



THE MALTA CHAMBER

Report on Public Procurement Reform 2021

In collaboration with

ganado
advocates

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1 Executive Summary

Issue	Recommendation
Planning Procurement	A procurement outlook is published by contracting authorities every 6 months in advance on the contracting authorities' website, centralised websites and on local newspapers.
Preliminary Market Consultation (PMC)	<ul style="list-style-type: none"> a. PMC can be a useful tool to ensure that Contracting Authorities are aware of the market, and the services or products available to them. b. Contracting authorities must act proportionately when drafting PMC and can only ask information which is necessary for the purposes of the market study. c. Following the conclusions of PMC, the Contracting Authority should inform participants whether a procurement procedure will be issued.
Drafting of Procurement Documents	<ul style="list-style-type: none"> a. Panels of experts across the public service are to be constituted and may be tapped into, at a cost, by contracting authorities for the purposes of drafting tenders and for evaluation purposes too. b. Where no experts exist within the public service, contracting authorities should outsource expertise from external sources. c. Knowledge management systems should be put in place to capitalise on past market research and studies and previous experience in the procurement of certain items. d. The procurement of certain standard and essential solutions should be uniformized across the public service and ideally managed by the Department of Contracts as a central government authority.
Clarifications	<ul style="list-style-type: none"> a. While The Malta Chamber understands that certain requests for clarification might touch upon sensitive or complex questions, bidders should be given by default an additional round of requests for clarifications, even if the time limit is short. b. Further, the time limits to submit clarifications should be extended or re-opened (where closed) in case the deadline to submit tenders is extended for any reason.
Tender Submission Deadlines	The Malta Chamber recommends exercising sensitivity by contracting authorities if these issues are raised by bidders in the clarification phase of the procurement procedure and award extensions of time where these circumstances are verified.
Pre-Financing Guarantees	<p>The Malta Chamber suggests that there is a constructive discussion with the Department of Contracts and the Managing Authority for EU Funds in Malta, the Planning and Priorities Co-ordination Division, as to other alternatives to the pre-financing guarantees. This might include:</p> <ul style="list-style-type: none"> a. a mix of collateral over the economic operators' illiquid and liquid assets such that the bank guarantee does not cover 100% of the pre-financing payment; and b. allowing economic operators to use the single bond as collateral, permitted by Procurement Policy Note 22.

Lots	The use of lots continues to be prioritised by contracting authorities.
Timely Evaluation of Bids	<ul style="list-style-type: none"> a. The Malta Chamber favours a structured and differentiated approach under this heading. There should be different time periods within which bids should be evaluated. b. The Malta Chamber also suggests the introduction of a system of incentives and deterrents for contracting authorities to complete evaluations expeditiously and within the validity period of bids. On this point, The Malta Chamber suggest that bidders are expressly entitled to claim damages, both actual losses and loss of profits, against a contracting authority in case of failure to evaluate within the validity period without good reason and that a penalty system is implemented such that contracting authorities who are systematically in delay are sanctioned.
Cancellation of Tenders	<ul style="list-style-type: none"> a. The cancellation of tenders after the disclosure of financial bids should be exceptional and based on defined and limited situations in the law. b. Guidance should be issued by the Department of Contracts on the current interpretation and application of these defined and limited situations. c. If a contracting authority cancels a tender based on such defined and limited situations, it must provide bidders at least a high-level explanation of the reasons for which it is taking that decision. d. If a contracting authority cancels a tender, it must be transparent with bidders and give an indication of its intentions on the project in the short-term and long-term if a tender is to be re-issued, if the project is abandoned and so on. e. The exclusion of liability of contracting authorities in case of cancellation of tenders should be removed immediately. f. Contracting authorities should be liable also for loss of profits where bad faith, gross negligence and/or wilful misconduct is proven in the conduct of the procurement procedure and the subsequent cancellation.
Blacklisting	The Malta Chamber is of the view that this matter is not one which can be simply addressed using public procurement, but there is scope for public authorities, including, the Department of Contracts and the Inland Revenue Department to create systems of seamless integration which would automatically prevent an economic operator from submitting a bid if there are pending social security and tax dues and if there is no settlement agreement in place.
Policy Objectives & Public Procurement	The Malta Chamber notes that a high percentage of the respondents took the view that non-economic factors are important in public procurement, and therefore, it is to be inferred that public procurement should not focus solely on obtaining the cheapest offer on the market.
Remedies in Public Procurement	The Malta Chamber recommends that a set of procedural rules and guidelines are issued, in consultation with the main stakeholders, on the procedure to be adopted by the PCRB.

The Pre-Contractual Remedy	<ul style="list-style-type: none"> a. A nominal fixed amount should be payable and fixed at €2,500. b. Pre-contractual remedies can be filed at the very latest 24 hours before the closing date of a tender.
Disclosure in the Recommended Award Notice	<ul style="list-style-type: none"> a. The Malta Chamber recommends that the names of the individual members of a consortium are immediately disclosed in the recommended award notice. b. The Malta Chamber recommends the introduction of an express entitlement at law to request the above-mentioned information and further submits that the disclosure of this information will strengthen further the trust in contracting authorities and the evaluation process.
Direct Orders	<ul style="list-style-type: none"> a. The Malta Chamber recommends that the scope of the action for declaration of ineffectiveness of a contract is widened such that the PCRB's competence includes scrutiny of direct orders below the financial thresholds set by the EU Directives and such that 6-month time limit is linked with either discovery of the direct order by the interested party or the disclosure of the same in the Contract Register or Government Gazette. b. The Malta Chamber further recommends that standing requirements for the filing of the action for declaration of ineffectiveness of a public contract are widened and are not interpreted restrictively.
Terms of Public Contracts	The Malta Chamber recommends that the General Conditions should have specific terms, which cannot be deleted or modified by contracting authorities without the Department of Contracts' consent, which require the 100% purchase of all estimated quantities.
Performance of Public Contracts	The Malta Chamber recommends that the potential of this resource, the Contract Register, is maximised by keeping tabs on the status of a public contract whether any payments were made, whether any specific milestones have been reached by the contractor and whether any disputes have been submitted to judicial resolution or arbitration.
Modifications and Variations to Public Contracts	<ul style="list-style-type: none"> a. The Malta Chamber recommends that the Contract Register is designed to show any historic modifications to public contracts, including, a record that necessary approvals have been obtained and a summary of the justification. b. The Malta Chamber also recommends that the time limit to publish such modifications is reduced from 6 months to 3 months; with a view to shorten this time-period in years to come. c. The Malta Chamber further recommends that no archiving is done of past tenders and opened tender details on ePPS.

2 Introduction and Objectives

The Malta Chamber of Commerce, Enterprise and Industry (the “Malta Chamber”) is vociferous in its call to represent ethical business across Malta and Gozo. Public procurement represents an important component of business opportunities for economic operators in Malta; it must be done properly and with respect to the law. All economic operators must be on the same level playing field when tendering for government purchasing opportunities and such procurement exercises must be accessible to all eligible economic operators, free from impropriety and in compliance with the law. No distortions of the market should be tolerated by contracting authorities.

In 2020, The Malta Chamber held a high-level meeting with the Principal Permanent Secretary, Mr Mario Cutajar and Director of Administration at the Department of Contracts, Mr Oreste Cassar to discuss the challenges economic operators were having in relation to public procurement in Malta and to discuss various Government initiatives which were in the process of being implemented.

Following this high-level meeting, The Malta Chamber decided to embark on an exercise to identify proposals aimed at improving public procurement in Malta from multiple facets.

The Malta Chamber set up a working group formed by individuals representing economic operators that have different levels of experience submitting tenders, across different industry sectors (the “Working Group”). The Malta Chamber invited Dr Clement Mifsud Bonnici (Ganado Advocates) to form part of this Working Group and to take the lead in the drafting of this Report. The Working Group was composed of (in alphabetical order): Roderick Abela, Julia Aquilina, Liz Barbaro Sant, Anton Borg, Maronna Filletti, Mary Gaerty and Marcel K. Mifsud.

The Working Group tackled the drawing-up of the Report in the following three stages which were dealt with consecutively:

1. First, the Working Group identified core challenges faced by economic operators when dealing with public procurement in Malta.
2. Second, a survey was drawn up covering these core challenges identified by the Working Group, which was eventually sent to The Malta Chamber’s members for their responses.
3. Third, the Working Group, after taking into account the 100 responses received following the survey, put forward a series of recommendations proposing improvement and reform of public procurement in Malta. These recommendations and the rationale behind them have been detailed in this Report below. A draft version of this Report was shared with some of the respondents for their feedback.



The final stage of this exercise is the presentation of this Report to the Office of Prime Minister and the Department of Contracts and eventual circulation with the public.

The Malta Chamber intends to fiercely advocate for the implementation of the reforms proposed in this Report, but more importantly, The Malta Chamber intends to maintain an open and constructive dialogue with all relevant stakeholders on the future of public procurement in Malta so that the proposed recommendations can be adapted to ever-changing landscape of Malta’s economy.

3 The Survey

The Working Group drafted questions on each of the core challenges identified during the first phase of the exercise. The design of the questionnaire was mixed as it included both open-ended and close-ended questions. It consisted of 56 questions that touched upon several shared challenges identified by the Working Group. These questions were divided into nine (9) different sections:

- About your Business
- Your Business and Public Procurement
- Your Perception about Public Procurement
- Preliminary Stages of Public Procurement
- Prior to Closing of Tenders
- Evaluation and Transparency
- Blacklisting
- Policy Objectives and Public Procurement
- Remedies and Public Procurement

The Questionnaire was sent out to all of its members on 31 July 2020 with a deadline to reply by 14 August 2020. 100 responses were received.

The responses received by The Malta Chamber to the questions put in the questionnaire will be outlined below accompanied by an analysis and explanation of the respective challenge addressed by that question. Following this analysis and explanation, The Malta Chamber has put forward a recommendation or way forward which, in The Malta Chamber's view, is mutually beneficial to economic operators and contracting authorities.

A copy of the questionnaire and a summary of the responses received is included as an ANNEX in the survey.

4

The Respondents

The Malta Chamber asked the following five (5) questions to the respondents to understand the demographics of the responses received:

- What sector do you operate in?
- What was the business' yearly turnover in 2019?
- What is the number of persons the company employs?
- What is the proportion of your revenue generated from public contracts?
- How long has the company been tendering for?

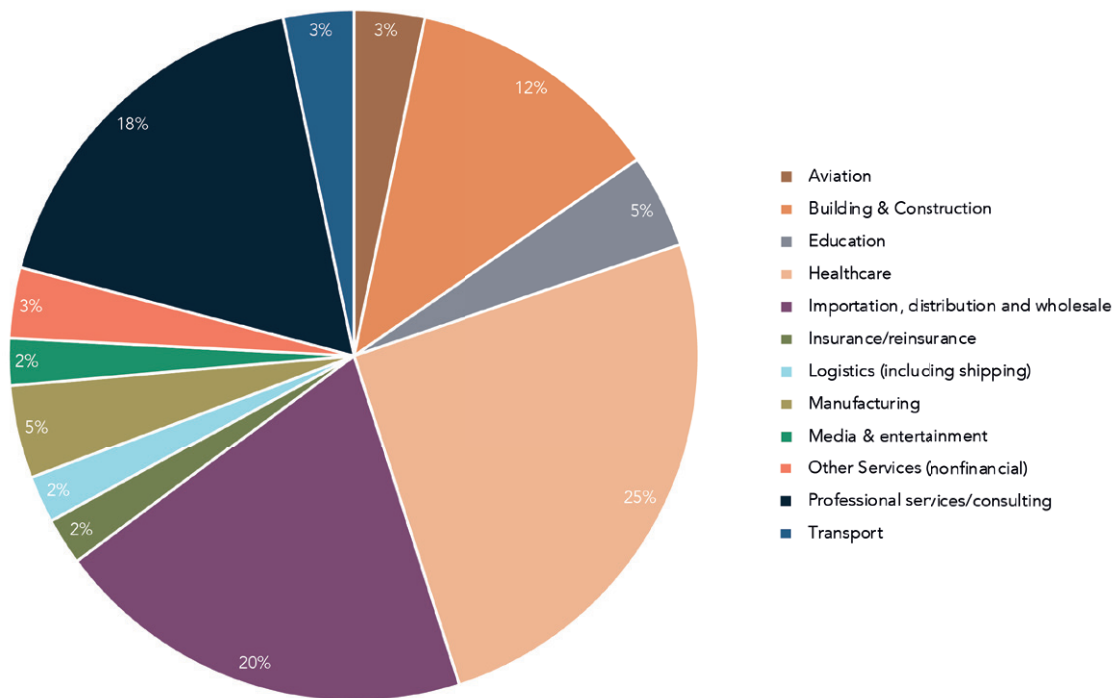


Figure 1: What sector do you operate in?

Figure 1 gives an overview of the sectors respondents represent; a majority of respondents hail from the healthcare industry.

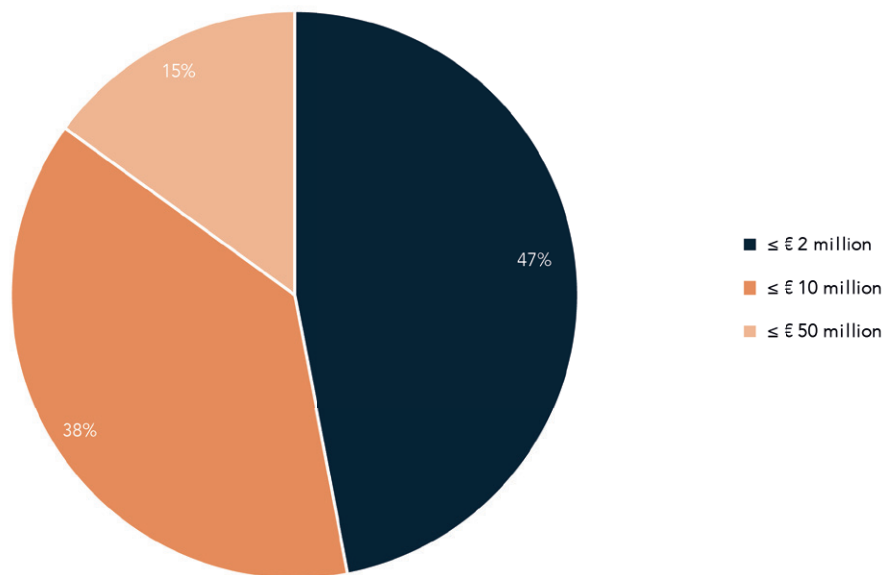


Figure 2: What was the business' yearly turnover in 2019?

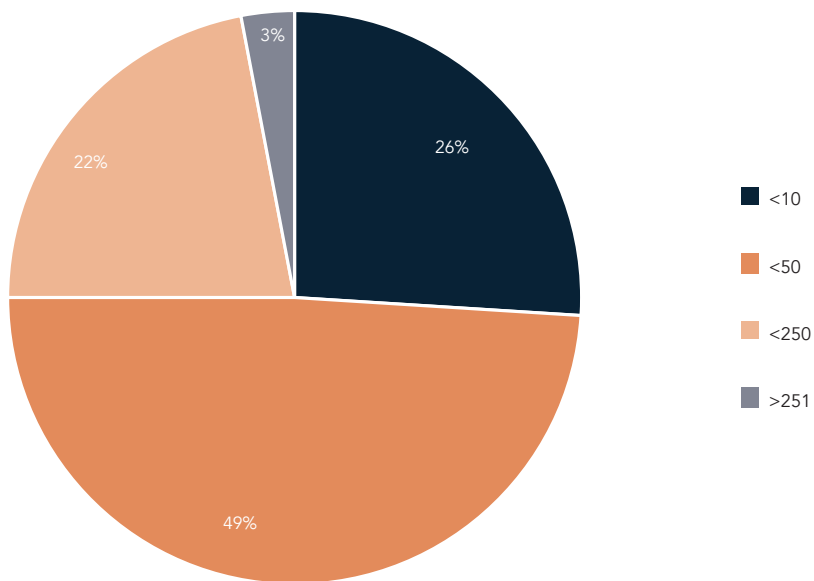


Figure 3: What is the number of persons the company employs?

Figure 2 and Figure 3 indicate that the respondents range from micro to small and medium enterprises. According to the NSO, in 2018, Malta had 54,739 active business units.

Out of which 51,867 are micro enterprises, 2,301 are small enterprises, 479 are medium enterprises and 92 are large businesses.¹

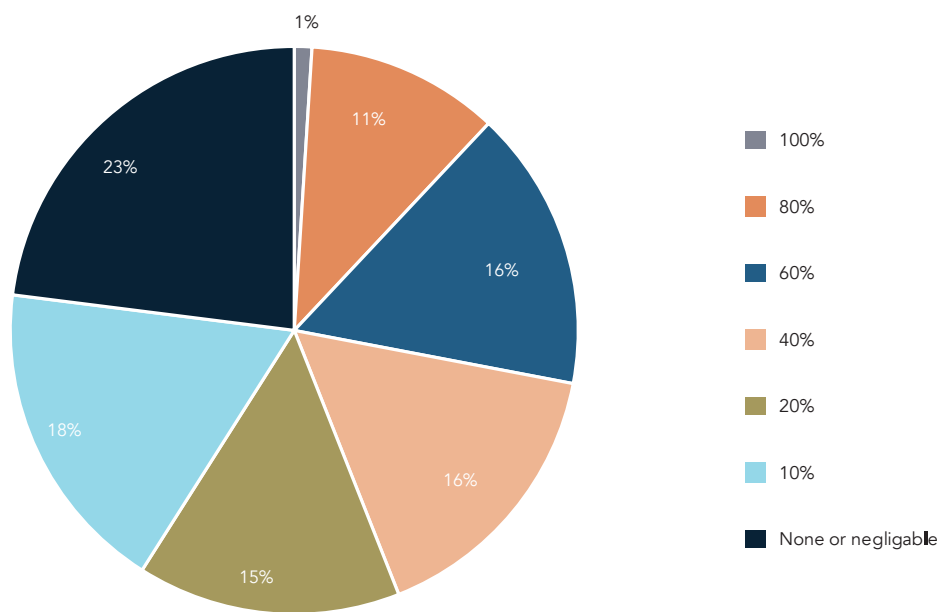


Figure 4: What is the proportion of your revenue generated from public contracts?

The average respondent has been tendering for 20 years, with the minimum number of years being two years and the maximum being 50 years.

The Malta Chamber believes that the sample of responses received is sufficiently representative of different economic operators on the market, and on that basis, The Malta Chamber decided to consider the responses received in the analysis made in this Report.

The respondents were also asked with which contracting authorities they typically tender the most. The larger shares of the respondents were taken up by the following ministerial procurement units and contracting authorities:

- i. 60 respondents indicated the Ministry for Health
- ii. 32 respondents indicated Ministry for Energy and Water Management
- iii. 29 respondents indicated Ministry for Transport, Infrastructure and Capital Project
- iv. 26 respondents indicated the Ministry for Education and Employment
- v. 65 respondents indicated the Central Procurement and Supplies Unit

¹ https://nso.gov.mt/en/News_Releases/Documents/2020/08/News2020_129.pdf

5 Issues & Recommendations

A. Trust and Perception

The Working Group put nine (9) questions to the respondents on their perceptions on public procurement in Malta.

A slim majority of respondents took the view that “most of the times” bids are evaluated fairly and equally by evaluation committees, while the same slim majority took the view that procurement procedures are conducted, evaluated and awarded transparently. However, 55% of the respondents responded that procurement procedures do not promote genuine competition and that tender specifications are drafted in such a way that competition is artificially narrowed.

It is also concerning that just about 32% of respondents expressed confidence that contracting authorities will keep their bids secret and confidential.

The respondents were also asked to indicate their “trust rating” in various institutions and processes involved in public procurement in Malta, with the score of 1 being the lowest, and 5 being the highest:

- i. In the case of the Department of Contracts, 47% gave a score of “3” and 28% gave a score of “4”.
- ii. In the case of Ministerial Procurement Units, 20% gave a score of “4”, 40% gave a score of “3”, 22% gave as core of “2”, while 16% gave a score of “1”.
- iii. In the case of “other Contracting Authorities, 23% gave a score of “4”, 39% gave a score of “3”, 20% gave a score of “2), while 14% gave a score of just “1”.
- iv. In the case of ePPS / eTenders, 45% gave a score of “4”, while 30% gave a score of “3”.
- v. In the case of the Public Contracts Review Board (“PCRB”), 31% gave a score of “4”, while 31% give a score of “3”.

The responses to these questions should not, in The Malta Chamber’s view, be taken as a conclusive judgment on public procurement in Malta, but are certainly indicative that there is room for improvement for public procurement in Malta such that trust in the key institutions increases in years to come.

The Malta Chamber is cognisant of situations of perceived conflict of interest amongst economic operators and contracting authorities. The Malta Chamber believes that rules on the management and avoidance of such conflicts of interest are not sufficiently clear and that the perceived lack of monitoring and enforcement is contributing to the low trust rating achieved by contracting authorities.

This is what this Report attempts to achieve: the setting out of proposals for reform, which have been endorsed by economic operators, to be taken up by contracting authorities.

In the following Sections, the Report introduces each “core challenge” identified by the Working Group and proposes reform or a way forward based on the responses received.

B. Planning Procurement

An issue which was identified by the Working Group and which was put forward as a question in the Survey is whether contracting authorities should disclose public procurement opportunities which are planned for the coming months.

This suggestion was well received by the respondents with 89% replying that contracting authorities should disclose such plans in advance.

To The Malta Chamber, this is obvious. Contracting authorities should already have, internally, an outline of their expected purchases for the coming financial year since such purchases should be budgeted in advance.

The Working Group was made aware that certain contracting authorities, such as the Malta Information and Technology Authority, publish a procurement outlook. There is no concept of a “procurement outlook” in the law, but it is possible for contracting authorities to inform the market of an expected public procurement opportunity by way of Prior Information Notices which are published on the Official Journal of the European Union. This Notice would contain high-level information on the prospective purchase. The Malta Chamber observes that the concept of a “procurement outlook” is consistent with the spirit and objectives of the Directive.

RECOMMENDATION: A procurement outlook is published by contracting authorities every 6 months in advance on the contracting authorities’ website, and to the extent possible, on centralised websites (such as ePPS) and on local newspapers.

C. Preliminary Market Studies

The Working Group identified the matter of proper market research and studies prior to the issue of tenders as one which merits attention. Such research and study are crucial to public procurement for the following reasons:

- i. Verification that the solution being procured is appropriate for the needs of the contracting authority.
- ii. Solutions on the market which are innovative and/or which are compliant with environmental, labour and social standards are promoted.
- iii. The solution being procured, and the technical specifications for it, can be purchased within the allocated budget for the tender.
- iv. The tender requirements and the technical specifications selected are in line with industry standards and are such to promote genuine competition in the market.

The Malta Chamber remarks that, as a matter of best practice, market studies and research should always be carried out prior to the issue of all tenders. Such studies and research must be exhaustive and cannot select only one or a few solutions on the market contrary to the duty to promote genuine competition. The general perception among respondents was that the level of market research and studies made by contracting authorities prior to the issue of tenders is "inadequate" according to 61% of the respondents.

Further, and in The Malta Chamber's view, whenever such studies and research require direct contact with economic operators who provide such solutions, the general principles of equal treatment and transparency must be guaranteed.

The Working Group identified the preliminary market consultation ("PMC") as a potential tool for ex ante study and research. The PMC is specifically provided for in the law. The Working Group remarked that out of the 39 respondents who indicated that they have participated in PMCs;

i

8.1%

remarked that the PMC was
"very useful"

ii

27%

answered that the PMC was
"somewhat useful"

iii

35.1%

answered that the PMC was a
"waste of time"



These responses might be indicative that there is the need for a proper follow-up after the conclusion of a PMC so that participating bidders can witness, first-hand, the utility of participating in the PMC. Even though contracting authorities are not legally or contractually bound to issue a tender following the conclusion of a PMC, contracting authorities must recognize that participation in PMCs by economic operators is a cost and requires time and energy. Nearly half of the respondents who have participated in PMCs answered that no tenders were ever issued after PMCs.

The responses received in the Survey also indicated that some economic operators are at times uneasy about providing price and other commercially sensitive information when participating in PMCs. Only 13 respondents indicated that they felt comfortable disclosing the financial consideration for the solution on the PMC, while only 15 respondents were comfortable disclosing prospective suppliers or sub-contractors.

The Malta Chamber will stop short of speculating why less than half of those Respondents who have participated in PMCs are uncomfortable disclosing this information, but it can

be inferred from the low trust levels in contracting authorities, that there is a perceived risk, right or wrong, that confidential information from such exercises is leaked.

RECOMMENDATION: The Malta Chamber submits that, as a matter of best practice, prior market research and studies ought to be carried out and that this research and study must be exhaustive and impartial. The PMC can be a useful tool to be used in such instances and it should be used more often as against informal contacts with economic operators; which should be avoided.

Furthermore, contracting authorities must act proportionately when drafting PMCs and should only ask information which is necessary for the purposes of the market study. There is a need for proper follow-up after the conclusion of a PMC and participants are informed whether a procurement procedure will be issued.



D. Drafting of Procurement Documents

The Working Group was also made aware that some of The Malta Chamber's members encounter issues with the wording and drafting of tender dossiers and accompanying procurement documentation.

The majority of respondents at 65% found that tender dossiers are "most of times" well drafted, but that this depended on the contracting authority in question. 34% of the respondents found that tender dossiers are not well drafted. Only 1 Respondent found that tender dossiers are "always" well drafted.

66% of respondents thought that contracting authorities are not sourcing the right expertise and competence for the drafting of tender dossiers and technical specifications. These views are aligned with feedback received by The Malta Chamber from its members over the course of the past few years.

The Malta Chamber is of the view that this is in part caused by the fact that experts within the public service are not efficiently and effectively consulted prior to the issue of tenders and that where no such expertise can be found within the public service, experts from the private sector are not customarily engaged. The risk appears to be higher when a contracting authority issues a tender relating to an issue which is unrelated to its core competence.

The Malta Chamber will stop short of making any specific recommendations on this point, but rather wishes to engage in an open and constructive dialogue with the relevant stakeholders to identify the most appropriate solutions for this issue.

Having said that, The Malta Chamber is of the view that the follow options ought to be explored:

i

Panels of experts across the public service are to be constituted and may be tapped into, at a cost, by contracting authorities for the purposes of drafting tenders and for evaluation purposes too. Clear rules on ethics should be put in place to avoid conflicts of interest, impropriety and undue influence.

ii

Where no experts exist within the public service, contracting authorities should outsource expertise from external sources. Clear rules on ethics should be put in place to avoid conflicts of interest, impropriety and undue influence.

iii

Knowledge management systems should be put in place to capitalise on past market research and studies and also on past experience in the procurement of certain items.

iv

The procurement of certain standard and essential solutions should be uniform across the public service and ideally managed by the Department of Contracts as a central government authority.

v

As per the preceding recommendation in Section 4.4, contracting authorities should engage in proper prior market research and studies and should consult the above-mentioned experts and even the actual end-users at that early stage.

On a concluding, but perhaps obvious note, The Malta Chamber insists that contracting authorities ought to have standard operating procedures in place on the review of procurement documentation, specifically, to apply the four-eyes principle when drafting and reviewing tender specifications, and finally, to proofread—irrespective of the value of the public contract.

E. Clarifications

Bidders are allowed to request clarifications from contracting authorities in connection with an open public procurement procedure. These requests are made through ePPS within specific time limits and have to be replied to by contracting authorities in writing and again within specific time limits. The requests for clarifications submitted by bidders and the contracting authorities' responses are all published and disclosed on ePPS.

The Working Group was made aware of certain issues relating to clarifications and for this reason a number of questions were put forward in the Survey.

31% of the respondents answered that they submit requests for clarifications "all the time", while 58% answered that requests are submitted "sometimes".

Respondents appear to have been split on the adequacy of contracting authorities' responses with 51.6% out of 95 respondents remarked that "clarifications posted generally skirt around the issue, are badly drafted or simply fail to consider sensible suggestions"; while the remaining 48.4% out of 95 respondents remarked that "clarifications posted are generally helpful and address any concern raised".

The Malta Chamber finds that while the responses received from respondents are not conclusively damning, it does appear that there is room for improvement in the formulation of responses by contracting authorities, and more generally, that contracting authorities should approach certain requests

with an "open mind" especially when it is evident that a tender specification is unreasonable, disproportionate or just misaligned with market expectations.

99% out of 97 respondents thought that bidders should be entitled to request additional clarifications on any responses by the contracting authority. The Working Group was made aware of a bad practice where requests for clarifications which are posted in the first few days of the tender submission period, are only replied to after the deadline to request for clarifications lapses. The Working Group was also made aware that, in certain instances, where the deadline to submit tenders is extended, the time limit to submit clarifications is not equally extended or re-opened, if previously closed.

RECOMMENDATION: While The Malta Chamber understands that certain requests for clarification might touch upon sensitive or complex questions, bidders should be given by default an additional round of requests for clarifications, even if the time limit is short, such as, 48 hours. This additional round of clarifications should not, in The Malta Chamber's view, delay in a significant manner the procurement procedure.

Furthermore, the time limits to submit clarifications should be extended or re-opened (where closed) in case the deadline to submit tenders is extended for any reason.

F. Tender Submission Deadlines

The Working Group was asked to verify whether the time limits afforded to bidders for the submission of bids are reasonable.

While 9% of the respondents found that the time limit to submit a bid is always reasonable, 78% found that “most of the times, it is”. Therefore, the general consensus is that time limits set for the submission of bids are appropriate.

In this respect, The Malta Chamber has no formal recommendations to make, but it does point out that some respondents remarked that the time limits are sometimes too short where the public contract is complex, or it relates to a large project which requires a degree of man hours to review the tender dossier and complete the bid.

Interestingly, one respondent remarked that tenders issued over the course of summer fail to take into account foreign holiday periods (such as Chinese New Year) or specialised supplier exhibitions and fairs taking place around the same time.

RECOMMENDATION: The Malta Chamber cannot but recommend that contracting authorities are receptive to these issues when raised by bidders in the clarification phase of the procurement procedure and award extensions of time where these circumstances are verified.



G. Estimated Financial Value of the Public Contract

74% of the respondents agreed that the estimated financial value of the public contract is disclosed in the tender dossier. This is a recent change by the Department of Contracts which appears to have been well-received by the market. Only 17% of respondents disagreed with the disclosure of this estimate.

However, the respondents appear to harbour reservations on the way the estimated financial value is calculated by contracting authorities.

70 of the respondents remarked that this estimate does not always match the onerous tender specifications selected by the contracting authority. On the other hand, 20 of the respondents remarked that the estimate is “unrealistically low probably based on the previous contract or an outdated market study”. Only 17 of the respondents remarked that the estimate “generally matches the average price of the solutions of the market”.

The Malta Chamber notes that these remarks are consistent with what was previously reported in Section 4.3 above that prior market research is inadequate or just absent.

The Malta Chamber also observes that it is simply unacceptable that the estimated financial value is at times calculated, by default, on the successful bidder's financial bid for the preceding tender, in particular, if that tender was awarded over 12 months prior.

The estimated financial value of a public contract needs to be right.

If it is too low with respect to the solution being procured, then the contracting authority's budget for the project will be off the mark and may not only lead to the cancellation of the tender (see more about this in section 4.11 (Cancellation of Tenders) below), but can threaten the viability of the project as a whole.

If the estimate is too high, and it is disclosed, then there is the risk that bids submitted are perceived to be abnormally low, unjustifiably, but also, there is the risk that bidders align their financial bids closer to the estimate, in particular, where there are a handful of economic operators on a given market.

RECOMMENDATION: The Malta Chamber recommends that contracting authorities engage in market studies prior to the issue of tenders to determine the market value for the solution to be procured.

H. Pre-Financing Guarantees

The Malta Chamber is aware that certain public contracts which are EU funded provide for pre-financing to the contractor's benefit. It would appear that this pre-financing payment is generally issued only after an amount of equal value is secured by way of a pre-financing guarantee put up by the contractor. This requirement seems to emanate from Procurement Policy Note 34 issued by the Department of Contracts which provides that where the estimated financial value of an EU-funded public contract exceeds €100,000 or where its duration exceeds 4 weeks, "such procurement shall have a mandatory clause for the payment of an advance payment against a pre-financing bank guarantee."

The Working Group received a number of grievances on this requirement, and therefore, a question on this matter was put forward in the Survey.

60% of the respondents said that this guarantee adds unnecessary costs to bidders, 20.2% said it is excessively onerous, and 12% said that they have decided not to participate in tenders in the past because of this requirement.

The Malta Chamber submits that this matter needs to be addressed and that alternative cost-efficient solutions should be explored and pursued. The Malta Chamber understands that the requirement for the pre-financing guarantee is there to enable contracting authorities to quickly recover funds in case of misspent or unused pre-financing payments by contractors.

However, the reality is that the pre-financing payment, which is meant in part to assist contractors undertaking such public contracts, is rendered redundant, and moreover, adds more costs to the performance of a public contract since bank guarantees have to be renewed annually for the duration of the contract and there are also bank charges.

The Malta Chamber will not make any formal recommendations on this point at this stage but does suggest that there is a constructive discussion with the Department of Contracts and the Managing Authority for EU Funds in Malta, the Planning and Priorities Co-ordination Division, as to other alternatives to the pre-financing guarantee. This might include:

- i. a mix of collateral over the economic operators' illiquid and liquid assets such that the bank guarantee does not cover 100% of the pre-financing payment; and
- ii. allowing economic operators to use the single bond as collateral, permitted by Procurement Policy Note 22.

I. Lots

The splitting of public contracts by lots is recommended by the Directives in a drive to open up public procurement opportunities to SMEs. There is no obligation in the law for contracting authorities to split public contracts into lots, however, and when no splitting is done, contracting authorities must provide an indication of the main reasons for not doing so in the tender dossier.

The Survey did not put forward a specific question on this issue, but rather, asked for the respondents' views. 69 responses were received.

The general perception among respondents is positive with various remarking that: (i) lots open the tender to more competition; (ii) lots provide an opportunity for a bidder to win at least one lot; and (iii) encourage a bidder to participate in a tender where it is not able to offer all products in a tender.

A significant portion of respondents remarked that the use of lots can be positive and beneficial to the extent that their use makes sense in a given market and for that relevant public contract. Some of the respondents emphasised that the benefit of lots must be assessed on a case by case basis. Some respondents remarked that the use of lots was artificial in some cases where each lot was procuring a proprietary solution, while others remarked that lots add unnecessary administrative burdens and complexity.

RECOMMENDATION: On the basis of the above, The Malta Chamber cannot but recommend that the use of lots continues to be prioritised by contracting authorities, however, a common-sense approach should be adopted, and lots should not be used where their use is unnecessary or inappropriate.

A specific question was asked to respondents on whether contracts for works should be split into lots, specifically, lots for design, demolition and construction, electrical, mechanical, finishes and furnishings. The majority of respondents at 50% answered in the affirmative.

There were other specific remarks:



One Respondent argued that where works contract, in particular, the design and build portion is split into lots, the project management and coordination will shift from the successful bidder to the contracting authority.



One Respondent observed that the splitting of lots in works contracts reduces the need for economic operators forming consortia and joint ventures to be able to service the totality of the works contract and further remarked that certain economic operators are uncomfortable to team up with perceived competitors.



One Respondent also observed that certain specialised components, such as, fire and security systems, should not necessarily be bundled together in the mechanical and electrical component of a works contract since it will not reward quality solutions and will result in an inflated price to contracting authorities.

The Malta Chamber observes that the splitting of lots in large scale works contracts should be the default rule, and in fact, the Working Group did observe that certain contracting authorities do split the various phases of a construction project in separate tenders which are consecutively issued.

The Malta Chamber will not make any recommendation on this issue at this stage, but will study this in further detail, in particular, from the following angles:

- i. Whether there are efficiency gains to be made from the issue of one tender, with respective lots, for a construction project rather than a tender for each phase of the works issued consecutively.
- ii. Whether there are specialist components of a construction project which should be segregated rather than bundled in a wider phase of works.



J. Timely Evaluation of Bids

The Working Group notes that the perception amongst some of The Malta Chamber's members was that the evaluation of certain tenders either took months to be concluded and in some rare instances was never concluded at all.

63%

of the respondents thought that the evaluation of tenders should be completed within 1 month of the opening of tenders

33%

thought that the evaluation should be completed within 3 months of the opening of tenders

The Malta Chamber cannot but stress the importance of timely evaluation of tenders, in particular, where the economic conditions of a given market are volatile.

Evaluation committees are bound to complete their engagement within the "period of validity of bids" which is set at 90 days from the submission deadline for bids.² If the evaluation committee does not complete the evaluation within these 90 days, the relevant contracting authority or even the Department of Contracts may cancel the tender process. According to the General Rules, and in "exceptional circumstances"- which are not defined, the contracting authority may extend further the validity of bids by 2 further periods of 1 month each up to 2 months.³ This brings us to a total of 5 months.

The issue here is that the cancellation of a tender is seldom an appropriate solution to a situation where the evaluation of tenders took months to complete. The cancellation of a tender is rarely, if ever, an effective deterrent on contracting authorities.

The Malta Chamber also acknowledges that the 90-day period in the General Rules might be appropriate for certain complex or high value infrastructural projects but is excessively generous in the case of straightforward tenders which are awarded on the basis of cheapest, technically and administratively compliant, bid.

RECOMMENDATION: The Malta Chamber favours a structured and differentiated approach under this heading.

There should be different time periods within which bids should be evaluated and as follows: (a) 1 month validity period in case of supply contracts below thresholds and (b) contracting authorities are to expressly choose, at their discretion, the validity period of bids on a case by case basis in a proportionate manner, but which does not exceed 90 days. The latter proposal is being made such that contracting authorities are challenged to act proportionately, but also, such that the exercise of this discretion can be scrutinized by the PCRB.

The Malta Chamber also suggests the introduction of a system of incentives and deterrents for contracting authorities to complete evaluations expeditiously and within the validity period of bids. On this point, The Malta Chamber suggests that bidders are expressly entitled to claim damages, both actual losses and loss of profits, against a contracting authority in case of failure to evaluate within validity period without good reason and that a penalty system is implemented such that contracting authorities that are systematically in delay are sanctioned.



² General Rules, Clause 8.1.

³ General Rules, Clause 8.3.

K. Cancellation of Tenders

The Malta Chamber acknowledges that contracting authorities are not duty bound at law to award a tender. However, the Working Group found that a considerable number of The Malta Chamber's members find the cancellation of tenders particularly frustrating, especially, after the deadline for the submission of bids and where the financial bids would have been disclosed in the opening tender report.

The Survey did not put forward a specific question on this issue, but rather, asked for the respondents' views. 65 responses were received which reiterated the following points:

- i. A cancellation made after the financial bids of bidders are disclosed in the opening tender report is unfair. One respondent even added that the re-issued tender would be substantially the same, if not identical. A few more respondents remarked that the disclosure of financial bids puts the cheaper bidder in a disadvantage in cases where contracting authorities re-issue the tender or, in rare cases, pursue a negotiated procedure without prior publication with those that participated in the cancelled tender.

- ii. It is unfair since the cost, time and energy put into bids by bidders is not taken into account or appreciated by contracting authorities who cancel tenders.
- iii. It deters foreign suppliers and partners from participating in tenders issued by contracting authorities in Malta.
- iv. The reasons given for cancellation are generally unclear or opaque.

It would appear to The Malta Chamber, from the responses received, that the general perception is not a positive one.

While contracting authorities understandably reserve the right to cancel tenders, the discretion to do so must be limited and defined. The decision to cancel a tender should remain reviewable, as is the case presently, by the PCRB and the Court of Appeal. However, where the decision to cancel turns out to be illegal, the contracting authority should be automatically liable to damages to the bidders who would have submitted a bid.

The General Rules allow contracting authorities to cancel tenders in the following situations:⁴

i

The tender procedure has been unsuccessful, namely where not qualitatively or financially worthwhile tender has been received or there has been no response at all

ii

The economic or technical parameters of the project have been fundamentally altered

iii

Exceptional circumstances or force majeure render normal performance of the project impossible

iv

All technically compliant tenders exceed the financial resources available

v

There have been irregularities in the procedure, in particular, where these have prevented fair competition

vi

The duration of the evaluation has exceeded the period of validity of bids

⁴ General Rules, Clause 18.3.

The Working Group has observed that certain contracting authorities, when cancelling a tender, simply cite one of the situations above without providing at least a high-level explanation as to why the contracting authority is invoking that ground. It is submitted that this is at odds with the expected transparency in public procurement.

The Malta Chamber would also add that transparency requires that contracting authorities are open and upfront about their intentions about the given project and the market should be made aware whether the opportunity is still on the table or whether it has been permanently cancelled.

In cases of cancellation of tenders, the General Rules also provide that:

In no circumstances will the Central Government Authority/Ministerial Procurement Unit/Contracting Authority be liable for damages, whatever their nature (in particular damages for loss of profits) or relationship to the cancellation of a tender, even if the Central Government Authority/Ministerial Procurement Unit/Contracting Authority has been advised of the possibility of damages. The publication of a contract notice does not commit Central Government Authority/Ministerial Procurement Unit/Contracting Authority to implement the programme or project announced.⁵

While this exclusion of liability rule has not been reviewed by the courts to date, The Malta Chamber submits that this rule is unfair and provides for no real sanction on contracting authorities in cases where cancellation is found to be unlawful. The Working Group has also been advised of case-law which has ruled that the damages which could have been claimed by bidders only include actual losses made (i.e. cost of putting up the bid) and profit losses from that tender are not recoverable.

RECOMMENDATIONS: On the basis of the above, The Malta Chamber has the following recommendations to make:

- i. The cancellation of tenders after the disclosure of financial bids should be exceptional and based on defined and limited situations in the law.**
- ii. Guidance should be issued by the Department of Contracts on the current interpretation and application of these defined and limited situations.**
- iii. If a contracting authority cancels a tender on the basis of such defined and limited situations, it has to provide bidders a high-level explanation of the reasons for which it is taking that decision.**
- iv. If a contracting authority cancels a tender, it must be transparent with bidders and give an indication of its intentions on the project in the short-term and long-term, in particular, if a tender is to be re-issued, if the project is abandoned and so on.**
- v. The exclusion of liability of contracting authorities in case of cancellation of tenders should be removed immediately.**
- vi. Contracting authorities should be liable also for loss of profits where bad faith, gross negligence and/or wilful misconduct is proven in the conduct of the procurement procedure and the subsequent cancellation.**



⁵ General Rules, Clause 18.3.

L. Blacklisting

The matter of blacklisting is one close to the heart for The Malta Chamber. The near absence of blacklisting in Malta and the inadequacy of the current mechanism to blacklist bidders has been repeatedly identified by The Malta Chamber as a matter of concern which should be addressed as a priority in public procurement.

Economic operators who are in breach of the law have to be sanctioned and cannot be allowed to participate in public procurement or allowed to enter into public contracts. If contracting authorities do not blacklist economic operators who have breached the law, then the wrong message is sent to the market: that everything goes.

Contracting authorities have to reward economic operators who comply with the law, not only because this is the right thing to do, but because it is a cost for economic operators to comply with the law and because contracting authorities must see that there is a level-playing field among economic operators.

For these reasons, the Working Group was tasked to focus on blacklisting.

The Survey showed that 51% of the respondents thought that economic operators are not being actually blacklisted from tenders. The Malta Chamber must add that this is not simply a matter of perception, but it is a matter of fact. In the last 5 years, the Department of Contracts issued circulars relating to only 3 economic operators which were blacklisted in accordance with the PPR.

Since 2015, a new procedure has been put in place in the law in order to blacklist economic operators. This new procedure distinguishes between "mandatory grounds of exclusion" and "discretionary grounds of blacklisting". The former relates to the commission of certain criminal offences, namely, participation in a criminal organisation, corruption, fraud, terrorism, money laundering, human trafficking, but also failure to pay tax and social security, insolvency, and conflicts of interest. If an economic operator is subject to a mandatory ground of exclusion, then it would be automatically barred, subject to certain exceptions, from participation in public procurement.

The discretionary grounds of blacklisting, on the other hand, require that the Director General (Contracts) finds that an economic operator fell foul of any one of the grounds for blacklisting in the law which include:

i

the economic operator has been declared guilty by any court or tribunal of an offence relating to labour law including those found in the Employment and Industrial Relations Act or any subsidiary legislation made under that Act;

ii

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

iii

the Director has sufficiently plausible indications to conclude that the economic operator has entered into agreements with other economic operators aimed at distorting competition;

iv

the Director has been informed in writing by a contracting authority that an economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement in a public contract, or a public concession contract, which led to early termination of that contract, damages or other comparable sanctions;

v

the economic operator has been declared guilty by any court or tribunal of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of the selection criteria, has withheld such information or is not able to submit the supporting documents required pursuant to the European Single Procurement Document;

vi

the economic operator has undertaken to unduly influence the decision-making process of the contracting authority, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, award or selection;


vii

it can be demonstrated by any appropriate means that in the execution of public contracts the economic operator is in violation of applicable obligations in the fields of environmental, social and labour law established by EU law, national law, collective agreements or by the international environmental, social and labour law provisions.

An economic operator who has been blacklisted by the Director General (Contracts) may appeal from that decision before the Commercial Sanctions Tribunal and may also appeal from the Commercial Sanctions Tribunal before the Court of Appeal. The blacklisting decision is suspended for the duration of this judicial process and the economic operator may continue to bid for and enter into public contracts.


The Director of the Employment and Industrial Relations may apply before the Commercial Sanctions Tribunal to blacklist an economic operator who has committed specific employment law breaches, namely:

i



Has failed to provide his employees with a written contract of service.

ii




Has failed to provide his employees with a detailed pay slip containing all relevant details including amount paid, normal hours worked, overtime hours, hours worked on Sundays and public holidays, availed of leave or a breakdown of bonuses and allowances as well as deductions made.

iii



Has failed to deposit wages or salaries by direct payment in the employee's bank account..

iv



Has failed to provide the relevant bank statements of wages and salaries' deposit and copies of the detailed payslips, which are to be made available as and when required by the Director of Employment and Industrial Relations.

v



Has subcontracted a public contract to another person employing the same employees of the principal contractor to carry out the same or similar duties for the execution of the said public contract.



It is perhaps telling that the majority of respondents thought that Malta's framework of blacklisting of bidders is not an effective deterrent against illegal conduct and that 89% of the respondents have never heard of the Commercial Sanctions Tribunal. Out of those respondents who are aware of the Commercial Sanctions Tribunal, the general remark was that they just "heard" about it and are not aware of its workings. The Working Group has reached out to the Commercial Sanctions Tribunal to make verifications on its case-load since

it has been establishment. The Working Group was informed that since its inception 2 cases for blacklisting were filed by the Director of Employment and Industrial Relations in 2019. While these 2 cases remain pending, the Working Group was told that frequent sittings were being held, at least before the COVID-19 pandemic hit Malta. No cases appear to have been filed by any economic operator aggrieved by a blacklisting decision of the Director General (Contracts).

The Malta Chamber will not make any recommendation on this issue at this stage but will study this in further detail. From the responses received and the information provided by the Commercial Sanctions Tribunal, it would appear that there is little evidence of a culture of enforcement of the “discretionary grounds of exclusion”. A culture of enforcement has to be cultivated by the Director General (Contracts), contracting authorities and all relevant stakeholders: where economic operators breach the law and fall within any one of the discretionary grounds of exclusion, then enforcement action must be taken.

The Malta Chamber also suggests that contracting authorities should have flexibility, when evaluating bids, to reject bids where some of the discretionary grounds of exclusion affect the economic operator. This flexibility must be exercised with responsibility and with respect to the general principles of public procurement law, specifically, equal treatment, transparency and proportionality. The Malta Chamber suggest that the contracting authorities’ right to reject such bids must be defined expressly and bidders must always be given the opportunity to provide further explanation if any such ground is identified by the evaluation committee.

Furthermore, the Working Group also identified two key aspects which, in its view, deserve a focus from a blacklisting perspective:

- i. Failure to pay tax and social security; and
- ii. Failure to publish financial statements, in the case of companies.

As to the matter of tax and social security, it has to be said that 85% of the respondents thought that economic operators who have not paid all of their tax and social security should not be allowed to participate in tenders. This already constitutes a ground of blacklisting according to the law, but the Working Group was made aware that a number of The Malta Chamber’s members were under the perception that economic operators who have reportedly defaulted on their tax and social security payments still participate in tenders and are still awarded public contracts. The Malta Chamber submits that, in its view, this is not just a matter of perception, and that economic operators are managing to obtain “compliance certificates” from public authorities after entering into “settlement agreements” on the payment of dues and without effectively paying all tax and social security due.

This is specifically allowed by the law:⁷

The exclusion mentioned under this regulation shall no longer apply if the economic operator fulfils his obligations by paying or by entering into a binding arrangement with a view to paying the taxes or social security contributions due, including, where applicable, any interest accrued or fines.

This exception has been transposed directly from the EU Directives.

RECOMMENDATION: The Malta Chamber is of the view that this matter is not one which can be simply addressed using public procurement, but there is scope for public authorities, including, the Department of Contracts and the Inland Revenue Department to create systems of seamless integration which would automatically prevent an economic operator from submitting a bid if there are pending social security and tax dues and if there is no settlement agreement in place.

As to financial statements, 70% of the respondents thought that bidders who are late by over 6 months in the submission of financial statements should not be allowed to participate in tenders.

It does not appear that the failure to submit financial statements in time is an express ground for discretionary blacklisting in the law, however, the Directive does allow contracting authorities to blacklist / exclude economic operators where: “where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable”.

RECOMMENDATION: The Malta Chamber submits that this ground ought to be transposed in the law—something which was not done in the transposition process in 2016—and further that it should be interpreted to include breaches of the Companies Act, including, failure to submit audited financial statements.

In addition to this, contracting authorities should be entitled to ask for the production of audited financial statements as part of the selection and eligibility criteria in the ESPD so that the evaluation committee is satisfied that an auditor signed off on the books of the economic operator.

The Malta Chamber also recognises that the onus to ensure compliance with the Companies Act should not be borne exclusively by contracting authorities within the limited context of public procurement, but this should be part of a united position across all relevant public authorities and departments.

⁶ PPR, Article 193.

⁷ PPR, Regulation 193(4).

M. Policy Objectives & Public Procurement

One of the priorities of the European Union is ensuring that policy areas that it deems important are reflected in Member States' workings. There is a specific emphasis in the EU Directives, and naturally Maltese law transposing the same, on the promotion of non-economic factors, such as environmental, social and labour, in public procurement.

The respondents were asked three questions to determine which priority areas they deemed important. The respondents were given the option to skip the question entirely or choose multiple answers. The following were the questions asked together with their responses.

Which environmental factors do you deem important in public procurement?

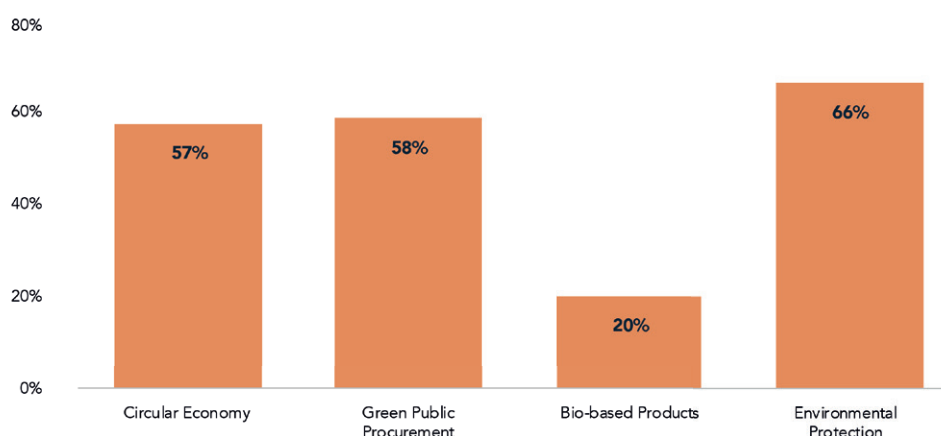


Figure 5: Which environmental factors do you deem important in public procurement?

Which social and economic factors do you deem important in public procurement?

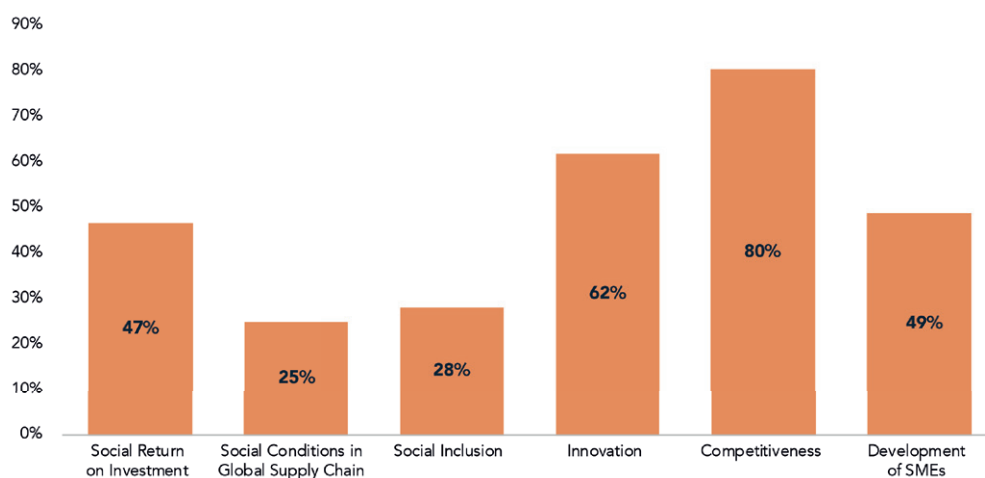


Figure 6: Which social and economic factors do you deem important in public procurement?



Which labour factors do you deem important in public procurement?

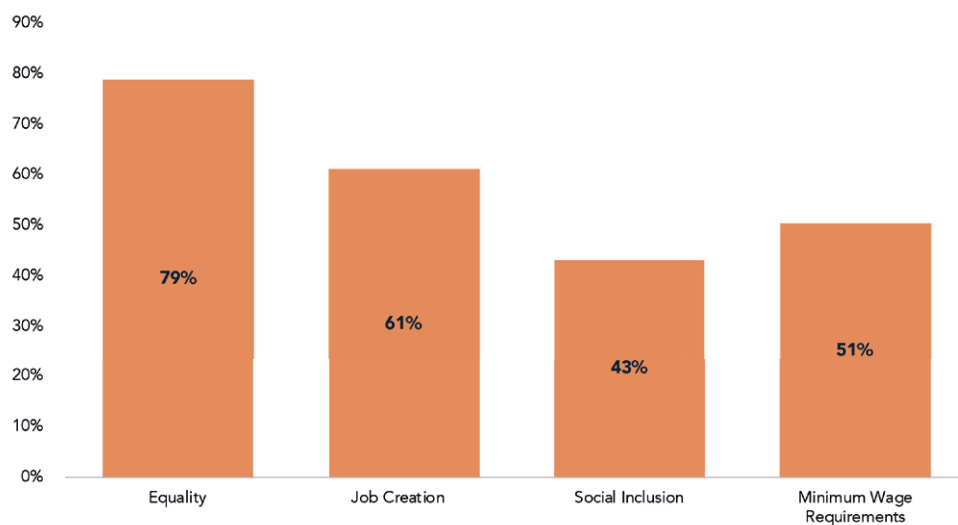


Figure 7: Which labour factors do you deem important in public procurement?

The Malta Chamber notes that a high percentage of the respondents took the view that non-economic factors are important in public procurement, and therefore, it is to be inferred that public procurement should not focus solely on obtaining the cheapest offer on the market. The Malta Chamber concurs and sees public procurement as a strategic tool for Malta to meet its environmental, social and labour targets and to promote economic operators who are not only

complying with the law (such as minimum wage), but who are also pushing for progress in other priority areas.

The Malta Chamber will not make any recommendation on this issue at this stage, but will study this in further detail, in particular, how public procurement can be utilised to achieve the priority areas identified by respondents.

N. Remedies in Public Procurement

The Working Group was also tasked to look into the remedies available to bidders and interested parties to raise their grievances on public procurement processes. The Working Group put forward specific questions on the remedies available and also on their handling by the competent tribunal, the Public Contracts Review Board ("PCRB").

74% of the respondents found that "most of the times" the PCRB handled cases efficiently time-wise and a further 65% of the respondents found that "most of the times" the procedure adopted before the PCRB is fair and treats all parties equally. On this basis, the Working Group finds that the majority of respondents are content with the PCRB's handling of cases - which appears to be consistent with the general principles of remedies in public procurement.

The Working Group has to report some remarks made by the respondents in the "further comments" section and other grievances raised over by The Malta Chamber's members in the past few months.

It appears that there are limited instances of perceived unfairness with the procedure adopted by the PCRB, in particular, decisions taken with respect to the disclosure of documentation in the hands of the contracting authority, decisions taken on dealing with certain grounds of objection before other grounds of objection during the case, and so on. It is submitted that it is customary that a tribunal reserves to itself a degree of discretion in dealing with case management and procedural issues, and therefore, there is nothing untoward in this respect. However, and in view of the financial value and/or complexity of certain public contracts, it is preferable in the interest of legal certainty that written guidance is put in place so that it is known how certain procedural issues will be dealt with.

RECOMMENDATION: The Malta Chamber recommends that a set of procedural rules and guidelines are issued, in consultation with the main stakeholders, on the procedure to be adopted by the PCRB.

O. The Pre-Contractual Remedy

In view of recent changes to the “pre-contractual remedy”, the Working Group was also tasked to assess the respondents’ perceptions on the changes.

The “pre-contractual remedy”, or as formally called the “remedy prior to the closing date of competition”, is unique to Malta. This remedy can be exercised by filing an application before the PCRB at any time before the closing date of competition to address any defect or illegality in a procurement document or procedure in advance and before economic operators submit their bids.

This remedy is attractive and has been used frequently for three principal reasons.

- i. First, this remedy is intrinsically pro-active and attempts to solve any defects or illegalities in the procurement documents or procedure adopted before bidders submit their bids. This guarantees legal certainty and also sets aside tender specifications which bar legitimate bidders with quality cost-effective solutions from participating in tenders.
- ii. Second, no deposit was payable by the bidder filing the pre-contractual remedy - which contrasts starkly with the deposit payable in case of an appeal from an award or rejection decision which can be as low as €400 and as high as €50,000.
- iii. Third, the PCRB has showed, time and time again, its willingness to hear these applications in one sitting (in some more complex cases spanning hours) and delivering its decision in just a few weeks.

The Working Group understands that two legislative amendments were passed to curb the perceived misuse of this remedy.

The first amendment which was passed on 15 November 2019 introduced the requirement for a deposit to be paid to the PCRB upon the filing of the pre-contractual remedy. The exercise of this remedy is no longer free but requires the payment of a deposit representing 0.05% of the estimated financial value of the potential public contract, capped at €50,000.

The second amendment which was passed on 15 May 2020 requires that the application is filed not just before the closing date of the tender (which sometimes meant filing it just a few hours before a tender was due to close), but “*within the first two-thirds of the time period allocated in the call for competition for the submission of offers*”.

The respondents were asked specific questions on both these amendments. It is worth noting that there is no evident “majority” pointing towards one direction or another.

When asked how much deposit should be paid when filing a pre-contractual remedy:

24%	said that no fee should be payable
18%	said that a nominal fixed amount should be payable, irrespective of the financial value of the public contracts
37%	said that the current fee payable is fair and reasonable
20%	remarked that they didn’t know how much should be payable

The Working Group’s interpretation of these results is that there is a split between roughly 42% of the respondents who do not agree with the current fee structure, while 37% of the respondents who are of the view that the current fee is fair and reasonable.

RECOMMENDATION: The Working Group tends to agree with the first camp, and in the interest of access to justice and to have remedies which are capable of holding contracting authorities to account, the recommendation is that a nominal fixed amount should be payable and fixed at €2,500.

When asked by when pre-contractual remedies are to be filed:

22%	of the respondents said that it may be filed at any time before the closing date of a tender, even if need be, an hour before
17%	of the respondents said that it should be filed at the very latest on the eve of the closing date of a tender
32%	of the respondents said that the current limit is fair and reasonable
29%	of the respondents remarked that they didn’t know how much should be payable

The Working Group’s interpretation of these results is that there is a split between roughly 39% of the respondents who do not agree with the current time limits, while 32% of the respondents agree with the current time limits.

RECOMMENDATION: The Working Group tends to agree with the first camp, and again in the interest of access to justice and to have remedies which are capable of holding contracting authorities to account, the recommendation is that pre-contractual remedies can be filed at the very latest 24 hours before the closing date of a tender.

P. Disclosure in the Recommended Award Notice

The Working Group also investigated what information should be disclosed to unsuccessful bidders about the successful bid recommended for award of a tender. The law requires that the

identity of the successful bidder is disclosed along with the total financial value awarded and the points awarded for each criterion and sub-criterion in case of a BPQR tender.

The respondents were asked what information should be disclosed with the letter of recommendation. These were the responses:



As a matter of law, points a. and c. are already disclosed, however, the Working Group notes that when a consortium, joint venture or association submits a bid, only the name of the consortium is disclosed in the recommended award notice and the names of the individual members are not.

RECOMMENDATION: The Malta Chamber recommends that the names of the individual members of a consortium are immediately disclosed in the recommended award notice.

As to the information in points b, d, e, f, and g, this information is specifically identified by the law as not confidential, however, the law does not expressly provide for their disclosure.

The Malta Chamber observes that respondents' reactions on these points have been mixed, but there is a clear majority in favour of the disclosure of:

- i. The successful bidder's technical information submitted, and which is already in the public domain.
- ii. The successful bidder's financial bid form.

The Malta Chamber, in principle, agrees with the disclosure of information which ensures the utmost transparency in the evaluation of bids. The Malta Chamber understands that the monitoring of contracting authorities' conduct is currently shared between the **public sector**, chiefly the Department of Contracts, but also public institutions tasked with auditing (such as the National Audit Office and the Parliamentary Ombudsman), and also the **private sector**, mostly aggrieved bidders who lodge complaints and remedies.

Technical information, such as, the brand and model of a solution, its technical literature and dossiers, should be disclosed upon request in writing and within a short time frame where they contain no business secret or commercially sensitive information.

The financial bid form should also be disclosed in full, in particular, where the ultimate total price forms part of a

number of constituting elements (i.e. bills of quantity and other multi-faceted supply contracts). The Malta Chamber submits that there is no legitimate reason for the withholding of such information which relates to the disbursement of public funds.

Naturally, and in both cases, limited and defined exceptions should be made for complex or particularly sensitive public contracts which relate to security and defence.

RECOMMENDATION: The Malta Chamber recommends the introduction of an express entitlement at law for bidders to be able to request the above-mentioned information.



Q. Direct Orders

The Working Group was keen to have a mature discussion on public contracts which are awarded to economic operators directly with no or little competition. The Malta Chamber recognizes that the public procurement framework needs to be sufficiently flexible to allow contracting authorities in limited and exceptional circumstances to award public contracts directly. This flexibility is specifically allowed in the law and in the Directives by what is called a Negotiated Procedure without prior publication; this applies where the financial value of the public contract exceeds the financial thresholds set by the EU Directives. This procurement procedure can only be resorted in limited situations which are defined in the law and the EU Directives and which have been restrictively interpreted by the Courts of Justices of the European Union.

However, and where the estimated financial value of a public contract is below these thresholds, the traditional procurement procedure of "Direct Order" can be resorted to in "exceptional circumstances" - without these circumstances being defined.

The Malta Chamber has no issue with directly awarded public contracts so long as their award is:

- i. Duly substantiated and justified in accordance with the law.
- ii. Adequately publicized, ideally, through a Contract Register (see Section 4.20).
- iii. Subject to scrutiny and judicial challenge by interested parties.

The Working Group was made aware that there is a perception among its members and the general public that direct orders are associated with impropriety, misuse of public funds and at times corruption. The Working Group was also made aware that there is no culture of challenging and annulling direct orders by regulators and by competitors. The absence of an effective deterrent, through a proper, effective and efficient framework of judicial scrutiny, might be contributing to the abuse, or perceived abuse, of direct orders by contracting authorities.

55% of respondents thought that the current remedies available at law are ineffective against illegal direct orders awarded by contracting authorities.

The natural choice for any interested party who wishes to challenge a direct order is the action to declare a contract ineffective. This remedy has been transposed into law from the EU Directives.

The difficulties associated with this remedy are the following:

- i. It does not apply to direct orders which are below the financial thresholds set by the EU Directives.
- ii. There is a strict time limit of 6 months from when the public contract was signed.

These make the action to declare a contract ineffective an impractical and unattractive remedy. In fact, the Working Group was made aware that only 3 such applications for this remedy have been filed since its introduction in 2016.

Where a direct order falls outside the scope of the declaration of ineffectiveness, interested parties may resort to Malta's Civil Courts, however, the timeline of a trial before these Courts is longer and at times costlier than that before the PCRB.

The Malta Chamber believes that remedies in public procurement should be rapid and effective such that they comply with the general principle of remedies in EU public procurement law. The Malta Chamber also understands that this principle has been generally adhered to in cases of appeals from decisions to recommended awards and rejection decisions.

The Malta Chamber further understands that there are certain standing requirements for the filing of such a remedy. On this point The Malta Chamber believes that remedies to challenge direct orders should be made available to interested parties who would not have necessarily an economic interest in the public contract, such as, public enforcement authorities in related markets and Non-Governmental Organisations.

RECOMMENDATION: The Malta Chamber recommends that the scope of the action for declaration of ineffectiveness of a contract is widened such that the PCRB's competence includes scrutiny of direct orders below the financial thresholds set by the EU Directives and such that a 6-month time limit is linked with either discovery of the direct order by the interested party or the disclosure of the same in the Contract Register or Government Gazette.

The Malta Chamber further recommends that standing requirements for the filing of the action for declaration of ineffectiveness of a public contract are widened and are not interpreted restrictively.



R. Terms of Public Contracts

The terms of a public contract are incorporated in the tender dossier by applying the General Conditions of Works, Services, and Supplies, as the case may be, which are the standard contract terms stipulated by the Department of Contracts. These General Conditions are then modified or deleted by the Special Conditions which are stipulated for any given tender. The Special Conditions will have precedence over the General Conditions in case of a conflict.

The Working Group was made aware of a perception among its members that the terms of public contract are sometimes unreasonable, one-sided and commercially unfeasible. This perception was in part confirmed by the Survey; 73% of the respondents confirmed that they have, in the past, decided not to participate in a tender on the basis that the General Conditions and Special Conditions were onerous, unfair and/or unreasonable.

It is undesirable that competition is narrowed and economic operators are deterred from participating in a tender due to unfair and unreasonable contract terms.

RECOMMENDATION: The Malta Chamber's recommendation on this point is that standard terms of a public contract are drafted in consultation with the respective industry so that contracting authorities are aware of what contract terms are material to economic operators and what terms are either deterring economic operators from participating or adding unnecessary costs to public procurement. The Malta Chamber also recommends that any changes to the above-mentioned General Conditions are notified to the market in advance.

Furthermore, The Malta Chamber also adds that contracting authorities should, where available, prefer the use of industry accepted standard terms, such as FIDIC in the case of construction related projects. In The Malta Chamber's view, standard terms which are widely used and trusted by an industry are preferable and should not only increase participation, but also decrease costs for contracting authorities.

The Malta Chamber also recommends that the General Conditions shift back to arbitration as the default dispute resolution mechanism in public contracts but should also place importance to genuine negotiations in good faith and/or mediation prior to any party initiating arbitration.

S. Binding Quantities

The Working Group was also made aware that certain contracting authorities do not, in the tender, commit to purchase the entirety of the “estimated quantity” of supplies, services or works.

78% of the respondents answered that contracting should be bound to purchase all of the estimated quantities indicated in the tender since the financial bid would have been calculated on that basis.

The Malta Chamber adds here that contracting authorities should not be allowed the benefit of a lower price which is based on a certain volume (calculated on the estimated quantity) without a contractual commitment to purchase the entirety of the quantity provided in the tender. Naturally, and without prejudice to any permitted contract modifications, there should be tolerance for variance, however, this should not exceed commercially accepted ranges (e.g. +/- 5%).

RECOMMENDATION: The Malta Chamber recommends that the General Conditions should have specific terms, which cannot be deleted or modified by contracting authorities without the Department of Contracts’ consent, which require the 100% purchase of all estimated quantities.



T. Performance of Public Contracts

The Working Group identified the matter of monitoring of the performance of a contract as an issue which is sometimes overlooked in discourse on public procurement.

The Working Group noted that the performance of a public contract is not transparent and rather reserved only to the parties to that public contract. For this reason, the onus of monitoring and scrutinising the post-award phase of public contracts rests exclusively with the public sector.

The Working Group was made aware that according to certain press reports there are concerns that the performance of public contracts is not monitored adequately by contracting authorities.

24% of respondents said that performance of public contracts is “always” monitored by contracting authorities, while 9% said that the performance is “never” monitored. Some respondents remarked that it depended on a number of factors, including, on the contracting authority in question (47%), on the contractor in question (9%) and on whether the public contract is EU funded (7%).

The Malta Chamber submits that the monitoring of the performance of public contracts should also be shared with the private sector just as other aspects of public procurement, obviously, with due respect to trade secrets and commercial sensitive information.

The Malta Chamber is aware that Government is planning the roll-out of a “Contract Register” which is meant to contain all details of a public contract which is awarded, and which Contract Register is meant to be updated with any changes to the public contract.

RECOMMENDATION: The Malta Chamber recommends that the potential of this resource, the Contract Register, is maximised by keeping tabs on the status of a public contract, in particular, whether any payments were made, whether any specific milestones have been reached by the contractor and whether any disputes have been submitted to judicial resolution or arbitration. This added transparency, with due respect to trade secrets and commercially sensitive information, should achieve this goal.

U. Modifications and Variations to Public Contracts

The Working Group was made aware that certain modifications to public contracts agreed to by contracting authorities raised concerns of equal treatment and transparency and in certain cases deviated from the original tender specifications of the tender and the bid submitted by the successful bidder. Some cases which were reported in the press were also referred to.

The Malta Chamber understands that there needs to be flexibility, as permitted by the law and by the tender specifications, for the modification of public contracts, however, it strongly believes that such modifications have to be publicized for scrutiny.

As currently drafted, the law obliges contracting authorities to disclose the following in the Government Gazette every 6 months:

- i. List of contracts awarded.
- ii. List of modifications to the financial value of contracts where value exceeds 5% if value is less than the financial thresholds set by the EU Directives.
- iii. List of modifications to the financial value of contracts where value exceeds the financial thresholds set by the EU Directives.

The Survey asked respondents what changes in public contracts should be disclosed and made public, including,

changes in the financial value of the contract, change of contractor, changes in subcontractors, key experts and changes in the product or solution. 80% of respondents categorically answered that ANY and ALL aspects of a public contract which are modified should be made public.

The Malta Chamber wholeheartedly agrees with this and submits that the whole cycle of public purchasing should be as transparent as practically and legally possible. The post-award phase of public procurement, specifically, the performance of public contracts is not, as submitted above in 4.22, transparent. This needs to change.

RECOMMENDATION: The Malta Chamber recommends that the Contract Register (mentioned above in Section 4.20) is designed to show any historic modifications to public contracts, including, a record that necessary approvals have been obtained and also a brief summary of the justification. The Malta Chamber also recommends that the time limit to publish such modifications is reduced from 6 months to 3 months; with a view to shorten this time period in years to come.

The Malta Chamber further recommends that no archiving is done of past tenders and opened tender details on ePPS.

6 Concluding Observations and Way Forward

The Malta Chamber submits that the number of responses received from its members in connection with this Report is a testament to the fact that public procurement in Malta is extremely active and generally working well; otherwise, economic operators would not bother and seek other opportunities elsewhere. At the same time, this Report confirms that the core challenges identified by the Working Group are shared by most of the 100 respondents who have participated in the Survey.

The Malta Chamber has dealt with these core challenges in some detail and has put forward recommendations or suggestions which are undeniably constructive and positive. The Malta Chamber acknowledges that not all recommendations apply to ALL public contracts in the same manner, but a common-sense approach is to be applied when taking on board these recommendations.

The Malta Chamber is adamant to engage in open dialogue with all stakeholders on this Report and to advocate for the adoption of the recommendations contained in this Report based on the responses received by its members.

Malta Chamber of Commerce Survey on Public Procurement in Malta

The Malta Chamber of Commerce is conducting an exercise to identify potential areas where public procurement in Malta should be reformed and improved.

This survey should help us understand:

- i. how important public procurement is to you;
- ii. your perceptions on public procurement; and
- iii. whether certain aspects of public procurement are, according to you, working well.

It should take you more than 10 minutes to complete this survey.

You are also allowed to add additional feedback after each section, which is strongly encouraged if you do find the time.

***Required**

ABOUT YOUR BUSINESS

1. What sector do you operate in?*

Check all that apply.

- ☐ Aviation (including Maintenance)
- ☐ Banking/credit
- ☐ Building & Construction
- ☐ Education (including ELT sector)
- ☐ Healthcare
- ☐ Hospitality and restaurants
- ☐ Importation, distribution and wholesale
- ☐ Information Technology (including software and other high-tech companies)
- ☐ Insurance/reinsurance
- ☐ Logistics (including shipping)
- ☐ Manufacturing
- ☐ Media & entertainment
- ☐ Other Financial Services
- ☐ Other Services (nonfinancial)
- ☐ Professional services/consulting
- ☐ Real estate
- ☐ Remote Gaming
- ☐ Retail
- ☐ Telecommunications

2. What was the business' yearly turnover in 2019?*

Mark only one circle.

- ☐ ≤ € 2 million
- ☐ ≤ € 10 million
- ☐ ≤ € 50 million

3. What is the number of persons the company employs?*

Mark only one circle.

- ☐ < 10
- ☐ < 50
- ☐ < 250
- ☐ > 251

YOUR BUSINESS & PUBLIC PROCUREMENT

4. What is the proportion of your revenue generated from public contracts?*

Mark only one circle.

- ☐ 100%
- ☐ 80%
- ☐ 60%
- ☐ 40%
- ☐ 20%
- ☐ 10%
- ☐ None or negligible

5. How long has the company been tendering for?*

Kindly respond in terms of years

6. With which Ministerial Procurement Units do you tender the most?

Check all that apply.

- ☐ OPM Office of the Prime Minister
- ☐ MFH Ministry for Health
- ☐ MFEA Ministry for Foreign and European Affairs
- ☐ MFIN Ministry for Finance and Financial Services
- ☐ MEW Ministry for Energy and Water Management
- ☐ MEDE Ministry for Education and Employment
- ☐ MHAL Ministry for the National Heritage, The Arts and Local Government
- ☐ MSD Ministry within the Office of the Prime Minister
- ☐ MTIP Ministry for Transport, Infrastructure and Capital Projects
- ☐ MFCS Ministry for The Family, Children's Rights and Social Solidarity
- ☐ MJEG Ministry for Justice, Equality and Governance
- ☐ MAFA Ministry for Agriculture, Fisheries and Animal Rights
- ☐ MSA Ministry for Social Accommodation
- ☐ MEIB Ministry for The Economy, Investment and Small Businesses MTCP Ministry for Tourism and Consumer Protection
- ☐ MECP Ministry for The Environment, Climate Change and Planning
- ☐ MGOZ Ministry for Gozo
- ☐ MHSE Ministry for Home Affairs, National Security and Law Enforcement
- ☐ Other:

7. With which other Contracting Authorities do you tender the most?

Check all that apply.

- ☐ Central Procurement and Supplies Unit (CPSU)
- ☐ Infrastructure Malta
- ☐ Transport Malta
- ☐ Malta Information and Technology Agency (MITA)
- ☐ Identity Malta Agency
- ☐ Individual Investor Programme - IIP Agency
- ☐ Institute for Education Agency - Advisory Board

- ☐ Malta Residency Visa Agency
- ☐ National Literacy Agency
- ☐ Servizz.gov
- ☐ Aġenzija Support
- ☐ Aġenzija Żgħira
- ☐ Malta Council for Science and Technology Agency (MCST)
- ☐ Malta-EU Steering and Action Committee (MEUSAC)
- ☐ Court Services Agency
- ☐ Legal Aid Agency
- ☐ Agriculture and Rural Payments Agency
- ☐ Correctional Services Agency
- ☐ The Energy and Water Agency (EWA)
- ☐ Local Enforcement Systems Agency
- ☐ Resources, Recovery and Recycling Agency
- ☐ Agricultural Bioresources Agency
- ☐ Enemalta plc
- ☐ Water Services Corporation (WSC)
- ☐ Foundation for Tomorrow's Schools
- ☐ Malta Financial Services Authority (MFSA)
- ☐ Malta Gaming Authority (MGA)
- ☐ Projects Malta Limited / Projects Plus Limited
- ☐ Social Projects Management Limited (SPM)
- ☐ Armed Forces Malta
- ☐ Malta Police Force
- ☐ Civil Protection Directorate
- ☐ Sport Malta
- ☐ Malta Tourism Authority
- ☐ Other:

8. Do you tender for the following public contracts?*

Check all that apply.

- ☐ Works Contracts
- ☐ Service Contracts
- ☐ Supplies Contracts
- ☐ Renting/Purchase of Immovable Properties
- ☐ Concessions
- ☐ Other:

9. What is generally the award criteria used in the tenders you participate in?*

Mark only circle.

- ☐ Price Only ("cheapest priced offer satisfying the administrative and technical criteria")
- ☐ Best Price-Quality Ratio (BPQR) / Most Economically Advantageous Tender (MEAT)
- ☐ A mix of both
- ☐ Other:

YOUR PERCEPTIONS ABOUT PUBLIC PROCUREMENT

10. Do you find that bids are evaluated fairly and equally by evaluation committee?*

Mark only one circle.

- ☐ Always
- ☐ Most of the times
- ☐ Sometimes
- ☐ Rarely
- ☐ Never

11. Do you find that procurement procedures are conducted, evaluated and awarded transparently?*

Mark only one oval.

- ☐ Always
- ☐ Most of the times
- ☐ Sometimes
- ☐ Rarely
- ☐ Never

12. Do you find that tenders issued promote genuine competition?*

Mark only one circle.

- ☐ Yes. Tenders are genuine opportunities for all players on the market to participate
- ☐ No. Tender specifications are drafted in such a way that competition is artificially narrowed.
- ☐ I don't know

13. What is your trust rating in the Department of Contracts?*

Please indicate your score below with 5 being the highest score.

Mark only one oval.

	1	2	3	4	5	
NO TRUST	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	BLIND TRUST

14. What is your trust rating in Ministerial Procurement Units?*

Please indicate your score below with 5 being the highest score.

Mark only one oval.

	1	2	3	4	5	
NO TRUST	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	BLIND TRUST

15. What is your trust rating in other Contracting Authorities (i.e. MITA, Infrastructure Malta, Transport Malta)?*

Please indicate your score below with 5 being the highest score.

Mark only one oval.

	1	2	3	4	5	
NO TRUST	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	BLIND TRUST

16. What is your trust rating in ePPS / eTenders?*

Please indicate your score below with 5 being the highest score.

Mark only one oval.

	1	2	3	4	5	
NO TRUST	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	BLIND TRUST

17. What is your trust rating in the Public Contracts Review Board?*

Please indicate your score below with 5 being the highest score.

Mark only one oval.

	1	2	3	4	5	
NO TRUST	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	<input type="radio"/>	BLIND TRUST

PRELIMINARY STAGES OF PROCUREMENT

18. Do you think that contracting authorities should make public future procurement opportunities before tenders are issued in due course?*

Mark only one circle.

- ☐ Yes
- ☐ No

19. What is in your opinion the level of market research and studies made by contracting authorities before issuing competitive tender procedures?

Mark only one circle.

- ☐ None are done
- ☐ Inadequate
- ☐ I don't know
- ☐ Adequate
- ☐ Very good

20. Did you ever participate in any Preliminary Market Consultation or prior market study?*

Mark only one circle.

- ☐ Yes
- ☐ No

21. If you replied "Yes" to the question on the participation in Preliminary Market Consultation, please let us know what was the proportion of competitive tender procedures which were issued after that.

Mark only one oval.

- ☐ None
- ☐ Around 25%
- ☐ Around 50%
- ☐ Around 75%
- ☐ All the time

22. If you replied "Yes" to the question on the participation in Preliminary Market Consultation, please let us know whether you perceived the exercise as useful or otherwise:

Mark only one circle.

- ☐ Very useful. Our feedback on market solutions available was considered by the contracting authority in the competitive tender process issued afterwards.
- ☐ Somewhat useful
- ☐ Neutral
- ☐ Waste of time. Our feedback was ignored by the contracting authority. The contracting authority did not issue any competitive tender procedure afterwards.

23. If you replied "Yes" to the question on the participation in Preliminary Market Consultation, let us know if you are comfortable disclosing the following information about your business and your solution:

Check all that apply.

- ☐ Financial consideration for the solution
- ☐ Proprietary information about the solution
- ☐ Identification of prospective suppliers or subcontractors

24. Do you find tender dossier and procurement documentation to be well drafted?*

Mark only one circle.

- ☐ Yes, always
- ☐ Most of the times, depending on the contracting authority
- ☐ Not at all

25. Do you think that the right expertise and competence is sourced for the drafting of tender dossiers and technical specifications?*

Mark only one circle.

- ☐ Yes
- ☐ No
- ☐ I don't know

26. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

PRIOR TO CLOSING OF TENDERS

27. Do you submit requests for clarifications in response to a competitive tender procedure?*

Mark only one circle.

- ☐ Yes, all the time
- ☐ Most of the times
- ☐ Not always
- ☐ Never

28. If you do submit requests for clarifications in response to a competitive tender procedure, do you clarifications posted address your request?

Mark only one circle.

- ☐ Yes. Clarifications posted are generally helpful and address any concern raised.
- ☐ No. Clarifications posted generally skirt around the issue, badly drafted or simply fail to consider sensible suggestions.

29. Do you find that the time limit to submit a bid is reasonable?*

Please keep in mind that the minimum time-limit to submit bids is around 30 days from date of issue. Mark only one oval.

- ☐ Yes
- ☐ Most of the times, it is
- ☐ No

30. Do you agree that the estimated financial value of the public contract is now declared in the tender dossier?*

Mark only one oval.

- ☐ Yes
- ☐ No

31. The estimated financial value of the public contract is generally:

Check all that apply.

- ☐ The value is unrealistically low probably based on the past contract or an outdated market study
- ☐ The value does not always match the onerous tender specifications selected by the contracting authority
- ☐ The value generally matches the average price of the solutions on the market
- ☐ The value is inflated where most solutions on the market are cheaper

32. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

EVALUATION AND TRANSPARENCY

33. Do you agree with requests for the rectification of documents submitted with the bid?*

Mark only one circle.

- ☐ Yes
- ☐ No
- ☐ I don't know

34. If you replied "Yes" to the previous questions, indicate which documents should be, in your view, subject to rectification?

Check all that apply.

- ☐ European Single Procurement Document (ESPD)
- ☐ Standard Declarations or Forms requested by the Tender
- ☐ Key Expert Forms
- ☐ Technical Literature
- ☐ Financial Bid Form
- ☐ Technical Offer

35. If you have participated in a tender with a Best Price-Quality Ratio (BPQR) formula, do you find that the evaluation was made:

Mark only one circle.

- ☐ Objectively
- ☐ Subjectively
- ☐ I don't know

36. If you have participated in a tender with a Best Price-Quality Ratio (BPQR) formula, do you agree that it was effective to reward quality over price?

Mark only one circle.

- ☐ Yes
- ☐ No
- ☐ I don't know

37. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

BLACKLISTING

38. Do you think that bidders are being actually blacklisted from competitive tender procedures?*

Mark only one circle.

- ☐ Yes
☐ No
☐ I don't know

39. Do you think that Malta's framework of blacklisting of bidders is an effective deterrent against illegal conduct?*

Mark only one circle.

- ☐ Yes
☐ No
☐ I don't know

40. Do you think that bidders who have not paid all of their dues in terms of tax and social security should be allowed to participate in competitive tender procedures?*

Mark only one circle.

- ☐ Yes
☐ I don't know
☐ No

41. Have you ever heard about the Commercial Sanctions Tribunal?*

Mark only one circle.

- ☐ Yes
☐ No

42. If you replied "Yes" to the previous question, please let us know any feedback on the Commercial Sanctions Tribunal.

43. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

POLICY OBJECTIVES & PUBLIC PROCUREMENT

44. Which environmental factors do you deem important in public procurement?

Check all that apply.

- ☐ Circular Economy
☐ Green Public Procurement
☐ Bio-based Products
☐ Environmental Protection

45. Which social and economic factors do you deem important in public procurement?

Check all that apply.

- ☐ Social Return on Investment (SROI)
☐ Social Conditions in Global Supply Chains
☐ Social Inclusion
☐ Innovation
☐ Competitiveness
☐ Development of SMEs

46. Which labour factors do you deem important in public procurement?

Check all that apply.

- ☐ Equality
☐ Job Creation
☐ Social Inclusion
☐ Minimum Wage Requirements

47. Do you think that these environmental, social and labour factors are given the right importance in public procurement in Malta?

Mark only one circle.

- ☐ Yes
☐ Sometimes
☐ Not at all

48. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

REMEDIES AND PUBLIC PROCUREMENT

49. Do you find that cases handled by the Public Contracts Review Board (PCRB) are handled efficiently in terms of time?*

Mark only one circle.

- ☐ Always
- ☐ Most of the times
- ☐ Rarely
- ☐ Never

50. Do you find that the process before the PCRB is fair and that the parties are treated equally?*

Mark only one circle.

- ☐ Always
- ☐ Most of the times
- ☐ Rarely
- ☐ Never

51. Do you think that current remedies are effective against illegal direct orders awarded by contracting authorities?*

Mark only one circle.

- ☐ Yes
- ☐ No

52. (Optional) Feel free to add any further comments relevant to the subject-matter of this section.

POST-AWARD

53. Did you ever decide not to participate in a tend because the performance obligations in the General Conditions and Special Conditions were onerous, unfair and/or unreasonable?*

This is a multiple choice Mark only one circle.

- ☐ Yes
- ☐ No
- ☐ I don't know

54. What proportion of the estimated quantities indicated in the Tender should be purchased by the contracting authority?

Mark only one circle.

- ☐ None, the contracting authority should reserve the discretion to order as much of the estimated quantities as it wishes
- ☐ 25%
- ☐ 50%
- ☐ 75%
- ☐ 100%.
- ☐ The contracting authority should be liable to purchase all estimated quantities since the price is calculated on that basis.

55. Do you think that contracting authorities monitor the performance of the public contract by the Successful Bidder effectively?*

This is a multiple choice. Check all that apply.

- ☐ Yes, always
- ☐ No, never
- ☐ It depends on the contracting authority
- ☐ It depends on the economic operator
- ☐ It depends if the public contract is funded by EU funds
- ☐ I don't know

56. Where contracting authorities agree to changes in the public contract which depart from the successful bidder's original bid, what, if any, of the following should be made public to all:*

Check all that apply.

- ☐ Everything
- ☐ Changes in the Financial Value of the Contract
- ☐ Change of Contractor
- ☐ Changes in Subcontractors, Key Experts, Suppliers
- ☐ Changes in the Product / Solution Nothing

57. Should you wish to leave your email to be consulted further on public procurement, kindly leave your email below.



