



Before filling in this form, please read 'How to submit a complaint to the European Commission':

https://ec.europa.eu/assets/sg/report-a-breach/complaints_en/

All fields with * are mandatory. Please be concise and if necessary continue on a separate page.

1. Identity & contact details

(This complaint has been sent by Partit Demokratiku MPs, Dr. Godfrey Farrugia and Dr. Marlene Farrugia)

2. How has EU law been infringed?*

	Authority or body you are complaining about:
Name*	Ministry for Family, Children's Rights and Social Solidarity
Address	310, Plazzo Ferreria, Republic Street
Town/City	Valletta
Postcode	VLT 1110
EU Country*	Malta
Telephone	+356 2590 3125
Mobile	
E-mail	Michael.a.falzon@gov.mt

2.1 Which **national measure(s)** do you think are in breach of EU law and why?*

- 1) Requesting the provision of a gift to the Government of Malta as a mandatory requirement for consideration and eventual award of CT 2009/2015 for a 'Public Private Partnership for the Provision of Comprehensive Services to St. Vincent de Paule Residence', without at least observing the basic principles of equality and transparency in establishing this requirement.
- 2) Negotiating only with winning Tenderer following the award of CT 2009/2015 and Varying the Public Contract by more than 50%
- 3) Failing to observe any procurement procedures whatsoever in relation to the award of one of the largest public contracts.

2.2 Which is the **EU law** in question?

Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC Text with EEA relevance, hereinafter referred to as the 'Directive'

2.2 Describe the problem, providing facts and reasons for your complaint* (max. 7000 characters):

1) Requesting the provision of a gift to the Government of Malta as a mandatory requirement for consideration and eventual award of CT 2009/2015 for a 'Public Private Partnership for the Provision of Comprehensive Services to St. Vincent de Paule Residence', without at least observing the basic principles of equality and transparency in establishing this requirement.

In November 2015 the Department of Contracts on behalf of the Ministry for the Family and Social Solidarity had issued a CfT (CT 2009/2015) for a 'Public Private Partnership for the Provision of Comprehensive Services to St. Vincent de Paule Residence', the subject of which tender was for the '*setting up of a Public Private Partnership (PPP) for the provision of comprehensive catering services to St. Vincent de Paul Long-term Care Facility (SVP), and to demolish, build and equip a fully furnished new kitchen complete with all the necessary equipment.*' This was an open procedure and the evaluation mechanism was the 'Best Price-Quality Ratio'.

San Vincenz De Paule Residence (SVP) is a hybrid between a nursing home and a hospital, fully owned and operated by the Government of Malta.

The tender included a requirement for Catering Services, the construction of a kitchen, and the provision of '*an additional offer over and above those established as mandatory in the tender document and this at no additional cost to the contracting authority*'. [added emphasis]

The tender document stated that '*the added investment should be able to enhance...care at SVP. Such Additional offer shall be of a type and nature compatible with the requirements of Saint Vincenz de Paul. Due consideration should be given to SVP's role and shall be described in detail in the tenderer's offer. Offers shall also be fully costed at market price and certified by a warranted independent auditor in order to enable the Contracting Authority to be in a position to confirm the market price of the item being offered. At the end of the contract agreement the additional investment shall become the property of the Contracting Authority at no extra cost* [added emphasis]. Therefore Tenderers are requested to submit a detailed proposal of additional investment and a cost report certified by a warranted independent auditor.'

Effectively, through this requirement the Contracting Authority and the Ministry for Family and Social Solidarity were eliciting the provision of a gift, couched as an 'Additional Investment', out of the prospective tenderers, without providing any technical guidelines or specifications for that requirement, when that 'additional investment' requirement made up 60% of the financial bid.

Two consortia participated in this bid, the CCE Joint Venture with an offer of € 47.7m + Additional Investment and the consortium made up of James Caterers Limited and Malta Healthcare Caterers Limited with an offer of € 58m + Additional Investment. The following appeals on the technical criteria, the Evaluation Committee recommended that the tender was to be awarded to the consortium made up of James Caterers Limited and Malta Healthcare Caterers Limited despite this offer being about € 10m more expensive than that of the CCE Joint Venture.

This contract was awarded to this consortium on the 4th April 2017 for € 15,760 excl. Vat per day for a 10 year period (totalling therefore to circa € 58,000,000) whilst the consortium had to provide an additional investment of circa € 29,280,000 consisting of constructing two blocks to house residents within the SVP, increasing capacity by 252 new beds. This contract was only signed on the 14th November 2017.

The principle of equal treatment in the award of contracts necessitates the transparency that allows all tenderers to be reasonably informed of the criteria that will be applied in the contract award decision.

Transparency is a corollary of the principle of equal treatment and *implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the contract notice or specifications so that, first, all reasonably informed tenders exercising ordinary care can understand their exact significance and interpret them in the same way, and, second, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the contract in question* – Pizzo, C-27/2015, EU:C:2016:404 [36]

“the principles of transparency and equal treatment which govern all procedures for the award of public contracts require the substantive and procedural conditions concerning participation in a contract to be clearly defined in advance and made public, in particular the obligations of tenderers, in order that those requirements may know exactly the procedural requirements and be sure that the same requirements apply to all candidates” – Pizzo[37]

The onus to do this lies squarely with the Contracting Authority.

One fails to understand how ‘enhancing..care at SVP’ could remotely be considered to be a transparent requirement. This requirement is therefore in breach of the general principles of equal treatment, transparency, lack of discrimination and proportionality indicated in Article 18 of the Directive. It is further submitted that the lack of clear specifications on this ‘Additional Investment’ requirement has served to artificially narrow competition – to the extent that only two tenderers deemed it appropriate to participate in this CfT.

2) Negotiating only with the winning tenderer following the award of CT 2009/2015 and Varying the Public Contract by more than 50%

It appears that, after the award of this contract in April 2017, and before the signing of the same in November 2017, the Government of Malta entered into negotiations with the consortium and the offer for ‘Additional Investment’ was doubled with the consortium offering to build four blocks to house residents instead of the original two blocks, and doubling the new beds to 504. The Contracting therefore appears to have entered into negotiations with the winning tenderer after the conclusion of the award, and varying the contract by more than 50% before the works had even commenced. The change in the ‘Additional Investment’ component is evidenced by the fact that SVP had applied with the Planning Authority in January 2018 for the construction of 4 blocks to house over 500 beds.

The modification in question resulted in an increase in the ‘Additional Investment’ by circa 100% of the original offer which in turn varies the value of the offer made by the Consortium by more than 50%, and further extended the scope of the contract considerably in terms of Article 72(4)(c) of the Directive thereby necessitating a new procurement procedure in terms of Article 72(1). In addition to this, this modification exceeds both the thresholds set out in Article 4 and 10% of the initial contract value, thereby a new procurement procedure ought to have been carried out also in terms of Article 72(2) of the Directive. [Ref also to Preambles 107-109 of the Directive]

3) Failing to observe any procurement procedures whatsoever in relation to one of the largest public contracts

The Ministry for Family, Children’s Rights and Social Solidarity, awarded a Direct Order Reference Number SVP 943, for the ‘Management Services of New Hospital/Residence (Part of Public Private Partnership)’ in favour of the consortium formed by James Caterers Limited and Malta Healthcare Company Limited for a contract value (Excl. Vat) of € 273,649,698, which services are to be

rendered at the San Vincenz De Paule Residence.

This contract was approved on the 9th November 2017, **five days before the contract with the same consortium for the tender it had originally submitted was signed.** Despite this direct order for a public contract having been awarded in November 2017, it was only published on the Government Gazette 8 months later on the 20th July 2018.

No procedures for procurement were taken by the contracting authority in respect to this public contract for the supply of products and/or the provision of services.

Such a contract falls clearly within the purview of Article 3 of the Directive and is significantly greater than the thresholds established in Article 4. Thus there is no justifiable reason why this process could not be carried out through the procurement process.

Note also that the circumstances at hand do not allow for the use of the negotiated procedure without publication in terms of Article 32 of the Directive. There is no scenario in which the 'Management Services of a New Hospital/Residence' could only be carried out by what was originally a catering consortium. Therefore this is clearly not the case where these supplies or services can be provided 'only by a particular economic operator where competition is absent for technical reasons or due to the protection of exclusive rights'; nor was there any extreme urgency to justify this decision or indeed any of the other reasons indicated in Article 32. The contract in question did not follow a design contest and the rules of that contest did not in any manner indicate that the winner of that contest would be entitled to the public service contract in question.

2.4 Does the Country concerned receive (or could it receive in future) EU funding relating to the subject of your complaint?

Yes, please specify below No I don't know

2.5 Does your complaint relate to a breach of the EU Charter of Fundamental Rights?

The Commission can only investigate such cases if the breach is due to national implementation of EU law.

Yes, please specify below No I don't know

3. Previous action taken to solve the problem*

Have you already taken any action in the Country in question to solve the problem?*

IF YES, was it: Administrative Legal ?

3.1 Please describe: (a) the body/authority/court that was involved and the type of decision that resulted; (b) any other action you are aware of.

This matter was reported to the Public Accounts Committee (PAC) and a request was made for a discussion on this topic and for an investigation to be carried out by the Auditor General.

IF NOT please specify below as appropriate

- Another case on the same issue is pending before a national or EU Court
- No remedy is available for the problem
- A remedy exists, but is too costly
- Time limit for action has expired
- No legal standing (not legally entitled to bring an action before the Court) please indicate why:

It is highly debatable whether the complainants, or any other third party would have legal standing before a Court of Law to challenge the award of the Contract CT 2009/2015. In addition to this, a Maltese court of law is likely to deem the award of the said contract as well as the award of the direct order as *res inter alios acta* for the complainants, thereby limiting the possibility of challenging the same.

- No legal aid/no lawyer
- I do not know which remedies are available for the problem
- Other – specify

4. If you have already contacted any of the EU institutions dealing with problems of this type, please give the reference for your file/correspondence:

- Petition to the European Parliament – Ref:.....
- European Commission – Ref:.....
- European Ombudsman – Ref:.....

○ Other – name the institution or body you contacted and the reference for your complaint (e.g. SOLVIT, FIN-Net, European Consumer Centres)

N/A

5. List any supporting documents/evidence which you could – if requested – send to the Commission.

 Don't enclose any documents at this stage.

1. Contract Notice for CT 2009/2015
2. Tender Document for CT 2009/2015
3. Decision of the Public Contracts Review Board following Objection filed by CEE Joint Venture
4. Decision of the Court of Appeal following appeal filed by CEE Joint Venture – Appeal Dated 14th February 2017
5. Planning Application for the proposed excavation of site for the preparation of old people's home- filed on the 9th January 2018
6. Planning Application “to construct a 500 bed residential blocks to the long care term facility”.
7. Government Gazette of Malta dated 20th July 2018 where on page 6842, the Gazette states that according to SVP943, a direct order of 273,694,698 has been approved on 9.11.2017 to JCL and MHC Consortium for the Management Services of New Hospital/ Residence (Part of Public Private Partnership)
8. Newspaper cuttings from the 7th August 2018 where the Finance Minister admits that he had not approved any such direct order and learnt about it from the newspaper. - https://www.timesofmalta.com/articles/view/20180807/local/finance-minister-gets-to-know-of-274-million-direct-order-from.686217?utm_source=tom&utm_campaign=top5&utm_medium=widget
9. Letter to the Public Accounts Committee dated 12th August 2018 requesting an urgent meeting and investigation by the Auditor General
10. Parliamentary Secretary Anthony Agius Decelis claims that the publication in the Government Gazette was a mistake – Article on the Times of Malta dated 22nd August 2018 - <https://www.timesofmalta.com/articles/view/20180822/local/watch-274m-direct-order-notice-printed-in-government-gazette-a-mistake.687315>
11. Rebuttal by the Department of Information within the Office of the Prime Minister indicating that there was no mistake in the Government Gazette – Article on the Times of Malta dated 23rd August 2018 - <https://www.timesofmalta.com/articles/view/20180823/local/we-made-no-mistake-on-direct-order-doi.687371>
12. Letter sent to Members of Parliament dated 23rd August 2018 and newspaper cuttings from the 25th August in relation thereto - <https://www.timesofmalta.com/articles/view/20180824/local/democratic-party-calls-out-mps-for-inaction-over-svpr-direct-order.687491>
13. Newspaper cutting reporting that the Government has accepted the request for the Auditor General to probe the elderly home contract dated 24th August 2018 - <https://www.maltatoday.com.mt/news/national/89022/government-accepts-godfrey-farrugias-call-for-auditor-general-to-probe-elderly-home-contract-#.W4Em58KxXIV>

6. Personal data*

Do you authorise the Commission to disclose your identity in its contacts with the authorities you are lodging a complaint against?

Yes No

 In some cases, disclosing your identity may make it easier for us to deal with your complaint.