ganado
advocates



Ganado Advocates
171, Old Bakery Street,
Valletta VLT 1455, Malta

T. +356 2123 5406
E. lawfirm@ganado.com

ganado.com

Public Contracts Review Board
Notre Dame Ditch
Floriana FRN1601
Malta

5 November 2026

Dear Sirs,

Re: Framework Contract for the Provision of Transport Services in an Environmentally Friendly Manner for Outings as Organised by Various Active Ageing Centres within the Active Ageing and Community Care (AACC) – Lots 1 to 5 – Ref. SPD4/2026/028 (the "Tender") – PCRB Case No. 720

1. This reply is being filed on behalf of **Active Ageing and Community Care** (the "**Contracting Authority**" or "**AACC**") in terms of Regulation 276 of the Public Procurement Regulations (the "**PPR**") in connection with the above-captioned Tender and in response to the appeal lodged by Co-operative Services (TID 248247) (the "**Appellant**") on 26 October 2026 (the "**Appeal**").

2. The Appellant has lodged 5 separate appeals, one for each Lot of the Tender, by means of one document. The Contracting Authority shall be replying to all 5 appeals in this one reply. Unless otherwise stated, everything submitted in this reply applies separately and severally to each of Lot 1, Lot 2, Lot 3, Lot 4 and Lot 5, *mutatis mutandis*. Although the Appellant asks that the outcome of each appeal be "*without prejudice to the outcome of the others*",[1] it accepts that the 5 appeals "*arise from the same rejection letter, are founded on the same reasons given by the Contracting Authority and raise the same grievances*". The grounds of appeal being identical, the Contracting Authority submits that this Honourable Board should decide the 5 appeals by means of one decision applicable to all Lots.

[1] Appeal, para 1.3.

ganado
advocates

A. EXECUTIVE SUMMARY

3. The Appellant's Appeal is unfounded and should be rejected. The Appellant's offer exceeded the estimated procurement value (the "**EPV**") in *every* one of the 5 Lots, by between 69.74% and 90.04%, and by 83.01% overall. No contracting authority can be expected to pay 83% more than it estimated and budgeted for a service, least of all with public funds earmarked for services to older persons.

4. The Appeal is built on a false premise. The Appellant claims that "*No EPV was indicated for any of the Lots*".[2] This is simply wrong. The EPV of each Lot was published in Clause 1.3 of the Instructions to Tenderers on the very day the Tender was published.

5. The Appellant's complaint that it was given no "findings" and no Lot-by-Lot information is nothing but a red herring. The Appellant *knew* the EPV of each Lot and it *knew* its own price for each Lot. The rest is simple arithmetic.

6. The Appellant's real grievance is with the EPV itself. But the EPV was published on 23 July 2026 and the Appellant never challenged it before the closing date. It cannot do so *now*, after it has seen the outcome. In any case, the EPV was calculated on the basis of rates quoted to the Contracting Authority in 2026 for the same or comparable services, including rates quoted by the Appellant itself.

7. The remaining grounds of appeal, on an alleged duty to clarify, on proportionality and on the disclosure of prices, are equally unfounded in fact and at law, as will be explained in the upcoming sections of this reply.

8. The Contracting Authority will set out its reply as follows:

   a. **FIRST GROUND OF APPEAL: THE APPELLANT WAS GIVEN THE FINDINGS AND THE REASONS FOR THE DECISION** (see Section C)

   b. **SECOND GROUND OF APPEAL: THE DECISION CONCERNS ECONOMIC FEASIBILITY AND THERE WAS NOTHING TO CLARIFY** (see Section D)

[2] Appeal, para 2.5.

ganado
advocates

c. **THIRD GROUND OF APPEAL – PRELIMINARY PLEA: THE APPELLANT'S CHALLENGE TO THE EPV IS TIME-BARRED AND WAIVED** (see Section E)

d. **THIRD GROUND OF APPEAL – ON THE MERITS: THE DECISION WAS TAKEN UNDER THE CORRECT HEADING AND THE EPV IS SOUND** (see Section F)

e. **FOURTH GROUND OF APPEAL: CANCELLATION WAS THE ONLY LAWFUL OUTCOME** (see Section G)

f. **FIFTH GROUND OF APPEAL: THE DEPOSITS SHOULD NOT BE REFUNDED** (see Section H)

B. FACTUAL BACKGROUND

9. The Contracting Authority runs 28 Active Ageing Centres across Malta. These Centres offer older persons living in the community support, activity and engagement through courses, talks and physical activity, both within the Centres and outside them.

10. Outings are a key part of this service. Each Active Ageing Centre is to have one monthly outing, together with occasional outings for Lent, Holy Week, Easter and Christmas activities, village feasts, the elderly awards expo, sports day and other annual events. Some of the older persons attending are wheelchair users, which is why the Tender also requires tail-lift vehicles.

11. The Tender was published on ePPS on 23 July 2026. It is a framework contract for a period of 3 years, with a possible extension of 1 year, divided into 5 Lots by geographical zone. Contracts were to be awarded Lot by Lot, and the sole award criterion was price. The prices quoted are fixed and not subject to revision. The Tender is financed through local budget funds.

12. Although the Tender is a framework contract, the Contracting Authority is not free to order as little as it likes. The Contracting Authority "*will procure at least equivalent to 80% of the contract value based on the indicative quantities in the financial bid form*". If that 80% is not exhausted within 3 years, the contract is extended for a further year (Clause 1.2 of the Instructions to Tenderers and the Financial Bid Form).

ganado
advocates

13. Clause 1.3 of the Instructions to Tenderers (pages 3 and 4 of the Tender document) published the EPV of the Tender, and of each Lot:

Lot	Zone	EPV (€, excl. VAT)
Lot 1	Zone 1 – Southern Harbour	59,000.00
Lot 2	Zone 2 – South-Eastern	33,520.00
Lot 3	Zone 3 – Northern Harbour	31,140.00
Lot 4	Zone 4 – Northern	44,250.00
Lot 5	Zone 5 – Western	39,650.00
Total		**207,560.00**

14. The same clause stated that the EPV "*is not to be considered as a binding capping price*", and that economic operators were free to submit financial offers above or below it. But it went on to state: "*However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value*".

15. The EPV was not plucked out of thin air. It was calculated on the basis of the rates actually quoted to the Contracting Authority, during 2026 and up to the publication of the Tender, in calls for quotations for the same or comparable transport services. These rates were quoted by various economic operators, including the Appellant itself. The Contracting Authority's budget for this framework was determined accordingly, before the Tender was launched.

16. The deadline for requests for clarifications was 20 August 2026. No economic operator, the Appellant included, sought any clarification on the EPV. Nor did anyone file an application in terms of Regulation 262 of the PPR before the closing date.

17. Tenders closed on 11 September 2026 and were opened in public on the same day. The names of the tenderers and their prices were published on ePPS at the opening.

ganado
advocates

18. The Appellant's offer for each Lot, compared to the EPV of that Lot, was the following:

Lot	EPV (€, excl. VAT)	Appellant's offer (€, excl. VAT)	Excess (€)	Excess (%)
Lot 1	59,000.00	110,750.00	51,750.00	87.71%
Lot 2	33,520.00	63,700.00	30,180.00	90.04%
Lot 3	31,140.00	56,800.00	25,660.00	82.40%
Lot 4	44,250.00	81,300.00	37,050.00	83.73%
Lot 5	39,650.00	67,300.00	27,650.00	69.74%
Total	**207,560.00**	**379,850.00**	**172,290.00**	**83.01%**

19. In other words, the Appellant's offer exceeded the EPV in every single Lot. The *smallest* excess, in percentage terms, was in Lot 5: €27,650.00, or 69.74%. Every figure in this table is derived from 2 sources only: the EPV published in Clause 1.3, and the Appellant's own prices. Both were known to the Appellant well before it lodged its Appeal.

20. By letter dated 16 October 2026, the Appellant was informed that its offer had been rejected in each Lot. The letter of rejection referred to Clauses 18.1 and 18.3(a) of the General Rules Governing Tenders v4.10 (the "**GRGT**") and stated, as quoted by the Appellant, that "*the Tender Evaluation Committee noted that the financial offer exceeds the EPV by 83 per cent overall and no extra funds are available*" and that "*in view of this offer is considered not economically feasible*".

21. On the same day, a Cancellation Notice was issued, informing tenderers that the Departmental Contracts Committee had agreed with the recommendation to cancel each of the 5 Lots.

22. The Contracting Authority strongly rebuts the Appeal and the grievances raised therein. The grounds of appeal raised by the Appellant are inadmissible at law, and, or, in any case, unfounded on the merits. These grounds of appeal will be dealt with in turn below.

ganado advocates

C. FIRST GROUND OF APPEAL: THE APPELLANT WAS GIVEN THE FINDINGS AND THE REASONS FOR THE DECISION

23. By means of the first ground of appeal,[3] the Appellant claims that the decision is vague, that it contains no "findings", and that the Appellant was given no information on a Lot-by-Lot basis.

24. The Contracting Authority submits that this first ground is nothing but a red herring.

25. ***First***, the decision complies with the law. Regulation 15(3) of the PPR requires that the decision leading to the cancellation of a procurement procedure "*has to be made in writing and must include the findings and the reasoning that led to this decision*". Regulation 272 of the PPR requires the communication of a cancellation to be accompanied by "*a summary of the relevant reasons*".

26. The letter of rejection, read together with the Cancellation Notice issued on the same day, contains all of this information:

a. that the Appellant's financial offer exceeds the EPV by 83% overall;
b. that no extra funds are available;
c. that in view of this, the offer is not economically feasible; and
d. that the legal basis was Clauses 18.1 and 18.3(a) of the GRGT.

27. The test, as established by the case-law of the Court of Justice of the European Union (the "**CJEU**"), is whether the reasons provided enable the bidder to "*come to an informed view as to whether there has been an infringement of the applicable provisions and as to the appropriateness of bringing proceedings*".[4] The Appellant knew exactly why its offer was rejected and why each Lot was cancelled: its prices were far above the EPV and the Contracting Authority had no funds to pay the difference. It was able to raise no fewer than 5 grounds of appeal against that decision.

---

[3] Appeal, Section 3.

[4] C-406/08 *Uniplex* (28 January 2010) para 31.

28. ***Second***, the Appellant had all the information it needed to work out the excess on a Lot-by-Lot basis. The EPV of each Lot was published in Clause 1.3 on 23 July 2026. The Appellant knew its own price in each Lot. The Lot-by-Lot figures are a matter of simple subtraction, and they are set out in paragraph 18 above.

29. The Appellant speculates that the overall figure of 83% might be "*driven by one Lot alone*" and that, in some Lots, its offer might be "*in line with, or marginally above*" the EPV.[5] This is false. The smallest excess, in Lot 5, is almost 70%.

30. ***Third***, the case-law cited by the Appellant is inapplicable:

a. In *Agius Stone Works*, the only communication received by the bidder was an automated ePPS e-mail stating that the call "*has been cancelled*". It contained no reason at all. The only explanation the bidder ever saw was a post by the mayor on social media. The Court of Appeal also found that the local council had never investigated the conflict of interest on which it relied. Moreover, the Court of Appeal held that the local council could not rely on Clauses 18.2 and 18.3(e) of the GRGT "*since the cancellation decision made no reference whatsoever to them*".[6] This case is the very opposite: the decision states its legal basis, its findings and its reasoning, and its findings are objective figures capable of verification against the Tender.

b. In *Cherubino*, the reason given for the cancellation, namely that the offer was not "*qualitatively or financially worthwhile*", without specifying which of the 2 limbs applied, proved to be unfounded. The PCRB found that the product was compliant and that "*there was no credible submission suggesting that the price of the Appellant's product was beyond the expectations*". The real reason surfaced only at the hearing: the product was a centrally authorised medicinal product, which could only be marketed through a local representative of the marketing authorisation holder, and the bidder had ceased to be that representative before the closing date of the call. The PCRB nonetheless upheld the cancellation on that new basis. The Court of Appeal annulled

[5] Appeal, para 3.1.2.

[6] *Agius Stone Works Limited vs Kunsill Lokali Valletta et*, Court of Appeal (8 April 2025) [Ref. 65/2025/1] para. 27.

Para 27 reads: "*Ta' xejn għalhekk li l-Kunsill Lokali jipprova jirreferi għall-Artikoli 18.2 u 18.3(e) tal-General Rules Governing Tenders ladarba fid-deċiżjoni tal-kanċellament ma sar l-ebda sura ta' aċċenn għalihom.*"

the cancellation because the reason was changed during the hearing without the bidder being given the opportunity to answer it, and because the new reason related to the execution of the contract.[7]

c. In the case before this Board, the letter of rejection did not leave the Appellant guessing as to which limb applied. It specified that the offer was not economically feasible, and it gave the finding on which that conclusion rests: an excess of 83% over the EPV, with no extra funds available. The reason given is the real and only reason for the decision.

31. Therefore, this first ground of appeal is unfounded and should be rejected.

D. SECOND GROUND OF APPEAL: THE DECISION CONCERNS ECONOMIC FEASIBILITY AND THERE WAS NOTHING TO CLARIFY

32. By means of the second ground of appeal,[8] the Appellant claims that its offer is "feasible", that its prices reflect market conditions, and that the Contracting Authority should have asked it to explain its prices before rejecting them.

33. The Contracting Authority submits that this second ground is based on a misreading of the decision and of the law. This is so for the following reasons.

34. ***First***, the Appellant proposes its own definition of a "*feasible*" offer, namely one which the economic operator "*is able to perform*" at the price offered "*in a sustainable manner*".[9] It cites no source for this definition. The GRGT do not define the expression "*economically not feasible*".

35. However, Regulation 2 of the PPR, reproducing the wording of Article 26(4)(b) of Directive 2014/24/EU (the "**Classical Directive**"), defines "*unacceptable tenders*" as including "*tenders whose price exceeds the contracting authority's budget as determined and documented prior to the launching of the procurement procedure*". Clause 18.1 itself equates the estimated value with the budget: "*the estimated value (budget)*". An offer which exceeds the estimated value (budget) by between 69.74% and 90.04% in every Lot is, by definition,

[7] *Cherubino Limited (C-3677) vs Dipartiment tal-Kuntratti et*, Court of Appeal (3 October 2017) [Ref. 203/17].

[8] Appeal, Section 4.

[9] Appeal, para 4.1.2.

an unacceptable tender. It is, therefore, not economically feasible within the meaning of Clause 18.1 of the GRGT.

36. On this basis, the Appellant's offer to substantiate its prices "*Lot by Lot, by means of a cost breakdown*"[10] is beside the point. The question is not how the Appellant built up its prices, but whether its offer exceeds the budget determined and documented before the Tender was launched. It does, in every Lot.

37. ***Second***, the claim that the Appellant's prices reflect the market, while the EPV does not, is unfounded, as will be proven during the hearing. As explained in paragraph 15 above, the EPV was calculated on the basis of rates quoted to the Contracting Authority in 2026 for the same or comparable services, including by the Appellant itself, with a further margin on top. The Appellant can hardly claim that an EPV built, *inter alia*, on its own rates ignores "*market realities*".

38. The consistent excess of 70% to 90% across all 5 Lots does not point to an error in the EPV. It points to the Appellant having priced this Tender well above the rates which it had been quoting to the Contracting Authority for the same services. In any case, and as submitted in Section E below, any challenge to the EPV is inadmissible at this stage.

39. ***Third***, there was no duty to clarify incumbent on the Tender Evaluation Committee. The passage quoted by the Appellant[11] from Procurement Policy Note 40 applies where information or documentation "*is or appears to be ambiguous, contrasting or not sufficiently explicit and clear*". It concerns clarifications, not offers priced above the EPV.

40. There was nothing ambiguous, contrasting or unclear about the Appellant's prices. They were stated in figures, Lot by Lot. A clarification would not, and indeed could not, have changed them.

[10] Appeal, para 4.1.3.

[11] Appeal, para 4.2.3.

ganado advocates

41. Nor was there any duty to investigate the Appellant's prices as if they were abnormally low.[12] *Star Fuels* and *Lombardini and Mantovani* concern abnormally *low* tenders, as the very passages quoted by the Appellant show ("*jekk prezz huwiex baxx b'mod mhux normali*").[13]

42. The PPR lay down a specific procedure for abnormally low tenders. Regulation 243 of the PPR, which transposes Article 69 of the Classical Directive, requires contracting authorities to ask economic operators "*to explain the price or costs proposed in the tender where tenders appear to be abnormally low*", and allows such a tender to be rejected only "*where the evidence supplied does not satisfactorily account for the low level of price or costs proposed*".

43. The law requires explanations before an abnormally low tender is rejected because a price which is too low raises a question which only the bidder can answer: can it actually perform the contract at that price? A price which is too high raises a different question, which only the contracting authority can answer: is the offer economically feasible for it?

44. That is precisely why neither the PPR nor the GRGT lay down any equivalent procedure for tenders priced above the budget. Instead, the PPR classify them as "*unacceptable*". The Appellant's "*a fortiori*" argument[14] turns the logic of the abnormally low tender regime on its head.

45. Finally, the OECD and SIGMA materials cited by the Appellant[15] provide no *"best practice"* requirement that the Contracting Authority actively engage with a bidder whenever its price *"significantly diverges from the EPV, whether higher or lower"*. No such requirement appears in the materials relied upon. In any case, they are neither legislation nor case-law. The OECD *Principles for Integrity in Public Procurement* (2009) and the SIGMA *Principles of Public Administration* (2023) are policy publications and commentaries. They create no legal obligation and certainly cannot override Clause 15.2 of the GRGT, which provides that requests for clarification and the responses to them "*may in no circumstances alter or try to change the price or content of the tender*", or the principle of equal treatment. Notably, the Appellant does not cite a single provision of the PPR, of the Classical Directive or of the

[12] Appeal, paras 4.2.1 and 4.2.2.

[13] Appeal, para 4.2.5.

[14] Appeal, para 4.2.6.

[15] Appeal, para 4.2.3.

ganado advocates

GRGT, or a single judgment, which obliges a contracting authority to investigate a price which exceeds the EPV.

46. Therefore, this second ground of appeal is unfounded and should be rejected.

E. THIRD GROUND OF APPEAL – PRELIMINARY PLEA: THE APPELLANT'S CHALLENGE TO THE EPV IS TIME-BARRED AND WAIVED

47. By means of the third ground of appeal,[16] the Appellant claims that "*if anything is not feasible, se mai it is the EPV*", that the EPV "*falls short of the actual market realities*" and that it is "*not updated to reflect current market conditions*".

48. By way of a preliminary plea, the Contracting Authority submits that, insofar as it challenges the EPV, this third ground of appeal is inadmissible at law because:

a. the Appellant has failed to exhaust the remedies at law which were available to it to challenge the EPV before the closing date; and
b. in any case, the Appellant accepted the EPV, and the Contracting Authority's right to reject offers exceeding it, when it submitted its offer.

49. ***First***, the EPV was published on 23 July 2026. If the Appellant considered that the EPV did not reflect market conditions, it could have sought a clarification by 20 August 2026, or resorted to an application in terms of Regulation 262 of the PPR before the closing date. It did neither.

50. The Court of Appeal has consistently refused to consider grievances on the procurement procedure raised by bidders at a late stage and after bids have been submitted:

> "*The appellant should not have exercised this remedy after it submitted its bid and after the evaluation of bids was concluded if it was of the opinion that the procurement procedure was affected by ambiguities*".[17]

---

[16] Appeal, Section 5.

[17] *AIB Insurance Brokers Limited vs Awtorità dwar it-Trasport ta' Malta et*, Court of Appeal (27 October 2021) [Ref. 237/2021/1] para 16: "*Ma kellhiex l-appellanti titfa' l-offerta tagħha u wkoll tħalli li jingħalaq il-proċess tal-evalwazzjoni tal-offerti qabel ma tfittex rimedju jekk dehrilha li dak il-proċess kien milqut b'ambigwitajiet*".

ganado advocates

51. The Court of Appeal has applied the same principle in *Truevo Payments* and in *MCSI*.[18]

52. ***Second***, the Appellant waived any reservation it may have had on the EPV when it submitted its offer. Clause 9.4 of the GRGT provides that, by submitting a tender, the tenderer "*accepts in full and in its entirety, the content of this tender document*" and that its own corresponding conditions are "*waived*". The tender document included both the EPV and the Contracting Authority's express reservation of "*the right to accept or reject Financial Offers exceeding the Estimated Procurement Value*".

53. The Appellant chose to submit offers far above the published EPV, knowing full well that the Contracting Authority had reserved the right to reject them. It cannot now, *ex post facto*, expect the Contracting Authority to revise the EPV to fit its prices.

54. Therefore, this preliminary plea should be upheld, and this third ground of appeal declared inadmissible insofar as it challenges the EPV, irrespective of the merits of the issue.

F. THIRD GROUND OF APPEAL – ON THE MERITS: THE DECISION WAS TAKEN UNDER THE CORRECT HEADING AND THE EPV IS SOUND

55. Without prejudice to the preliminary plea raised in the preceding Section E, the Contracting Authority submits that the third ground of appeal is, in any case, unfounded.

56. ***First***, the decision was not taken under the "*wrong heading*". Clause 18.1 of the GRGT provides:

> *The Central Government Authority/Sectoral Procurement Directorate/Contracting Authority reserves the right to accept or reject any tender and/or to cancel the whole tender procedure before and after the closing established for the submission of the tenders,* ***including instances where the financial offers submitted exceed the estimated value (budget) for the tender and/or the financial offers are deemed as economically not feasible.*** *The Central Government*

[18] *Truevo Payments Limited vs Direttur tal-Kuntratti et*, Court of Appeal (30 June 2021) [Ref. 95/21/1] para 7; *Managing Consulting Service Industry (MCSI) Limited vs Direttur tal-Kuntratti et*, Court of Appeal (17 June 2019) [Ref. 45/19] para 16.

Authority/Sectoral Procurement Directorate/Contracting Authority reserves the right to initiate a new invitation to tender.

57. Clause 18.1 is to be read as follows:

a. the right to reject any tender and to cancel the tender procedure is express and unequivocal;
b. the word "*including*" introduces examples of instances in which that right may be exercised, not an exhaustive list;
c. even if the list were exhaustive, both examples apply here, as explained below; and
d. the 2 examples are not mutually exclusive. They are joined by "*and/or*", so that both may apply at once.

58. The Appellant claims that the decision was taken under the "*wrong heading*", but does not say which heading, in its view, would have been the correct one.

59. Both limbs apply here. The Appellant's offers exceed the estimated value (budget) by 83%. And precisely because they do, and no extra funds are available, they are not economically feasible for the Contracting Authority. For the same reason, "*no qualitatively or financially worthwhile tender has been received*" in terms of Clause 18.3(a) of the GRGT. An offer which would cost a contracting authority 83% more than its budget is not financially worthwhile to that contracting authority, however compliant it may otherwise be.

60. As explained in paragraph 35 above, both the EU and the Maltese legislators treat a tender priced above the budget as unacceptable in its own right, without any requirement that the contracting authority first seek explanations from the bidder. Whatever the Appellant's view of the market, an offer which exceeds the budget is an unacceptable tender.

61. ***Second***, the Appellant relies on the statement in Clause 1.3 that the EPV "*is not to be considered as a binding capping price*".[19] In doing so, the Appellant conveniently omits the tender statement in the subsequent paragraph: "*However, the Contracting Authority reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value*".

[19] Appeal, para 5.2.5.

62. ***Third***, the EPV is sound. The Appellant claims that the Contracting Authority "*has not shown how its EPV was compiled, when it was compiled, or on which market data it was based*".[20] The Tender itself stated that the EPV was "*based on comprehensive research including appropriate financial analysis*" and "*based on market research*". Paragraph 15 above explains what that research consisted of and when it was carried out.

63. ***Fourth***, the Appellant suggests that the Contracting Authority should have reviewed the EPV after the opening of tenders. The Appellant does not cite any legal obligation incumbent on the Contracting Authority to do so.

64. Nor is there one. The EPV is the objective benchmark against which offers are measured, precisely because it is fixed before, and independently of, the offers received. It was based on market research carried out in 2026, right up to the publication of the Tender (paragraph 15 above). Re-examining it because the only offer received exceeds it would make the benchmark depend on the very offer which it is meant to measure.

65. Therefore, even on the merits, this third ground of appeal is unfounded and should be rejected.

G. FOURTH GROUND OF APPEAL: CANCELLATION WAS THE ONLY LAWFUL OUTCOME

66. By means of the fourth ground of appeal,[21] the Appellant claims that the cancellation was not necessary, that it was disproportionate, and that it has exposed the Appellant's prices to its competitors.

67. The Contracting Authority submits that cancellation was, in this case, the only outcome available.

68. The principle of proportionality requires that measures adopted by contracting authorities do not exceed the limits of what is appropriate and necessary in order to achieve the objectives

[20] Appeal, para 5.1.3.

[21] Appeal, Section 6.

pursued and that, when there exists a choice between several appropriate measures, recourse must be had to the least onerous one.

69. In this case, cancellation was not merely a last resort. It was the only option. The Contracting Authority received one offer in each Lot. That offer exceeded the EPV in every Lot, by between 69.74% and 90.04%, and no extra funds were available.

70. Indeed, the Contracting Authority humbly submits that it is accepting the Appellant's offer which would have been disproportionate. Such a decision would have breached the principles of equal treatment and fair competition. Economic operators decided whether, and at what price, to bid by reference to the published EPV. Had the EPV been 83% higher, the Contracting Authority might well have received more offers. Accepting the Appellant's offer would also have defeated the very objective of the Tender which, as the sole award criterion shows, was to obtain the service at the lowest price (Clause 6.1 of the Instructions to Tenderers).

71. Against this background, the Contracting Authority will address the 4 reasons put forward by the Appellant in turn.

72. ***First***, the Appellant says that its offer "*provides precisely what the Contracting Authority requires*". Technical compliance is necessary for an award, but it is not sufficient. The offer must also be financially worthwhile.

73. ***Second***, the Appellant says that the Contracting Authority did not examine whether any individual Lot could be awarded within, or close to, the funds available. As shown in paragraph 19 above, no Lot came close. The offer closest to its EPV, in Lot 5, was still almost 70% above it.

74. ***Third***, the Appellant says that, being a framework contract, the Tender does not oblige the Contracting Authority to order any specific quantity, so that it could have managed its expenditure within the funds available. In other words, the Appellant is asking the Contracting Authority to award a public contract and then not procure, under it, the very services which it needs. In any case, the premise is wrong. The Contracting Authority is bound to procure at least 80% of the awarded contract value. At the Appellant's prices, that minimum alone exceeds the EPV in every Lot:

ganado
advocates

Lot	EPV (€, excl. VAT)	80% of the Appellant's offer (€, excl. VAT)	Minimum commitment above the EPV (%)
Lot 1	59,000.00	88,600.00	50.17%
Lot 2	33,520.00	50,960.00	52.03%
Lot 3	31,140.00	45,440.00	45.92%
Lot 4	44,250.00	65,040.00	46.98%
Lot 5	39,650.00	53,840.00	35.79%
Total	**207,560.00**	**303,880.00**	**46.41%**

75. ***Fourth***, the Appellant says that less onerous measures were available, namely "*the seeking of clarifications from the Objector, the review of the EPV, and the award of those Lots which could be accommodated*".[22] None of these was a lawful alternative to cancellation:

a. a clarification can only be sought where there is something to clarify. The Appellant's financial offer was clear, and exceeded the EPV by a significant margin in every Lot. No clarification could have changed it;

b. as to a review of the EPV, the EPV was based on market research, it was published from the outset, and no economic operator questioned it before the closing date. It was also the objective benchmark against which the offers were to be measured; and

c. as to the award of some Lots, no Lot could be accommodated. The offer closest to its EPV, in Lot 5, was still almost 70% above it (paragraph 73 above).

76. The Contracting Authority applied the rules which the Appellant itself accepted when it submitted its offer, and treated the Appellant as it would have treated any other tenderer. Having received one offer in each Lot, priced far above the published EPV, the Contracting Authority was entitled, by law and under the Tender, to reject that offer and to cancel the Tender.

[22] Appeal, para 6.1.2.

ganado
advocates

77. Finally, the Appellant claims that the cancellation has exposed its commercially sensitive information, since its prices for each Lot are now known.[23] This claim is unfounded.

78. ***First***, the Appellant's prices were not disclosed by the cancellation. The tendered price of each tenderer is published on ePPS at the public opening of tenders (Clauses 13.1 and 13.2 of the GRGT), as the Appellant accepted when it submitted its offer. It is published precisely because it is not confidential.

79. ***Second***, the Appellant's total price for each Lot is not confidential information, whether from a subjective or from an objective perspective:

a. from a subjective perspective, Regulation 40(1) of the PPR protects information forwarded by economic operators "*which they have designated as confidential*". The Appellant did not designate its prices as confidential; and

b. from an objective perspective, information is confidential only if it is known to a limited number of persons, its disclosure is liable to cause serious harm to the person who provided it, and the interests liable to be harmed are, objectively, worthy of protection.[24] A total price for each Lot, published to all participants at the opening, meets none of these conditions. It is an aggregate figure, which reveals neither the Appellant's unit rates nor its cost structure, and which is incapable of influencing the commercial strategy of its competitors.

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

H. FIFTH GROUND OF APPEAL: THE DEPOSITS SHOULD NOT BE REFUNDED

81. By means of the fifth ground of appeal,[25] the Appellant seeks the refund of its deposits irrespective of the outcome of the Appeal, claiming that it was compelled to appeal in order to obtain the reasons for the decision. This is simply wrong.

---

[23] Appeal, para 6.2.

[24] T-88/09 *Idromacchine and Others v Commission* (8 November 2011) para 45; Commission Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (2020/C 242/01) para 20.

[25] Appeal, Section 7.

ganado
advocates

82. The Appellant relies on *Borg Bros*. But in that case, the Court of Appeal was dealing with an authority which "*did not give an explanation in the letter of rejection*".[26] In this case, the letter of rejection stated its legal basis, its findings and its reasoning, and the EPV of each Lot was already public. The Appellant did not need to appeal to learn why its offers had been rejected. It only needed to read Clause 1.3 of the Tender.

83. The refund of the deposits (Regulation 273 of the PPR) should follow the principle customarily applied by the PCRB, that is, that costs follow the event.

84. If the Appellant's Appeal is not successful, the deposits should not be refunded.

85. **On a concluding note, the Contracting Authority will not object to the refund of the deposits paid by the Appellant if the Appeal is withdrawn in good time before the hearing to be scheduled by this Honourable Board.**

THEREFORE, the Contracting Authority humbly demands that this Honourable Board should:

a. decide the 5 appeals by means of one decision applicable to all Lots;
b. uphold the preliminary plea raised in Section E and declare the third ground of appeal inadmissible insofar as it challenges the EPV;
c. reject the Appeal in its entirety and confirm the decision to reject the Appellant's offer and to cancel each of Lots 1 to 5 of the Tender; and
d. order the deposits paid by the Appellant not to be refunded,

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

Yours sincerely,

Dr. Clement Mifsud-Bonnici
(cmifsudb@ganado.com)

Dr. Calvin Calleja
(ccalleja@ganado.com)

[26] *Borg Bros vs Ministeru għall-Familja u s-Solidarjetà Soċjali et*, Court of Appeal (27 June 2014): "*darba li l-awtorità konċernata ma tatx spjegazzjoni fl-ittra tal-irtirar*".