

PUBLIC CONTRACTS REVIEW BOARD

Case 2057 – CT3021/2023 – Framework Contract for the Supply and Maintenance of Energy Efficient Laptop Computers for Year 7 Students in Malta and Gozo

13th February 2025

The Board,

Having noted the appeal filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Newtech Limited, (hereinafter referred to as the appellant) filed on the 30th August 2024;

Having also noted the letter of reply filed by Dr Maurice Meli acting on behalf of the Foundation for Tomorrow Schools (hereinafter referred to as the Contracting Authority) and Dr Audrey Marlene Buttigieg Vella, acting on behalf of the Department of Contracts, filed on the 6th September 2024;

Having heard and evaluated the testimony of the witness Mr Franco Costa (Chairperson of the Evaluation Committee) as summoned by Dr Clement Mifsud Bonnici acting for Newtech Limited;

Having heard and evaluated the testimony of the witness Mr Keith Cutajar (Technical Expert) as summoned by Dr Clement Mifsud Bonnici acting for Newtech Limited;

Having heard and evaluated the testimony of the witness Mr Joseph Miceli Demajo (Representative of Newtech Limited) as summoned by Dr Clement Mifsud Bonnici acting for Newtech Limited;

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

Having noted and evaluated the minutes of the Board sitting of the 9th January 2025 hereunder-reproduced.

Minutes

Case 2057 – CT 3021/2023 – Framework Contract for the Supply and Maintenance of Energy Efficient Laptop Computers for Year 7 Students in Malta and Gozo

The tender was issued on the 19th July 2023 and the closing date was the 10th August 2023.

The estimated value of this tender, excluding VAT, was € 26,089,240.

On the 30th August 2024 Newtech Ltd filed an appeal against the Foundation for Tomorrow's Schools objecting to their disqualification on the grounds that their bid was not technically compliant and at the subsequent cancellation of the tender.

A deposit of € 50,000 was paid. There were five bids.

On the 9th January 2025 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Vincent Micallef and Mr Lawrence Ancilleri as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Newtech Ltd

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Joseph Miceli Demajo	Representative

Contracting Authority – Foundation for Tomorrow’s Schools

Dr Maurice Meli	Legal Representative
Mr Franco Costa	Chairperson Evaluation Committee
Mr Julian Cassar	Evaluator
Mr Simon Mallia	Evaluator
Mr Neil Attard	Evaluator
Mr Mario Borg Martin	Representative

Interested Party – Avantis Education

Mr David Rizzo	Representative
Mr David Mann	Representative (Online)

Department of Contracts

Dr Audrey Marlene Buttigieg Vella	Legal Representative
Ms Marisa Gauci	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited submissions.

Dr Maurice Meli Legal Representative for the Foundation for Tomorrow’s Schools, (FTS) (the Contracting Authority) on a point of procedure pointed out that Documents A14 and A15 filed at the last minute by the Appellant should not be accepted as they were unauthenticated and the authors could not be cross examined.

Dr Mifsud Bonnici Legal Representative for the appellant (Newtech Ltd) said that the documents referred to were articles from journals or information obtained from websites and it was up to the Board to decide if they should be accepted.

The Chairman said that the Board does not agree that the documents should be expunged and it was up to the Board to decide on their relevance after hearing submissions thereon. He invited submissions on the merits of the case.

Dr Mifsud Bonnici said that the full written submissions make the appellant’s position very clear. The application of the principle of proportionality applies on the first two grievances whilst the third and fourth grievances deal with disclosure of information request and the re-issue of the rejection letter. It is to be noted that a few months after the issue of this tender an exactly similar tender was issued under the guise of the Ministry of Education, whilst the current tender was still active and on stand-still. The second tender was eventually cancelled and hence this shows the need for this tender to be heard expeditiously so as not to obstruct the provision of the laptops. The fact that this procurement is EU funded and that there is the need for the laptops are factors in favour of seeking an expeditious decision.

Dr Meli said that the Authority's position is very clear – the crucial starting point is that the sample delivered was not what the tender requested. Whilst the point regarding funds is appreciated the tender must be decided on points of law.

Dr Mifsud Bonnici requested the hearing of witnesses.

Mr Franco Costa (345774M) called to testify by the appellant stated on oath that he was the Chairperson of the Tender Evaluation Committee (TEC) and Head of Procurement at FTS with an IT background and had been responsible for compiling the tender document. He stated that the TEC consisted of himself, a Secretary and three evaluators all members of the Information Management Unit. Five offers in all had been received with the evaluation starting about a week after the closing date of the tender. Witness described the process of how this evaluation was carried out over six or seven meetings. The Secretary kept notes on these meetings based on the tender templates. Rectifications/clarifications were sought from the appellant company on 1st September, 28th September, 30th November 2023 and on the 15th March 2024 on the financial offer.

Witness went on to explain that there was at the technical stage, a divergence of opinion among the TEC members regarding the Forestals' bid, which was the cheapest. The matter was referred to the General Contracts Committee (GCC) and a sample was requested from Forestals around September/October 2023. The GCC in turn referred the matter to the State Advocate who advised that the Forestals offer had to be disqualified. Newtech therefore now became the cheapest offer and the TEC was advised by the State Advocate to re-evaluate this bid. A sample was requested around March/April 2024. Sample was only requested from the cheapest bid in line with the 'usual norm' at FTS. Witness confirmed that he was not aware that once samples were requested then the request had to apply to all bidders as laid down in the Standard Operating Procedures (SOP) on tenders. He also confirmed that the evaluation was active at all times until the final decision was made and that no clarification was permissible on the sample submitted as this was a Note 3 submission.

Questioned by Dr Meli, witness stated that the delay in asking Newtech for a sample was due to the serious reasons in having to seek advice. From examining the sample, which had to be submitted within five working days, it was obvious that the it did not have a UK keyboard as required in the tender and although the difference was minimal it could not be accepted as it did not comply with what had been offered. There was no issue by Newtech in providing the sample in time.

In reply to further questions by Dr Mifsud Bonnici, witness said that the TEC had not agreed to the request, on the 24th July 2024, for a one day extension to provide the sample for the simple reason that this would have infringed the tender terms.

Mr Keith Cutajar (98288M) called to testify by the appellant stated on oath that he was a professional IT consultant with a Masters degree obtained in the UK, was a Court expert on IT matters and had IT business experience. He explained graphically the differences between UK and US QWERTY keyboards – these being in the Entry, Shift and Function buttons. Some of the shortcut buttons vary in their positioning but the alphabet and numbers are in the same positions in both keyboards. The keycaps can be swapped through use of overlay stickers and at the installation stage the region of residence is requested so that the computer can adjust accordingly – this is not a complex process.

In reply to questions from Dr Meli, witness confirmed that there was a difference in the buttons between the two keyboards, with US keyboards following US authority's guidelines and UK keyboards following British ISO standards. MITA and the NCC are moving towards adopting Government Information Security standards. The Maltese ž and the ampersand are placed differently and at opposite ends this however makes no difference when one is touch typing. Activation points also make

no difference because nowadays most keyboards are mass produced for all brands. If one is using foreign symbols all the time then the keyboard has to be changed accordingly.

Mr Joseph Miceli Demajo (231584M) called to testify by the appellant stated on oath that he is a Director of Newtech and the Chief Executive Officer of the Demajo Group with a B.Sc. in Computer and Information Systems and an MBA. He acted as a consultant in the preparation of the tender bid which was submitted on the 10th August 2023. He confirmed that the appellant had received five clarification/rectification requests but was not requested by the Contracting Authority to extend the validity of their offer. On receiving the request for a sample appellant company contacted Lenovo to provide it and this was airfreighted from China with rushed customs clearance to meet the five day deadline. The requested one day extension was not granted by the Authority. Appellant believed that it had already passed the technical evaluation so it was rather surprised when the request for a sample was received. Witness further stated that the sample was rejected as it had a US keyboard. The letter of rejection and cancellation of the tender followed.

In reply to questions from Dr Meli, witness stated that the original sample had been returned to the manufacturer as it was bound by agreement to send it back. The first sample was an exact equivalent to what was submitted later bar the keyboard.

At this stage the witness was asked to withdraw to allow the lawyers to discuss legal points on a letter submitted by appellant with the sample. The Board directed that the letter could be considered even though it was not part of the original submissions.

Dr Meli referred the witness to the letter submitted by Newtech signed by Mr K Schembri, General Manager. Witness stated that Mr Schembri was a consultant on the tender submission but could shed no further light as he had no involvement in the production of that letter. As far as he knew the Authority had already confirmed the validity of their technical offer and had found no issues.

This concluded the testimonies.

Dr Calvin Calleja Legal Representative for Newtech Ltd said that one must consider the functional equivalent of the sample provided based on the principle of proportionality. One must focus on the sample – there are format differences between UK and US keyboards but as shown in Exhibit A15 and as confirmed by witness the keyboards are nearly identical with differences only in the positioning of the shortcuts. The problems can be easily dealt with through using stickers and also by simply switching software solutions.

Dr Mifsud Bonnici stated that although the sample is not compliant with the technical offer, the appellant would supply UK keyboards if awarded the contract. In any case as proven the difference between the keyboard is minimal. This is where the proportionality principle comes in as there is equivalence in the offer. There was an opportunity to clarify to ensure that a UK keyboard would be offered but the Contracting Authority chose the most onerous route and on a proportionate basis was the worst one to choose to reach their objectives. This case is a prize example to test the extremities of the proportionality concept. It is not just or fair to disqualify on a simple and venial matter like this. The Authority's approach was to take their time to evaluate but then to pressure the individual bidder.

The framework on the tender process is clear said Dr Mifsud Bonnici. The first ninety day period was used for the bulk of clarifications and rectifications with the evaluation stage practically complete. Three months later - during which time appellant felt no need to retain a sample, having successfully gone through the technical evaluation the appellant receives a financial clarification requesting a sample within five days – totally disproportionate. The principle here is that if a sample is requested

it should be sought from all bidders. General Rules 16.4 clearly state that if appellant passes the technical stage, then it has legitimate expectation that it goes on to the financial stage. The proportionate rule is not absolute and cannot override an appellant from being treated fairly, however Forestals were requested to provide samples in the first 90 days – the appellant in 11 months. The SOP clearly states that if samples are sought then they must be sought from everybody.

The offer by appellant was € 11 million cheaper than the estimated value of the tender, said Dr Mifsud Bonnici. A subsequent tender issued did not reduce the estimated value and one might ask if the Authority was expecting someone to come up with that price. This is all the more reason not to cancel the tender when there is a lower offer. A performance condition was that the laptops had to be provided within 15 weeks: this makes the five day request 11 months later appear ridiculous. The claimed EU funding aspect makes it more imperative to try and save the bid. On the preservation of competition Court of Appeal Cases *Melchior Dimech vs Ministry for Finance* (429/23/1) and *Polaris* (329/23/1) support the principle of not cancelling and of proportionality.

As regards the Newtech letter produced at the last minute, concluded Dr Mifsud Bonnici, this case involved much work and it is not acceptable to produce fresh documents at the last minute. In any case the sample provided is still equivalent to 8GB minimum and that is what was offered. One gets the impression that the Authority wants to disqualify appellant at all costs.

Dr Meli said that the Authority has no interest in disqualifying any bidder: its interest is in ensuring that it follows certain boundaries which were clear from the start, namely that the keyboard had to have a UK layout and that samples had to be delivered within five days. The sample provided does not meet the Financial Bid – there are a number of decisions confirming that tender requirements have to be fully met, and this is not a matter of functional equivalence. Testimony has been heard that the position of certain keys is different and the layout is not functionally equivalent. It is only fair that what is provided is what has been requested, especially bearing in mind that these laptops are to be used by children. To be fair rules have to be followed as change of rules could otherwise have opened the tender to other bidders. Mr Cutajar, in his testimony, conceded that changes to the keyboard are necessary to make it compliant. Tenders cannot be stretched and manipulated to make the appellant's bid compliant. In the *Signal 8 Security Services* Case it was held that tender conditions have to be faithfully followed whilst in the *Projekte Global vs Marsascala Local Council* Case it was stated that the hands of the Contracting Authority are tied by the terms of the tender and there was no leeway. The proportionality concept cannot be abused and the principle cannot be manipulated to fit this case. The Authority had no alternative but to cancel the tender as the offer and the sample do not match.

Dr Mifsud Bonnici said that what is clear is that the terms of the tender were not followed as there was no equality in requesting samples. After a certain stage the appellant was right in assuming that the original sample could be returned.

Dr Meli concluded by saying that there is one simple question to be answered here – why provide a sample which did not meet the requirements? and no reply has been provided to this question.

There being no further submissions the Chairman thanked the parties and declared the hearing closed.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 9th January 2025.

Having noted the appeal

filed by Newtech Limited (hereinafter referred to as the Appellant) on 30th August 2024, refers to the claims made by the same Appellant with regard to the tender of reference CT3021/2023 listed as case No. 2057 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Antoine Cremona, Dr Clement Mifsud Bonnici &

Dr Calvin Calleja

Appearing for the Contracting Authority: Dr Maurice Meli

Appearing for the Department of Contracts: Dr Audrey Marlene Buttigieg Vella

Whereby, the Appellant contends that:

a) ***First Ground of Appeal: The Appellant's sample was technically compliant and functionally equivalent to technical specifications***

The Contracting Authority decided that the laptop sample submitted by the Appellant was technically non-compliant because it had an in-built QWERTY US keyboard rather than a QWERTY UK keyboard. The Appellant submits that the Contracting Authority's decision on this issue is wrong and unlawful. This for the following reasons.

First, a QWERTY UK keyboard and a QWERTY US keyboard are functionally equivalent and the differences between the two are negligible and of no consequence to the functionality of the laptop. The functional equivalence is self-evident from a quick look at both keyboards, but, in any case, it shall be proven in due course in these proceedings.

Second, the Contracting Authority was bound to accept the sample in so far as its characteristics are functionally equivalent to the technical specification requested in the Tender. The Contracting Authority is so bound by law and also by Rule 5.6 of the General Rules Governing Tenders.

Third, the Contracting Authority's interpretation and application of the technical specification for an *"in-built QWERTY UK keyboard"* with respect to the Appellant's submitted sample is wrong on account that:

- a. technical specifications are meant to *"lay down the characteristics required of a [...] supply"*.
- b. these characteristics must be "proportionate" to the value and objectives of the contract.
- c. technical specification should be drafted in terms of functional and performance

requirements. QWERTY UK and US keyboard are equivalent from a functional and performance perspective. The Contracting Authority's failure to consider a QWERTY US keyboard as functionally equivalent to a QWERTY UK keyboard is inconsistent with the technical specifications as drafted and disproportionate to the significant value and stated objective of the Tender.

Fourth, and while the Appellant has undertaken to deliver a laptop with an in-built QWERTY UK keyboard in its Technical Offer Form submitted in August 2023, the Contracting Authority failed to consider the fact that the Appellant was expected to submit a laptop sample in July 2024: a. within 5 working days from the request of the tender evaluation committee; b. 11 months after the submission of the Appellant's bid in August 2024; c. after being put on notice in March 2024 that its financial offer was being evaluated. This specific factual context to the case must be considered by this Honourable Board in its eventual decision.

b) ***Second Ground of Appeal: In any case, the Contracting Authority's decision to reject the Appellant's bid and to cancel the Tender is disproportionate***

Even if, for argument's sake, one had to consider that the Appellant's sample was technically non-compliant, the Appellant submits that the Contracting Authority's decision to reject the Appellant's bid is disproportionate and disregarded less onerous and intrusive measures to address the issue. Regulation 39(1) of the PPR clearly stipulates that '*contracting authorities [...] shall act in a transparent and proportionate manner.*' The principle of proportionality requires that measures adopted by contracting authorities, including those adopted during the evaluation process, do not exceed the limits of what is appropriate and necessary in order to achieve the objectives pursued and that when there exists a choice between several appropriate measures, recourse must be had to the least onerous one.

The Contracting Authority had at least two "choices" when dealing with the alleged technical non-compliance of the Appellant's sample:

- a. The first and most proportionate choice, would have been to request a clarification from the Appellant on the sample submitted and on the Appellant's undertakings in its Technical Offer Form.
- b. The second and most onerous choice was the disqualification of the Appellants bid and subsequent cancellation of the Tender.

The Contracting Authority went for the latter choice, and this constitutes a breach of the duty to act proportionately for the following reasons:

The alleged issue of technical non-compliance is, if at all, negligible "*zball venjali*"-which had no impact on the functionality of the laptop sample and which will have no impact on the Appellant's eventual performance of the contract resulting from the Tender. While the Appellant was unexpectedly requested to submit a sample within 5 working days, 11 months in the evaluation of

the Tender, the Appellant, if awarded the Tender, will be requested to supply the laptops within 15 weeks of the purchase order.

The "objective pursued" by the Tender was the selection of the cheapest bid and the supply of laptops. The evaluation committee lost sight of the objective of the Tender and exceeded the limits of what is appropriate and necessary to achieve those objectives when it rejected the Appellant's bid and opted for the cancellation of the Tender.

The rejection of the Appellant's bid and the consequent cancellation of the Tender was not necessary to preserve genuine competition in public procurement. Rather, the cancellation and re-issue of the Tender will, in the specific circumstances of this case, distort competition given that the Appellant and other economic operators had their Grand Total of the Financial Offer published.

The estimated procurement value of the Tender (circa €26 million) and the bid submitted by the Appellant (circa €15 million) are significant in value, and therefore, the Contracting Authority had more of an onerous obligation to decide responsibly and proportionately.

The Appellant's financial offer, despite being the third cheapest, represented a significant cost saving for Government given that it is nearly €11 million cheaper than the estimated procurement value of the tender. The Appellant's objection finds comfort in various decisions of this Honourable Board, the Court of Appeal and the Courts of Justice of the European Union, as shall be explained during the proceedings.

c) ***Third Ground of Appeal: The Contracting Authority did not disclose the Requested Information***

The Appellant submits that the Contracting Authority has breached its duty at law to disclose the Requested Information, and consequently, the Appellant's right to effective judicial protection is breached. The Requested Information is necessary to ensure the efficacy of the remedies framework provided in the PPR to which the Appellant is entitled. The Appellant must be aware of this information to be able to effectively scrutinise the Contracting Authority's decision to reject the Appellant's bid and to cancel the Tender. The non-confidential nature of the Requested Information is recognised at law and has been confirmed time and time again by EU and Maltese judgements alike. According to Regulation 40(2) of the PPR. The Requested Information simply does not (and cannot) constitute commercially sensitive information or a trade secret which may prejudice the legitimate commercial interests of the other economic operators, if disclosed. In fact, not one of the Requested Information concerns commercially sensitive information pertaining to other economic operators in the Tender, but rather, the Requested Information, in the most part, concerns the evaluation of the Appellant's bid. This Requested Information is essential for the Appellant to determine whether to lodge an appeal with this Honourable Board against the Contracting Authority's decision or otherwise and whether to raise additional grounds of appeal.

d) ***Fourth Ground of Appeal: The Rejection Letter should have been re-issued***

The Appellant submits that the Rejection Letter as issued by the Contracting Authority on 20 August 2024 contained a fatal mistake on the amount of the deposit payable upon filing of this present application. For this reason, the Rejection Letter should have been revoked, re-issued and the standstill period started running afresh.

The law is very clear that *"in no case shall the deposit be [...] more than fifty thousand euro (€50,000)"*. However, the Rejection Letter says that the deposit payable is €130,446-160% higher than the cap at law. This is a clear violation of the law which could have had the impact of misleading the Appellant and might have misled the other economic operators in this Tender on the import of the deposit.

The Department of Contracts amended the Schedule of Cancellation only-less than 24 hours from the deadline to appeal-and did not make any changes to standstill period. In essence, the excessive amount of deposit indicated by the Department of Contracts in the Rejection Letter, original schedule of cancellation, and presumably in every other letter of rejection sent to the other economic operators, might have misled and disheartened other economic operators from lodging an appeal. It is for this reason that the only lawful, reasonable and proportionate course of action for the Department of Contracts was the re-issuance of all Rejection Letters and the running afresh of the standstill period.

This Board also noted the Contracting Authority's and DoC's Letter of Reply filed on 6th September 2024 and their verbal submission during the hearing held on 9th January 2025, in that:

a) ***First Ground of Appeal - The Appellant's sample was NOT technically compliant and was NOT functionally equivalent to the technical specifications***

As clearly conceded by the Appellant itself, the sample laptop submitted did not incorporate a QWERTY UK keyboard as requested and specifically indicated in the Minimum Technical Specifications, specifically in page 28 of the tender document. Instead, the laptop submitted by the Appellant as a sample during the evaluation stage included a US keyboard. This, in and of itself, is enough for the Appellant's bid to be rejected. However, without prejudice to the above, the main difference between the keyboards is the positioning of a number of essential characters and symbols. The US version is based on the ANSI (American National Standards Institute) layout while the British version is based on the ISO (International Organisation of Standardisation) layout. These standards are not "equivalent standards" in terms of article 5.6 of the General Rules Governing Tenders! This is essential even in view of the fact that these laptops were to be used in the Education sector as will be shown during the hearing of these proceedings.

Nevertheless, the sample request letter published on the 4th of July 2024 clearly stated that:

“The sample Laptop must be the same model and configuration which is being proposed in the technical offer. Any sample which does not correspond with the submitted model shall be deemed as technically non-compliant.”

Therefore, there was a clear and distinct difference between the specifications of the laptop the Appellant described in the technical offer when compared to the sample it provided. Furthermore, reference is also being made to Article 16.3 of the General Rules Governing Tenders where it is being affirmed that:

“Wherever applicable in the procurement documents, and also in terms of Regulation 12 (1) (b) of S.L. 601.03, tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received. In case of different options provided by the same bidder, respective samples for respective offers should be provided as requested. Without prejudice to the possibility of requesting clarifications, where the samples do not corroborate the offer submitted, the tenderer shall be disqualified.”

The Appellant provided a sample laptop that; i. did not conform with the requirements of the tender, and ii. did not conform, as the Appellant clearly admitted, with the Appellant's own technical offer.

The Appellant knew that his laptops had US layout laptops and still declared that he is going to submit UK layouts for the tender, in a blatant attempt to mislead the Contracting Authority. The time limit imposed for the submission of the sample is entirely irrelevant when the Appellant also knew, despite that it declared the contrary, that its laptops had US layout. Furthermore, the Appellant states that the five (5) working day notice in order to supply a sample was illegal. This is once again entirely wrong. Such a time limit is not only common practice in tendering procedures but the Appellant himself was made aware of this time limit in the tender document itself even before he submitted his offer. Reference is made to para. 5. C. iii. of the Tender document found on page 8.

Therefore, the Appellant was made aware that their (sic) could be a possibility that it is requested [to supply] a sample within five (5) working days. Appellant can never claim that it was not aware of the five (5) working day time-limit as all tenderers were made aware by means of the tender document itself. Moreover, it was specifically stated that it fell under the remit of Note 3. Irrespective and without prejudice to the above Appellant still supplied a sample.

This Board as well as the Maltese Courts and the European Court of Justice have frequently held that Evaluation Committees must act in line with the principle of level-playing field and self-limitation. Thus the Evaluation Committee is bound to act in accordance with the Tender Document and has no leeway to act otherwise. The Appellant could never expect to be technically compliant when the Appellant did not provide UK layout laptops.

The Tender Document is there to be adhered to by the bidders and the Appellant should not expect that Evaluation Committee to chase the bidder for the required documents to be submitted and to adhere to the technical requirements. Afterall, when the Tender Document is clear and

requires certain documents/requirements, like the case at hand, the bidders are expected to submit them until the close of tender.

The Contracting Authority acted in full conformity with regulation 53 of S.L. 601.03 and had no other option but to reject the Appellant's bid. Doing otherwise would have been illegal, breaching the rules of fair competition and transparency, and for the reasons stated above which will be expounded upon during the hearing, this ground of appeal ought to be rejected.

- b) ***Second Ground of Appeal: The Contracting Authority's decision to reject the Appellant's bid and to cancel the tender was not only legitimate but the only option the Contracting Authority had in the circumstances and in terms of law.***

The Appellant claims that the Contracting Authority ought to have a more proportionate reaction to the fact that the Appellant was technically not compliant. The Contracting Authority humbly submits that the Appellant is erroneous in its interpretation as copious jurisprudence shows that such proportionality does not mean that the Contracting Authority should ignore blatant violations of Public Procurement regulations. On the contrary, the Evaluation Committee fully upheld the principle of proportionality and in the circumstances it was obliged to reject the Appellant's tender and to cancel the tender entirely.

The Appellant is somehow attempting to argue that the Contracting Authority ought to have disregarded the technical specification that the Contracting Authority had requested in the tender, and the law, and accept a product which does not conform to all the pre-established technical minimum requirements. Such requirements were mandatory, and the Evaluation Committee had no other option but to disqualify the Appellant on technical grounds. The Appellant was bound by the sample that he provided because ultimately that sample would determine the evaluation and adjudication by the Evaluation Committee. The sample, as submitted was not according to the specifications and consequently the Appellant's offer could not be accepted. Therefore, for the reasons stated above which will be expounded upon during the hearing, this ground of appeal ought to also be rejected.

- c) ***Third Ground of Appeal: The Contracting Authority disclosure of the Requested Information is irrelevant.***

As was stated in the letter sent on the 29th August 2024 Exhibit A-8 the Department of Contracts and the Contracting Authority are bound by law as to what information they can and cannot provide. Reference was made to the judgement of the European Court of Justice in the Antea Polska case (17 November 2022, c-54/21, EU:2022:888) as a means of guidance in requests for information in public procurement cases. This judgement made it clear that the right to information is limited to that information without which the aggrieved bidder would be unable to challenge effectively the decision of the contracting authority. Ultimately this means that the aggrieved bidder has no right to any other information which is not necessary for an effective appeal. Therefore, the information requested has to be relevant in order to contest the decision taken by the Contracting

Authority to cancel the tender procedure since it was unsuccessful, namely no qualitatively or financially worthwhile tender was received or there has been no response at all. The reasons for the rejection of the Appellant's bid were obvious and were made amply clear to the Appellant in the letter of rejection. Appellant had every opportunity to scrutinise his position at law and his right to appeal such a decision was not prejudiced in any manner. So much so that the Appellant filed this appeal addressing what it believes to be shortcomings of the contracting authority. The Appellant can never say that any withholding of information by the Contracting Authority prejudiced his rights in any manner. As shall be clearly shown in the hearing of this case, the information sought by the Appellant is in no way linked to the Appellant's technical shortcomings. The fact that the Appellant sought the said copious information was clear, and failed, attempt at attempting to create another ground for appeal out of thin air. The Appellant, clearly knowing that the information is irrelevant for the scope of the appeal, asked for copious amount of information when all the information it needed to file the appeal was already in their possession. This is but a frivolous attempt by the Appellant to add a grievance where there is none. For the reasons stated above, which will be expounded upon during the hearing, this ground of appeal ought to also be rejected.

d) ***Fourth Ground of Appeal: The Rejection Letter was valid at law.***

The Contracting Authority accepts that there has been an error in the rejection letter with respect to the indicated deposit payable in order to file an appeal. This should have read €50,000. Said error was rectified as the Contracting Authority was made aware of this error. Firstly, the Contracting Authority disagrees that such a mistake is fatal and cordially invites the Appellant to indicate which law or regulation states such. Secondly, the Appellant had every opportunity to appeal the rejection letter so much so that they filed a reply and the proceedings before the Public Contract Review Board have now commenced. Thirdly the Appellant did not explain how this error prejudiced the rights of the Appellant when an appeal was filed in terms of law. Appellant again erroneously refers to the General Cleaners case which has nothing to do with the facts of this case. In the General Cleaners case the Appellant appeal was thrown out due to a miscalculation of the deposit required. There is absolutely no similarity between that case and the facts of this case as no one is contesting the Appellant's right to file this appeal. With all due respect, having the Appellant make reference to such a case is a mere attempt at misleading the PCRB by creating a false parallelism between the facts of the General Cleaners Ltd. case and this case when such a parallelism cannot hold water.

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

a) ***First and Second Grounds of Appeal:***

The Board will address the first and second grounds of appeal simultaneously.

However, before proceeding, it is essential to outline the key milestones in the timeline to provide a clearer context and understanding of the events as they unfolded.

- i. August (10th) 2023 – Closing Date of the Call for Tenders
- ii. September 2023 – Rectification request issued to Newtech Limited on Eligibility
- iii. September 2023 – Rectification request issued to Newtech Limited on Technical Compliance
- iv. November 2023 – Rectification request issued to Newtech Limited on Technical Compliance
- v. March 2024 – Clarification request issued to Newtech Limited on Financial Evaluation
- vi. July 2024 – Sample request (Rectification request) issued to Newtech Limited on Technical Compliance

At this stage, the Board refers to the General Rules Governing Tenders (“GRGT”) which were applicable on the date of the publication of this tender, specifically July 2023 (as per Section 4, Paragraph 4.5 of the tender dossier).

Section 16.3 – Part 3: Technical Compliance, specifically provides the right to Contracting Authorities that “..... tenderers may be requested to submit samples so that the Evaluation Committee will corroborate the technical compliance of the offers received.....”

However, Section 16.4 – Part 4: Financial Evaluation explicitly states that “***Submissions which have qualified under Part 3 shall have their financial offer evaluated to ensure compliance with***” (bold & underline emphasis added)

In light of this, the Board believes that the arguments related to equivalence and proportionality have become less relevant. Once the Contracting Authority, through its Evaluation Committee, issued a financial clarification to the appellant in March 2024, it is reasonable to conclude that the Technical Compliance aspect of the appellant's bid would have been deemed successful.

The Contracting Authority cannot, after a full 16 weeks, reverse the procedure and request a sample from the appellant company, which falls under Part 3 of the evaluation process (Technical Compliance).

Consequently, the reason of rejection, as outlined in the Rejection Letter dated 20th August 2024 must be considered as out of procedure. Rather than focusing on the principle of proportionality and other related issues, this appeal primarily concerns the failure of the Contracting Authority to adhere to the principle of equal treatment of economic operators participating in its tendering process.

As a result, this Board upholds the first two grievances of the appellant.

b) ***Third Ground of Appeal: Disclosure of Information***

The Board notes that this third ground of appeal was previously addressed through an interim decree prior to the hearing of this appeal. Therefore, at this point, this Board will not consider this ground of appeal any further.

c) ***Fourth Ground of Appeal: The Rejection Letter***

Based on the findings of this Board, which uphold the first two grievances of the appellant, this fourth ground of appeal has now become irrelevant. Consequently, this Board will not be considering this ground further.

The Board,

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

- a) To uphold the Appellant's first two grievances;
- b) To cancel the 'Notice of Cancellation' letter dated 20th August 2024;
- c) To cancel the Letters of Rejection dated 20th August 2024 sent to Newtech Limited;
- d) To order the contracting authority to re-evaluate the bid received from Newtech Limited in the tender, whilst also taking into consideration this Board's findings.
- e) After taking all due consideration of the circumstances and outcome of this Letter of Objection, directs that the deposit be refunded to the Appellant.

Mr Kenneth Swain
Chairman

Dr Vincent Micallef
Member

Mr Lawrence Ancilleri
Member