of applicants for employment and the offering of employment contracts for, or on behalf of any employer to applicants for employment, the assignment of employees to user undertakings, whether such assignment is made by the employment agency or employment business through the activity of a temporary work agency or that of an outsourcing agency.

In this regard submitted that the Appellant does not operate in the above employment services field, and does not fall under the definition of an employment agency - and therefore, the afore-quoted Employment Agencies Regulations S.L.452.130 do not regulate the Appellant. The Appellant humbly submits that he is a self-employed service provider whose business consists in the direct provision of operational services. It is further submitted that the tendering process in question is for the provision of services for "the Cleaning and Clearing of Non-Urban Roads and Sites in Naxxat using Environmentally Friendly Products and Practices" - and therefore the nature of the tender is a service contract for the execution of operational works, and not the provision of labour intermediation, recruitment services or outsourced staffing arrangements. Therefore it is submitted, that the Appellant does not fall within the category of economic operators as contemplated in Clause 5(a) of the tender document, and that the Contracting Authority's interpretation of this clause is legally incorrect.

b) ***Second Grievance: The Contracting Authority was incorrect to reply upon criteria which does not form part of the published tender documentation***

By means of its rectification request dated 13th February 2026, the Contracting Authority's request for rectification stated that: *"The set of specific Services listed in the Annually Contracts Circular in relation to the 'Award of Service Contracts and Pegged Rates' shall always be deemed as services forming part of the scope of the Employment Agencies Regulations S.L. 452.130. Accordingly, in such circumstances, the requirement of the licence to operate an Employment Agency or Employment Business shall be included automatically"*.

The Appellant respectfully submits that this alleged interpretative position does not form part of the published tender documentation. It is further submitted that no such wording appears within the tender documentation, and therefore no such automatic deeming mechanism is to be incorporated into the procurement conditions communicated to economic operators - and economic operators are entitled to rely upon the tender conditions as published. It is humbly submitted that a Contracting Authority cannot, during the evaluation stage, introduce or rely upon unpublished interpretative criteria, internal administrative templates or requirements not expressly incorporated into the procurement - as this would tantamount to shifting of goalposts during the evaluation of the bids. The Appellant submits that to permit such a decision would undermine the fundamental procurement principles of transparency, legal certainty and equal treatment.

c) ***Third Grievance: The Contracting Authority was incorrect to determine that Circular 02/2025 issued by the Department of Contracts requires the licence to operate an Employment Agency or Employment Business***

Without prejudice to the second grievance, the Appellant respectfully submits that even if the contents of the Circular was not included in the tender document, the Contracting Authority nonetheless was incorrect to determine that the Circular 02/2025 issued by the Department of Contracts requires the licence to operate an Employment Agency or Employment Business. The third ground of appeal relates to the Tender Evaluation Committee's request for clarification/rectification issued by the Contracting Authority on 13th February 2026.

However, in this regard, the Appellant is hereby attaching a copy of Circular 02/2025 issued by the Department of Contracts dated 17h January 2025 entitled "Award of Service Contracts: Pegged Rates: 2025", whereby it is humbly submitted that no such reference to Employment Agencies Regulations S.L. 452.130 nor is there any requisite for the provision of licence to operate an Employment Agency or Employment Business. Without prejudice to the above - and without conceding to the request for the licence to operate as an Employment Agency or Employment Business - in the interest of equality of arms, the Contracting Authority should substantiate that all bidders have sufficiently proven that they hold the above-referenced licences. For the above reasons, the Appellant submits that the Contracting Authority was incorrect.

d) ***Fourth Grievance: The decision lacks adequate reasoning and is procedurally unfair***

The Appellant duly responded to the rectification request issued by the Contracting Authority. In his reply, the Appellant provided a legal explanation regarding the inapplicability of Employment Agencies Regulations S.L. 452.130 to his operations, a clarification regarding the nature of his business, documentary correspondence, as well as an explanation addressing each concern raised. Nonetheless, and notwithstanding the detailed reply, the appealed decision fails to explain why the Appellant's explanations and submissions were deemed insufficient - and furthermore it does not address the substance of the Appellant's clarifications. The Appellant humbly submits that a public procurement decision affecting an economic operator's participation in a competitive procedure must be properly reasoned.

The Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 20th May 2026 and its verbal submission during the hearings held on 25th June 2026 and 28th July 2026, in that:

- a) The objector contends, in substance, that the requirement relating to the Employment Agencies Regulations, namely S.L. 452.130, was incorrectly applied to him since he does not operate an employment agency or employment business but rather provides operational cleaning services directly.
- b) The Contracting Authority respectfully submits that the Evaluation Committee was bound to apply the tender dossier as published. Clause 5(A) of the tender document expressly refers to the Employment Agencies Regulations, S.L. 452.130, and requires the relevant self-declaration in relation to possession of a valid or conditional licence prior to contract signing. The same clause further provides that the signed and dated contract agreement is to be accompanied by a copy of the said licence, and that the Contracting Authority is not to endorse the contract agreement if the licence is not submitted.
- c) It is further submitted that the objector did not challenge the tender condition at the pre-submission stage. The tender dossier therefore constituted the rules of the procurement procedure and was binding on all participating economic operators, including the Contracting Authority itself. The Evaluation Committee could not at evaluation stage disregard or re-write a condition forming part of the tender document.
- d) Insofar as the objector argues that the requirement was inapplicable to his particular business model, the Contracting Authority respectfully submits that this was a matter to be assessed within the framework of the clarification and rectification process. The tender document expressly provides that tenderers may be requested to clarify or rectify incorrect or incomplete documentation, or to submit missing documents, within five working days from notification.
- e) The Contracting Authority understands that the objector replied to the rectification request by giving an explanation as to why, in his view, the licence requirement did not apply to him. However, the Evaluation Committee was not in a position to treat that explanation as a substitute for the

documentation requested, unless satisfied that the tender condition was either inapplicable or had been complied with in an equivalent manner. The decision taken must therefore be understood in this procedural context.

- f) Without prejudice to the foregoing, and consistently with the position adopted by the Contracting Authority in respect of the objection filed by AgriBrands Ltd, the Council does not oppose that the matter be remitted to the Evaluation Committee if this Honourable Board considers that further verification is required. However such remission should be limited to the proper reassessment of the administrative compliance of the relevant offers in light of the tender dossier and any directions which this Honourable Board may deem fit to give.
- g) The Contracting Authority objects to the objector's request that his offer be automatically reinstated and that the evaluation process be resumed on that basis without due reassessment by the Evaluation Committee. The Contracting Authority also objects to any remedy which would directly substitute the Board's assessment for that of the Evaluation Committee without first allowing the proper evaluation process to take its course.

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

Preliminary, relationship with Case 2254

- This appeal and Case 2254, AgriBrands Ltd vs Naxxar Local Council, concern the same tender, the same Clause 5(A), and the same rectification exercise conducted by the same Evaluation Committee in February 2026. Both are decided by this Board on the same day. The Board has considered them together and its findings in each are to be read consistently with the other.

Grievance 1 — The Contracting Authority was incorrect to determine that the Appellant's procurement proposal was non-compliant due to failure to submit documentation pertaining to Clause 5 of the instructions to tenderers.

The stated ground of rejection

- The ground on which the Appellant's offer was rejected was a failure to submit documentation pertaining to Clause 5. That ground is not borne out by the Contracting Authority's own electronic record.

- Clause 5(A) opens by directing that "*Economic Operators are to complete the Eligibility Section through the tender response format.*" The electronic structure is accordingly the means the tender itself prescribes for responding to Clause 5(A). Within that structure, responses to Clause 5(A) were collected through criterion 176093173188233, which was configured as mandatory and of file type, and which was the only criterion relating to that clause included in the evaluation. It admitted of no tick-box and no free-text answer. A bidder could upload a document or he could fail to submit a bid at all.
- The file index of the Appellant's submission records that a document entitled "Employment Agency or Employment Business Declaration.pdf" was uploaded against that criterion. That document, dated 14th November 2025 and therefore forming part of the Appellant's original offer submitted before the closing date of 21st November 2025, is before this Board.
- The Appellant did not fail to submit documentation pertaining to Clause 5. He submitted it, in the form and in the place the Contracting Authority had prescribed, and the Contracting Authority disagreed with what it said. Those are different things, and only the second was ever in issue. The Letter of Rejection is wrong on its face.

The content of the Appellant's declaration

- In that declaration the Appellant quoted Clause 5(A) and stated: "*we hereby declare that such criterion does not apply to our services, as the undersigned is a self-employed fulltime gardener and do not employ persons other than family members since it is a family run business. Moreover, we do not operate as a Temporary Work Agency, nor as an Outsourcing Agency or Employment Agency nor we are in the Employment Business. Our activity is solely to provide the work personally as self-occupied worker.*"
- The Appellant thus addressed, and expressly denied, each of the statutory activities by name. The Board observes that he did so notwithstanding that the specification of those activities, which appears in Clause 5(A) of the tender document, had been omitted from the electronic structure altogether. He answered a question the Contracting Authority had not put to him electronically, and answered it comprehensively.
- The declaration continued: "*We also hereby declare that if the licence shall be required as requested, we shall acquire such licence and present it to the Local Council.*" It exhibited the DIER email of 20th October 2025.

A requirement conditional twice over

- Clause 5(A) as printed in the tender document is itself conditional. It does not require every bidder to hold a DIER licence. It requires a licence of "*Economic Operators operating an Employment Agency or Employment Business,*" that is, of a defined class of operator only. A bidder falling outside that class falls outside the clause.

- When the Contracting Authority transposed the clause into the electronic structure, it did not simply reproduce that condition. It added a second one. To the words describing the licence it appended "(if applicable)", words which appear nowhere in Clause 5(A) as printed. The requirement as presented to the Appellant electronically was therefore conditional twice over.
- Those two words carry considerable weight, appearing as they do in the only criterion relating to this clause which the Contracting Authority scored. At their lowest they confirm the conditionality already present in Clause 5(A). At their highest they invite each bidder to determine for himself whether the requirement reaches him. On neither reading could the requirement be treated as applying automatically to every bidder. The Contracting Authority simultaneously compelled the bidder, by making the criterion mandatory and of file type, to record his answer by uploading a document.
- The Appellant did precisely what the criterion invited and the structure compelled. He assessed applicability, concluded the requirement did not apply to him, said so, gave his reasons by reference to each statutory limb, and offered a fallback undertaking should the Contracting Authority conclude otherwise. Having invited that assessment, the Contracting Authority could not lawfully treat the answer it received as a failure to comply.
- The Contracting Authority's rectification letter characterised the Appellant's primary position and his fallback undertaking as "conflictual." The Board does not accept that characterisation. A primary position, coupled with a without-prejudice undertaking in the event that the Contracting Authority takes a different view, is neither inconsistent nor evasive. It was a prudent and candid response to a criterion which invited a judgment of applicability while providing no means of recording one.

The substantive question of applicability

- S.L. 452.130 defines "employment agency" or "employment business" as an operator engaged in recruitment of persons for employment, or acting as a temporary work agency, or as an outsourcing agency, activities that all involve placing or assigning workers to work for a third-party undertaking.
- Regulation 3(1)(a) of the same subsidiary legislation, quoted by Dr Carabott at the hearing, exempts "*any employer who manages any employment agency or employment business connected to any employment in such employer's own undertaking.*" The Appellant's family members are employed within his own business to perform his own direct contract with the Contracting Authority; they are not placed with, or supplied to, a third-party user undertaking.
- The testimony of Mr Paul Gatt confirmed that the tender did not require employees to be engaged by the Naxxar Local Council, but rather a service to be delivered by workers employed by the contractor, consistent with an ordinary service contract, not labour intermediation.

- The Contracting Authority's own conduct at the time the tender was issued supports the same reading. On 20th October 2025, the Appellant asked DIER directly what Clause 5(A) required of him. DIER in turn queried the Contracting Authority itself and relayed the Contracting Authority's answer by email the same day, exhibited as CM2 and annexed to the Appellant's declaration: "*When we queried the contracting authority on such clause, they have stated it is there for contractors that already have a licence.*" The Contracting Authority's own explanation, given months before this dispute arose and before any bid had been evaluated, was that the clause exists for operators who already hold a licence, not to impose a new licensing obligation on operators who fall outside S.L. 452.130 altogether. This is narrower than, and inconsistent with, the position the Contracting Authority adopted later, at rectification stage in February 2026.
- This Board's decision in Case 2183, NLC 02/2025 (Naxxar Local Council), held that an economic operator personally performing the contracted services, without assigning workers to a third-party undertaking, falls outside the scope of S.L. 452.130. The same reasoning applies with equal force to an operator who personally directs a small family-employed crew to perform his own direct contract.

The pre-bid challenge point

- The Contracting Authority's submission that the Appellant should have contested Clause 5(A) before bidding does not assist it. Regulation 262(1) of the Public Procurement Regulations (S.L. 601.03) allows a prospective tenderer to file a reasoned application before this Board, within the first two-thirds of the time allowed for submission of offers, specifically to correct errors or remove ambiguities in a clause, or to have unlawful or discriminatory clauses set aside. That mechanism is designed for challenges to the wording of a clause as published. It is not designed to require a bidder to anticipate and pre-empt every interpretation a Contracting Authority might later adopt of that clause at evaluation stage. The Appellant is not challenging the wording of Clause 5(A); he is challenging the Contracting Authority's application of it to his own situation, a position the Contracting Authority first articulated only in February 2026, well after bids had closed. Regulation 262 has no bearing on that complaint. The point is weaker still where the clause as presented to the Appellant electronically was expressed to apply only "(if applicable)," and so gave him no cause to challenge it at all.

It is the opinion of this Board that the Evaluation Committee's interpretation of Clause 5(A) was not supported by the clause's own wording, by the statutory definition it invokes, by the further qualification the Contracting Authority had itself written into the criterion it scored, or by this Board's prior determination in Case 2183; and that the ground on which the Appellant's offer was rejected is in any event contradicted by the Contracting Authority's own record.

Therefore, the Board upholds the Appellant's grievance on this point. The Board notes that Grievances 2 and 3 below independently and additionally support this conclusion.

Grievance 2 — The Contracting Authority was incorrect to rely upon criteria which does not form part of the published tender documentation.

- The rectification letter of 13th February 2026 opened by asserting that "*the concerned services are regulated by Circular 02/2025 issued by the Department of Contracts,*" and stated that the Department of Contracts, "*within templates provided to contracting authorities,*" had indicated the following passage, quoted in the letter "for ease of reference": "The set of specific Services listed in the Annually Contracts Circular in relation to the 'Award of Service Contracts and Pegged Rates' shall always be deemed as services forming part of the scope of the Employment Agencies Regulations S.L. 452.130. Accordingly, in such circumstances, the requirement of the licence to operate an Employment Agency or Employment Business shall be included automatically."
- On the strength of that passage alone, the letter concluded that the Appellant's services, listed in the circular as Street Sweepers (Operative I), "*automatically form part of the Scope of S.L. 452.130.*"
- No such wording, automatic deeming or otherwise, appears anywhere in the tender document, nor anywhere in the electronic tender response structure, and this is not disputed by the Contracting Authority's Reasoned Letter of Reply. It surfaces for the first time in this rectification letter, five months after the tender was published and after the Appellant had already submitted his bid.
- The proposition is moreover directly contradicted by the Contracting Authority's own drafting. A requirement said to arise "automatically" and to apply "always" cannot be reconciled either with Clause 5(A), which is expressed to apply to a defined class of operator, or with the criterion by which the same Contracting Authority collected responses to it, which was expressed to apply "(if applicable)." The Contracting Authority advanced at evaluation stage the opposite of what it had published at tendering stage.
- The self-limitation principle, by which a Contracting Authority is bound throughout the evaluation by the conditions it has itself fixed in the published tender document, means it cannot introduce a new, unpublished interpretative rule at evaluation stage to justify disqualifying a bidder. Bidders are entitled to rely on the tender conditions as published. To do otherwise offends the principles of equal treatment, transparency and proportionality set out in regulation 39 of the Public Procurement Regulations, which require a Contracting Authority to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner.
- The unequal effect of that unpublished rule is demonstrated on the Contracting Authority's own record. Green Ivy Cleaning Services, the Recommended Bidder, answered the same criterion

176093173188233 at bid stage by uploading a document whose very title recorded that a "*licence for operators operating an employment agency or business is not required in this tender since it does not encompass any such work.*" That is materially the same position as the Appellant's. Both bidders received rectification requests dated 13th February 2026 and to the same effect. Green Ivy Cleaning Services abandoned its position, declared on 18th February 2026 that it would obtain the licence, and was recommended for award. The Appellant maintained his position and was rejected. A criterion which does not appear in the tender documentation was thus not only applied, but applied so as to exclude the bidder who adhered to the correct position and to advance the bidder who abandoned it.

Therefore, the Board upholds the Appellant's grievance on this point.

Grievance 3 — The Contracting Authority was incorrect to determine that Circular 02/2025 issued by the Department of Contracts requires the licence to operate an Employment Agency or Employment Business.

- Circular 02/2025 is nowhere identified in the tender document, whether in Clause 5(A), the Notes to Clause 5 or Article 40 (Compliance with local Employment Regulations), nor is it identified in the electronic tender response structure. The Board notes that the structure does contain a general undertaking by which bidders accept that they are "aware of, and shall abide with, the Circulars and Guidelines issued by the Department of Contracts." That undertaking cannot assist the Contracting Authority here. Even on the assumption that it incorporates Circular 02/2025 by reference, the Circular itself, as set out below, imposes no licensing requirement whatsoever, so that nothing is added to the tender conditions by incorporating it. Nor is the Circular referenced anywhere in S.L. 452.130 itself: the regulations contain no mention of Circular 02/2025, pegged rates, or any comparable deeming mechanism. The Circular does not form part of, or amend, S.L. 452.130 or any other legislation; it is an administrative circular issued by the Department of Contracts. It entered this case for the first time in the rectification letter of 13th February 2026 addressed to the Appellant, as the stated basis for extending the licensing requirement to his services.
- Circular 02/2025, "Award of Service Contracts: Pegged Rates: 2025," dated 17th January 2025, was exhibited by the Appellant as part of his objection (Doc. A).
- The circular establishes minimum hourly rates payable to contractors across a list of service categories, including Street Sweepers (Operative I), for the purpose of mitigating precarious work conditions and pay discrimination. It contains no reference to S.L. 452.130, the Employment Agencies Regulations, or any licensing requirement, automatic or otherwise.

- The testimony of Mr Paul Gatt at the hearing, that "*the circular does not mention the subsidiary legislation*," confirms this reading and is consistent with the primary document.
- As to the Appellant's further submission that, in the interest of equality of arms, the Contracting Authority should substantiate that all bidders have proven that they hold the licence, the Board observes that the Contracting Authority's own record establishes that Green Ivy Cleaning Services, the Recommended Bidder, did not hold the licence, stated at bid stage that it was not required, and was nonetheless recommended for award. The submission is well founded.

Therefore, the Board upholds the Appellant's grievance on this point.

Grievance 4 — The decision lacks adequate reasoning and is procedurally unfair.

- The Appellant's declaration of 14th November 2025, submitted with his original offer, and his rectification reply of 16th February 2026, set out a reasoned legal position, addressed each statutory limb of the definition by name, and exhibited correspondence from DIER. The Letter of Rejection dated 4th May 2026 does not engage with, or explain the rejection of, that position.
- The minutes of the Naxxar Local Council sitting of 29th April 2026 (Seduta Nru. 24, exhibited as CM3, minute 6.8) record the Executive Secretary informing the Council that the licence "*is applicable to Contractors who provide their services to public entities*", a materially broader and legally unsupported statement of the requirement's scope, and one irreconcilable both with Clause 5(A) itself and with the qualification "(if applicable)" which the Contracting Authority had published. It appears to have informed the Council's ratification of the evaluation outcome.
- Nothing in the record explains why the same answer to the same criterion was treated as curable when given by Green Ivy Cleaning Services and as fatal when given by the Appellant. The absence of any reasoning on that point is itself a failure of the duty to give reasons.

Therefore, the Board upholds the Appellant's grievance on this point, without prejudice to and reinforcing the findings on Grievances 1 to 3 above.

Observation and recommendation to the Contracting Authority

The Board records the following observations on the drafting of this tender, in terms identical to those recorded in Case 2254 delivered concurrently herewith.

Observations

1. Clause 5(A) applies only to Economic Operators "operating an Employment Agency or Employment Business." It was never a requirement falling on every bidder.
2. In the electronic structure the Contracting Authority qualified it further still, adding the words "(if applicable)," which do not appear in the tender document.
3. Notwithstanding both of the above, neither the tender document nor the electronic structure gave a bidder any means of stating that the clause did not apply to him.
4. Criterion 176093173188233 was mandatory and of file type. Every bidder had to upload a document, whatever his position, and it was the only criterion of the three that was scored.
5. Criteria 176093173188220 and 176093173188221 were mandatory and offered a single response, "I agree." Every bidder was therefore compelled to give undertakings premised on the licence being required of him, whether or not it was.
6. Those same two criteria were excluded from the evaluation altogether.
7. The part of Clause 5(A) identifying what an Employment Agency or Employment Business actually does, namely recruitment, Temporary Work Agency or Outsourcing Agency activity, was omitted from the electronic structure entirely, as was the reference to the DIER Employment Agencies portal. The bidder was asked to apply a definition he was never given, and denied the means of checking it. The Appellant supplied that missing analysis himself, unprompted, and was penalised for the conclusion he reached.

Recommendations

1. Criterion 176093173188233 should present the bidder with an express choice: "Applicable" or "Not applicable."
2. Whichever option is selected, the bidder should still be required to upload a signed self-declaration. Where "Applicable" is selected, that declaration should address the licence and the undertakings the clause requires. Where "Not applicable" is selected, it should state the grounds on which the bidder maintains that the clause does not apply to him. In either case the declaration should be assessed by the Evaluation Committee on its merits.
3. Criteria 176093173188220 and 176093173188221 should be triggered only where "Applicable" has been selected and should not be put to a bidder who has declared the clause inapplicable.
4. The wording of every criterion in the electronic structure should correspond exactly to the wording of the corresponding clause in the tender document. Qualifying words such as "(if applicable)" should not appear in one instrument and be absent from the other.
5. Where a clause is divided across several criteria, the division should be such that no substantive requirement falls outside the criterion put out to evaluation.
6. The definitional part of the clause, and the reference to the DIER Employment Agencies portal, should be reproduced in the electronic structure.

The Board,

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

- a. Upholds the Appellant's grievances in relation to Grievances 1, 2, 3 and 4;
- b. Declares that Clause 5(A) of the tender document does not require an economic operator who personally performs the contracted services, using only workers employed within his own undertaking, to hold or self-declare a licence to operate an Employment Agency or Employment Business under S.L. 452.130;
- c. To revoke the Letter of Rejection dated 4th May 2026 sent to the Appellant;
- d. To revoke the Letter of Award dated 4th May 2026 issued in favour of Green Ivy Cleaning Services;
- e. To order the Contracting Authority to re-evaluate the bids received in this tender, taking into consideration the findings of this Board and the findings of this Board in Case 2254 delivered concurrently herewith, and to do anything else which is conducive and necessary for the proper execution of the above orders;
- f. Directs that the deposit of €475 paid by the Appellant to be refunded in full.

Mr Kenneth Swain
Chairman

Dr Maria Cardona
Member

Dr Ing. Damien Gatt
Member