

PUBLIC CONTRACTS REVIEW BOARD

Case 2084 – P. 4074/2021 – A Negotiated Procedure for the Procurement of a Border Control System for the Malta Police Force

23rd June 2025

The Board,

Having noted the letter of objection filed by Dr Steve Decesare, acting on behalf of Camilleri Preziosi Advocates, acting for and on behalf of PTL Limited (hereinafter referred to as the "Appellant"), filed on the 12th of August 2024;

Having also noted the reasoned letter of reply filed by Dr Daniel Inguanez, Dr Miguel Degabriele, and Superintendent Dr Jurgen Vella, acting on behalf of the Malta Police Force (hereinafter referred to as the "Contracting Authority"), filed on the 22nd of August 2024;

Having noted the reasoned letter of reply filed by Dr Joseph Camilleri, acting on behalf of Mamo TCV advocates, acting for and on behalf of NetU Consultants Ltd (hereinafter referred to as the "Recommended Bidder"), filed on the 22nd of August 2024;

Having heard and evaluated the testimony of the witness Mr. Antonello Grech (Chairman of the Tender Evaluation Committee) as summoned by Dr Decesare acting for PTL Limited during the first hearing on February 25, 2025;

Having heard and evaluated the testimony of the witness Mr. Adrian Avellino (Member of the Tender Evaluation Committee) as summoned by Dr Decesare for PTL Limited during the first hearing on February 25, 2025;

Having heard and evaluated the testimony of the witness Mr. Adrian Avellino (Member of the Tender Evaluation Committee) as summoned by Dr Inguanez acting for the Malta Police Force during the second hearing on March 4, 2025;

Having heard and evaluated the testimony of the witness Mr. Clint Sammut (Representative of the Contracting Authority) as summoned by Dr Decesare acting for PTL Limited during the second hearing on March 4, 2025;

Having heard and evaluated the testimony of the witness Ms. Graziella Formosa (Representative of the Contracting Authority) as summoned by Dr Decesare acting for PTL Limited during the second hearing on March 4, 2025;

Having heard and evaluated the testimony of the witness Mr. Antonello Grech (Chairman of the Tender Evaluation Committee) as summoned by Dr Decesare acting for PTL Limited during the second hearing on March 4, 2025;

Having heard and evaluated the testimony of the witness Mr. Frank Steffens (Representative of Secunet) as summoned by Dr Decesare acting for PTL Limited during the second hearing on March 4, 2025;

Having heard and evaluated the testimony of the witness Mr. Antonello Grech (Chairman of the Tender Evaluation Committee) as summoned by Dr Inguanez acting for the Malta Police Force during the second hearing on March 4, 2025;

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

Having noted and evaluated the minutes of the Board sittings of the first hearing (25th of February 2025), and of the second hearing (4th March 2025), hereunder reproduced:

Minutes

Case 2084 – P.4074/2021 - A Negotiated Procedure for the Procurement of a Border Control System for the Malta Police Force

The tender was published on the 18th April 2024 and the closing date of the call for tenders was the 10th May 2024.

The estimated value of the tender was € 11,000,000.

On the 12th August 2024 PTL Limited filed an appeal against the decision of the Malta Police Force to disqualify their offer on the grounds that it failed to satisfy the criteria under the Best Price Quality Ratio (BPQR) basis.

A deposit of € 55,000 was paid.

There were three bids.

On the 25th February 2024, the Public Contracts Review Board, composed of Mr. Kenneth Swain as Chairman, Dr Ing. Damien Gatt and Mr. Richard Matrenza as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – PTL Limited

Dr Steve Decesare	Legal Representative
Dr Stefan Cutajar	Legal Representative
Ms Pauline Debono	Representative
Mr Pierre Attard	Representative
Mr Denis Vella	Representative

Contracting Authority – Malta Police Force

Dr Daniel Inguanez	Legal Representative
Dr Miguel De Gabriele	Legal Representative
Mr Antonello Grech	Chairperson Evaluation Committee
AC Neville Xuereb	Evaluator
Mr Sandro Calleja	Evaluator
Mr Robert Grixti	Evaluator
Mr Adrian Avellino	Evaluator
Supt Jurgen Vella	Representative
DG Stefania Sgandurra	Representative

Ms Graziella Formosa	Representative
Insp Clint Sammut	Representative
PS Ismael Vassallo	Representative

Recommended Bidder – NetU Consultants Ltd

Dr Joseph Camilleri	Legal Representative
Mr Demetris Nissiotis	Representative
Mr Michael Papadopoulos	Representative
Ms Androniki Kameri	Representative

Interested Party – SITA BV

Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative

Introduction and Procedural Matters

The Chairman welcomed the parties, and by way of introduction, mentioned that there is another appeal on this case due to be heard the following week. Reference is made to regulation 276(f), allowing the Board six weeks to publish the decision in writing. Next week's appeal has similar grievances, and the Board is therefore seeking the approval of all parties to allow the publication of this decision to be delayed until the other hearing is concluded.

This was agreed to by all parties.

Initial Submissions

Appellant's Submission

Dr. Steve Decesare, Legal Representative for PTL Ltd., stated that this tender is for the procurement of a border control system, a matter of national importance, and is partly financed by the EU. The award criteria is on a BPQR basis with 70% of the marks allotted on the technical offer. Three offers were submitted – one disqualified, one recommended, and the appellant's bid placed second. In line with the written submissions, the appellant has three grievances – the first is that the winning bid is not technically compliant, the second is that it is abnormally low, and the third grievance regarding the deposit can be dealt with at a later stage. He then requested that witnesses be heard.

Contracting Authority's Submission

Dr. Daniel Inguanez, Legal Representative for the Malta Police Force, said that the Authority will not contest the grievance about the deposit and there is no objection to the refund of the overpayment.

Witness Testimonies

Testimony of Mr. Antonello Grech (466372M) as summoned by Dr. Steve Decesare

Mr. Antonello Grech (466372M), called to testify by the appellant, stated under oath that he was the Chairperson of the Tender Evaluation Committee (TEC), which is a non-voting role. He was a member of the Police Force for several years, and for the last eight years, he has been in charge of the IT section

of the Force. He has some recent experience in procurement and of chairing evaluation committees. The TEC consisted of a chairperson, a secretary, and five voting members who were as follows:

- AC Neville Xuereb, who is Head of Immigration,
- Mr. Sandro Calleja, who is a technical person
- Mr. Adrian Avellino is also a technical person
- Mr. Robert Grixti, whose background is procurement
- PS Christine Pollacco who serves on the Entry/Exit System Advisory Group

The TEC held various meetings and on certain aspects of the hardware system sought assistance from Mr. Stoner from MITA as a technical expert. All evaluators had certain experience related to the subject matter in this case.

Testimony of Mr. Adrian Avellino (484982M) as summoned by Dr. Steve Decesare

Called to testify by the appellant, Mr Avellino stated on oath that he was one of the evaluators and that the TEC consisted of a balanced team of experts in various related disciplines such as hardware architecture, immigration systems, and border controls. The witness had worked on many projects related to the subject matter, such as the Schengen system, border control, and VISA check systems. He had two degrees in IT and a postgraduate qualification. He was involved as an evaluator when the first tender was issued but was not involved in the drafting or the specifications. However, he had attended a meeting with the drafting people at the time of the first tender.

The witness stated that he was not aware of how the estimated value of the tender of € 11 million was arrived at. When asked by Dr. Decesare whether an investigation in relation to tenders which appear abnormally low was carried out, Mr. Avellino confirmed that one clarification was sought from the preferred bidder related to the clarification of the price offered, and the bidder explained that the system was already built and implemented in another country and they were using a lot of open source components to reduce the cost of licensing. They have a lower risk profile than other bidders who had not implemented this type of system before. Having already been through the testing campaigns and having got full visibility of what is being anticipated makes estimating more accurate. The witness said that he does not know if the system (previously implemented) had morphing attack detection, as this was not mentioned.

The witness was referred to the tender specifications (page 36) and technical offer form (page 4) and agreed that bidders had to state 'yes' or 'no' as a compliance requirement and indicate cross-referencing to the technical offer. The preferred bidder met the requirement regarding the support of a differential morphing attack detection (NIST FATE Morph, Tier 3). The witness went on to explain what he understood using the word 'shall' in the requirement and stated that the word indicates something happening in the future. Mr Avellino further explained "*there are many items which were 'shall' and could not be implemented or available at the time of submission to the tender because they pertained to national implementations, so you had to connect onto this API, a Maltese API, and nobody could have that in place at the time of bidding. It's once you've been awarded and started the work and started implementing that is the sense of the 'shall'.*" The (preferred) bidder explained that it would extend the system by integrating it with other modules, one of which was called UMIDITY, to achieve Morph, Tier 3 standard of morphing attack detection. When further questioned by Dr. Decesare regarding the word 'shall', the witness once again emphasised that most of the requirements referred to the future as at the time of the issue of the tender, no member state had achieved entry/exit compliance. The selected bidder had opted for an eight-month implementation, although other periods were an option.

The witness explained that, in layman's terms, morphing detection is basically the ability to morph one photo with another to modify it to the extent of falsifying it. He clarified: "*Basically there's the ability... to morph one photo, let's say my photo with your photo, and make me not look like you, but make me look to a machine like you. My photo is modified enough that it continues to look like me visually, but when it's scanned and they look at the points, will pass as being you, so there's this attack to falsify the documentation and pass through the border control.*"

When asked about different types of morph attack detection, the witness confirmed there are different types: "*If you look at the NIST documentation, yes, there's single, where that photo has actually been modified itself individually, and there's a comparison.*" He noted that there are three tiers in the NIST system, "*each tier being of higher detection.*"

The witness described two types of morph detection: single and multiple. Multiple morph detection uses several photos to cover images.

The tender specifically required NIST FATE Morph, Tier 3, which the witness believed was '*differential*'. When asked to explain what NIST is, he described it as "*the National Institutes of something. It's an accrediting body*" that he believed to be independent.

The TEC assessed the capability of the system offered based on whether the bidders committed themselves to comply in the future and integrate with third-party modules. The witness stated they looked at "*whether the proposing company is promising to implement that standard.*" Beyond just ticking compliance boxes, bidders needed to indicate with a page number or reference how they would comply.

Two third-party modules were mentioned for morph detection – one was "UMIDITY" (which the witness believed was called), which provided a system for the EU Commission, and "NeuroLink," which the witness noted was only a Tier 1 system, not Tier 3. When asked which one was Tier 3, the witness thought it was "UMIDITY."

The witness confirmed that no commitment from the third-party module suppliers was requested by the TEC, but they did verify that the system would meet NIST standards by checking "*the NIST documentation*" to confirm that the companies were listed under Tier 3.

At this stage, Dr. Decesare requested the names of companies which feature in the NIST list, noting that the company being mentioned was not included in the replies to their request for information.

Procedural Intervention and Board Ruling

The Chairman pointed out that this would create difficulties as it meant revealing details in the technical offer form. To overcome this, he proposed reading out the relevant section from the preferred bidder's offer, which stated as follows:

For requirement: "*The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3)*", the bidder marked 'yes' in the column 'compliant' and in the column for 'Reference in Proposal', the bidder stated:

"Please refer to point 24 in Section 2.3 of document 'Border Control System Proposal.pdf' in Section 1.3.1 of the technical section of our offer"

Dr. Camilleri said that the interpretation of '*shall*' obviously refers to when the system will be available. He emphasised that the PCR's role is not to judge the technical offer, and he objects to further questions on this line which seek to open the technical evaluation.

The Chairman said that the best way forward is that this objection is upheld and that there will be no further questions on this point.

Dr. Decesare pointed out that the appellant had requested this information before filing the appeal.

At this stage, the Chairman said the Board will take a short recess to consider the points raised.

On resumption, the Chairman read out what was stated in point 24 in Section 2.3 of document 'Border Control System Proposal.pdf':

"It is confirmed that the proposed solution will support differential morphing attack detection NIST FATE Morph, Tier 3"

Continuation of Mr. Avellino's Testimony

Mr. Avellino requested that the record reflect his correction regarding the previously mentioned company name, stating: *"I made a mistake with the company..... it is IDEMIA."*

Dr. Decesare then sought clarification on which company was mentioned in the recommended bidder's offer for morph attack detection (MAD), noting: *"Now we have 2 companies UMIDITY and IDEMIA. We also have another company, we will refer to it later on. In the offer which company was mentioned as morph attack detection?"*

The Chairman clarified that he had read verbatim from point 24 of the document, which stated: *"It is confirmed that the proposed solution will support differential morphing attack detection NIST FATE Morph, Tier 3."* The Chairman confirmed that what was read out would be minuted.

Dr. Decesare continued his examination, asking Mr. Avellino to correct his earlier statement regarding the company that the recommended bidder would rely on for morph attack detection: *"Before I asked you what the product that the recommended would rely on for MAD, the morph attack detection, and you mentioned the company UMIDITY? Would you like to correct that statement?"*

Mr. Avellino responded: *"Yes, I believe we linked it to IDEMIA."*

Dr. Decesare then referenced a request for information (RFI) submitted by the appellant prior to filing the appeal. He asked Mr. Avellino whether he was involved in preparing the reply to this request. He explained that he could not recall the exact text of the reply to the RFI without having the documentation at hand.

Dr. Mifsud Bonnici, representing the interested party, SITA, noted that they did not have copies of the RFI or responses, and requested these documents be provided to all parties for proper defence.

The Chairman directed that copies of the RFI be distributed to the Board and all parties.

Mr. Avellino read the response to the RFI which stated: *"The Evaluation Committee took consideration of submissions, highlighting that the arrival and departure check module integrates with biometric SDKs from trusted manufacturers to comply with EES Regulation Standards, including support for eu-LISA USK by IDEMIA and Neurolink Verilook SDK, which guards against face presentation and morphing attacks."*

Dr. Decesare asked where this information could be found in the bid and what the source of this information was. Mr. Avellino responded that he didn't have the text of the bid in front of him. When asked to clarify his earlier statement about IDEMIA providing the morphing attack detection, Mr. Avellino specified: *"Through the USK."* He further explained that *"USK is provided by eu-LISA."*

Dr. Decesare suggested that the morph attack detection is separate from the USK, stating: "*The USK is relating to the biometrics, so fingerprints, facial eye, other biometrics, whilst the morph attack detection is a different requirement.*" Mr. Avellino disagreed, stating: "*I believe in the documentation of eu-LISA, and I can provide you a link later on, the USK includes morph attack detection.*"

Legal Arguments on Scope of Examination

Dr. Camilleri raised objections on two grounds: first, regarding the direct questioning technique being employed with the witness, and second, concerning what he characterised as an attempt to reopen the technical evaluation through questions about the technical offer.

Dr. Inguanez supported this objection, stating that the Contracting Authority remained unclear what the grievance is about, except for the interpretation of the term "*shall*".

Dr. Decesare countered that the PCRB has full authority to examine technical offers and may even appoint technical experts if necessary. He clarified that the appellant's fundamental grievance was that the recommended bidder failed to comply with mandatory technical requirements that needed to be in place from the outset. He further argued that even if the requirements could be implemented in the future, the bidder would still need to demonstrate in their offer sufficient evidence of their capability to provide these features.

The Chairman ruled on Dr. Camilleri's objections, upholding the procedural objection regarding direct questioning techniques, but rejecting the second objection. The second objection concerned the appellant's letter (specifically paragraph 4.4.7) which requested information that had only been partially addressed in the response.

Further Testimony on Technical Requirements

Reference was made to USK and eu-LISA. In the technical offer form, there is a requirement which provides as follows:

'The solution shall be fully compliant with the USK (user software kit) provided by eu- Lisa in the context of the EES project.'

When directed to page 4 of the mandatory requirements, the witness stated he could not recall the specific reply submitted by the preferred bidder without reference to the documentation.

The Chairman noted the similarity to the previous discussion, indicating this pertained to point 8 rather than point 24 in the documentation.

Dr. Decesare emphasised that these represented two distinct and separate requirements – the USK (User Software Kit) and morphing attack detection were completely different technical requirements that appeared to be conflated in the discussion.

The Chairman suggested that other evaluators present might be better positioned to address these technical questions.

Dr. Inguanez responded that the issue was not one of technical expertise but rather that the Tender Evaluation Committee (TEC) had based its assessment on the tender offer itself, which it deemed justified. He maintained there was nothing to add beyond what was contained in the recommended bidder's tender offer.

Dr. Decesare then referenced a requirement from the technical offer form which stated: "*The solution shall be fully compliant with the USK (user software kits) provided by eu-LISA in the context of the EES project.*" He asked whether the recommended bidder had indicated "yes" to this requirement, to which Mr. Avellino confirmed: "*They said yes to everything.*"

When asked what reference was provided in the second column, Mr. Avellino stated he couldn't recall without seeing the offer. The Chairman then read out the response from the technical offer form of the preferred bidder, which stated: "*Please refer to point 8 in section 2.3 of document "Border Control system proposal.pdf" in section 1.3.1 of the technical section of our offer.*"

The Chairman then read out point 8 in Section 2.3, which stated: "*It is confirmed that the proposed solution will be fully compliant with USK user software kit provided by eu-LISA in the context of the EES project.*"

Dr. Decesare asked where (from the bid) the information about "*eu-LISA USK by IDEMIA, and the Neurolink Verilook SDK, which guards against face presentation and morphing attacks*" was sourced from. Mr. Avellino believed it came from the technical offer but needed to see it to be certain.

At this point, the Chairman suggested that the chairperson of the evaluation committee testify to identify exactly where the reply to the RFI could be found in the technical offer of the recommended bidder. Dr. Decesare agreed but reserved the right to continue questioning Mr. Avellino later.

Recall of Mr. Antonello Grech (as summoned by Dr. Decesare)

Mr. Grech confirmed that the RFI was received on August 7, 2024, and replied to on August 10, 2024. He stated that the information provided in the reply was extracted directly from the proposal submitted by NetU Ltd. He then read the relevant excerpt:

"The arrival and departure check module includes integration with biometric software development kits (SDKs) from known manufacturers in order to ensure that biometric quality is met during the enrolment process, as required by EES regulation. For example, it can be integrated with the eu-LISA USK currently provided by IDEMIA, as well as the embedded Neurolink Verilook SDK that provides protection against face presentation and morphing attacks."

Upon further questioning by Dr. Decesare regarding which specific mandatory requirement this response addressed in the technical offer, Mr. Grech clarified that he was reading directly from the proposal document and would need to check each requirement individually to provide a precise answer.

The Chairman rephrased the question, asking which box in the technical offer form was being satisfied by the text read in the reply to the RFI.

Mr. Grech stated: "*The requirements for what I know was for the morphing and for the using of the eu-LISA USK.*" When asked specifically which product was for the morphing, Mr. Grech indicated: "*What I'm reading is the Neurolink.*" He then read out the full statement again: "*It's integrated with eu-LISA USK currently provided by IDEMIA as well as the embedded Neurolink Verilook SDK that provides protection against face presentation and morphing attacks.*"

Continuation of Mr. Adrian Avellino's Testimony

Mr. Avellino was then recalled continuing his testimony. Dr. Decesare asked if he was aware of the product referred to as Neurolink Verilook SDK, which Mr. Avellino confirmed. When asked if this product was submitted for the morph attack detection requirement, Mr. Avellino explained: "*I believe*

that the bidder referred to a particular section within their response, technical response, which then referred to and took the text in its entirety, so it referred to the whole statement that Mr Grech read out that included the USK. The system is able to integrate with other complex components, including these."

When questioned about whether Neurolink Verilook SDK was listed in the NIST FATE Morph list, Mr. Avellino clarified that Neurolink is classified as a Tier 1 system, not Tier 3, while IDEMIA is listed under the MORPH Attack Tier 3 category.

When asked if IDEMIA was the morph attack detection supplier, Mr. Avellino explained that the supplier was *"committing to integrate with other components, which included these two. The USK from IDEMIA and also they offered a Neurolink, but Neurolink would not have been an acceptable one to meet the tier 3."* He added that *"they did not exclude any others, but they did commit to meeting the standard."* Furthermore, the witness stated he was not aware if the EES regulation specifically regulated morph attack detection.

During cross-examination by Dr. Inguanez, Mr. Avellino confirmed that IDEMIA provides software functions and is *"one of the organisations listed under Tier 3."* When asked if IDEMIA's product is readily available in the market, Mr. Avellino explained that the evaluators didn't go into those merits, adding that the tender did not specifically require certification, only that solutions meet the standard, comparing it to complying with ISO standards versus being certified to them. He stated that *"the point of view of an evaluation, maybe the requirement wasn't extremely clear and what it was demanding, but it never demanded that they were certified and appearing as having passed these tests. But it seemed to suggest that they could meet this standard."*

He characterised IDEMIA's role as a *"third-party module"* provider.

Responding to Dr. Camilleri, Mr. Avellino described how each evaluator independently reviewed the tender submissions before discussing them collectively, with some members having more expertise in particular aspects. He confirmed that NetU passed all mandatory requirements.

Dr. Camilleri asked if the evaluation committee had any doubts that NetU would be able to meet the requirements of the tender. Mr. Avellino responded: *"NetU passed all of the mandatory requirements."*

Dr. Camilleri then asked about the term *"shall support"* in the requirement, suggesting that it refers to the ability to integrate with other systems or components. Mr. Avellino agreed: *"That was our understanding, the tender was asking for an outcome that this border control system, when presented with these kinds of attacks, was able to detect them irrespective if they were developed directly by the supplier or they integrated a third-party component to do this."*

Dr. Camilleri referenced another example from the tender document: *"The solution shall support verification of VISA (VIS) as per Schengen border code,"* and asked if this referred to the necessity of interaction with third-party systems. Mr. Avellino explained: *"The particular requirement is an API provided by the national VISA system, the Maltese VISA System. The API is unique to Malta because every Member State develops their own API in their own way with the result that the bidder would have to then integrate with the national API so no system at that point was able to integrate with the national API until it was customised to meet the requirements of the national API."*

Dr. Camilleri asked if these integrations should be developed at a later stage, to which Mr. Avellino responded: *"Definitely. I mean the tender allowed for different implementation tiers for each bidder to propose which tier they wanted to fall under. Like I said before, one was up to five months. One was*

between I think 5 to 8 months, and the other one was ... because of the customisations that needed to be done to the software to adapt to the national APIs."

Examination on Pricing and Clarifications

Replying to questions from Dr. Calleja, the witness (Mr. Avellino) said that the last clarification was the request for NetU to "*justify the rationale of their price, as it was approximately 50% of the stated budget.*"

Dr. Inguanez objected to questions on this point as it might very well lead to revealing confidential information.

Dr. Mifsud Bonnici said that this was very relevant as it was a point of appeal.

The Chairman directed that the Board had no objection to the clarification letter being read out.

The witness read out the letter of the 29th of July 2024 from the Malta Police Form to NetU Consultants Ltd.

"The Evaluation Committee noted that the Financial Offer submitted in reply to the financial requirements as per clause 5D (i) of Section 1, Instructions to Tenderers, is substantially lower than the estimated value of the tender as determined by the Contracting Authority. For this reason, the Contracting Authority is giving you the opportunity to justify/explain how you are able to submit such a tender. Hence you are being requested to explain the price or costs proposed in your offer.

The clarification request referenced Public Procurement Regulations SL601.03 Regulation 243, listing explanations that may relate to: a) the economies of the manufacturing process,b) technical solutions chosen or exceptionally favourable conditions available to the tenderer..., c) originality of the work, supplies or servicesd) compliance with obligations established in regulation 13(m) and 16(k), e) compliance with obligations referred to in Regulation 60, and f) the possibility of obtaining State aid."

Dr. Calleja asked if there was a reply to that letter.

The witness stated that the reply of the 1st of August to the letter was very detailed. Mr. Avellino explained that it references to European case law, their knowledge of the system from having already developed entry-exit system compliance in another Schengen state, their understanding of testing procedures, their extensive background working with the EU Commission in policing and Schengen areas, their use of open-source components with lower or no licensing fees, and the fact that the system was already built and only required national integrations.

Dr. Calleja asked if the preferred bidder provided any supporting documentation with this response or if the committee took the responses at face value. Mr. Avellino responded: "*I believe they referred to the references and past projects which they had already submitted as evidence of performance.*"

When Dr. Mifsud Bonnici asked if the committee verified whether the recommended bidder had received state aid or if there was a declaration to this effect, Mr. Avellino confirmed: "*We did not verify if any of the bidders received state aid.*" When pressed further about whether the recommended bidder specifically declared they were not receiving state aid in their response, he added: "*As far as I know they did not [declare they were not receiving state aid], and as far as I know it was not part of any of the evaluation criteria.*"

Dr. Mifsud Bonnici then asked if the recommended bidder confirmed compliance with social, labour, and environmental obligations in their response. Mr. Avellino stated that without looking at the multi-page response, he couldn't give a specific answer but noted that *"they complied with all of the administrative criteria which was established in the tender in the EPPS system."*

At this point, Dr. Mifsud Bonnici requested to have the document shown to the witness so he could review it. Mr. Avellino expressed he had no problem reviewing it. The Chairman then acknowledged the document, stating: *"It is a bit more than 4 pages."*

Dr. Camilleri then intervened, suggesting that the witness didn't need to read the document, stating: *"I'm going to suggest to the witness that actually there was this declaration which my colleague is referring to, but in any event the board has access to this document."* He further added: *"We can confirm that. I mean, we don't need the witness to read it and confirm. But I'm suggesting that there are [declarations] both in relation to the state aid question and the relation to other regulations."*

Dr. Mifsud Bonnici responded that as long as the length of the document was recorded in the minutes, he was satisfied and could conclude his questioning.

When Dr. Mifsud Bonnici asked Mr. Avellino which of those points the bidder had addressed, Dr. Camilleri objected that this implied a legal obligation to answer each one. Regarding the requirement to address points a) to f) in the clarification response, the Chairman clarified: *"With reference to the public procurement regulations SL 601.03 Regulation 243 to be more exact,, it goes on to say, the explanations may in particular relate to a) to f)So, in the law, there is no requirements that one has to reply to each a) to f)."*

Mr. Avellino confirmed this understanding, stating: *"The requirements stated over here are very generic. We're talking about software and we're talking about manufacturing process normally related to an industry. All members of the evaluation committee had seen the reply and deemed it to be an acceptable justification."* He further explained: *"But no, we did not go through point by point (a) to f) and because they were not asked to justify each and every point and everything."*

Final Examination

In re-examination, Dr. Decesare asked about the abnormally low justification and whether there was any specific reference to the cost of implementing morph attack detection. Mr. Avellino confirmed that as far as he knew, there was no specific reference to this cost.

Dr. Decesare then returned to the question of IDEMIA being on the NIST list and how this connected to the morph attack detection requirement. Mr. Avellino explained: *"We connected it through documentation of eu-LISA, saying that IDEMIA are the supplier of their USK kit. Additionally, the response of NetU, I believe, was open and not restricted to Neurolink or IDEMIA only."*

Dr. Camilleri asked about the previous tender call. Mr. Avellino confirmed that there had been a previous tender call that received only one bid, which was deemed non-compliant because the bidder had not attached the required financial information. Mr. Avellino also confirmed that the estimated value in the first call was around 5 million euros, compared to 11 million in the current tender. He also confirmed that the first tender was for 10 years of maintenance and support, while the current one was for 7 years. Dr. Camilleri summarised that the initial tender had a much lower estimated value (€5 million) while requiring more extensive services (10 years of maintenance instead of 7). Mr. Avellino confirmed this assessment. Dr. Camilleri, based on Mr. Avellino's testimony, also established that the recommended bidder was not actually the cheapest bidder in the process.

Adjournment

After a short discussion regarding the availability of further relevant witnesses, the Chairman declared the hearing adjourned to the 4th of March 2025, at 9:00 AM.

End of Minutes of first hearing

Second Hearing- March 4, 2025

On the 4th March 2025, the Public Contracts Review Board (PCRB) composed of Mr. Kenneth Swain as Chairman, and Dr Ing. Damien Gatt and Mr. Richard Matrenza as members convened a public hearing to consider the appeal of the second hearing.

The attendance for this public hearing was as follow.

Appellant – PTL Limited

Dr Steve Decesare	Legal Representative
Dr Stefan Cutajar	Legal representative
Ms Pauline Debono	PTL Representative
Mr Denis Vella	PTL Representative
Mr Imad Saleh	Secunet Representative
Mr Frank Steffens	Secunet Representative
Mr Christian Rutigliano	Secunet Representative
Mr Stephen Lenk	Secunet Representative

Contracting Authority – Malta Police Force

Mr Antonello Grech	Chairman
AC Neville Xuereb	Evaluator
Mr Sandro Calleja	Evaluator
PS Christine Pollacco	Evaluator
Mr Adrian Avellino	Evaluator/Expert
Mr Roderick Stoner	Expert – MITA
Mr Robert Grixti	Police Representative
Insp Clint Sammut	Police Representative
Ps Ismael Vassallo	Police Representative
Sup Jurgen Vella	Police Representative
Ms Graziella Formosa	Secretary/expert

Department of Contracts

Dr Daniel Inguanez Legal representative

Dr Miguel Degabriele Legal representative

Recommended Bidder- NetU Consultants Ltd

Dr Joseph Camilleri Legal Representative

Mr Demetris Nissiotis Company Representative

Mr Michael Papadopoulos Company Representative

Ms Androniki Kameri Company Representative (Online)

Interested Party – SITA BV

Dr Clement Mifsud Bonnici Legal Representative

Dr Calvin Calleja Legal Representative

Dr Kelly Cini Legal Representative

Dr Rhys Jenkins Company Regal representative

Opening of Proceedings

The Chairperson announced the opening of the second session in case number 2084.

Clarification of Previous Testimony

Further Testimony of Mr. Adrian Avellino (184982M) as summoned by Dr Inguanez

Dr. Inguanez called Mr. Adrian Avellino to take the witness stand as he wished to clarify some statements which he made in the previous session.

While testifying, Mr. Avellino (ID 184982M) explained that he did not have the documentation available during his previous testimony and had responded based on memory regarding a specific mandatory criterion and its justification. Regarding the response provided by NetU for the mandatory criterion that stated the “*solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3)*”, they responded ‘yes’. They referred to point 24 in Section 2.3 of the document titled ‘*Border Control System proposal.pdf*’, found in section 1.3.1 of the Technical Section of their offer. Point 24 confirms that the *proposed solution will support differential morph attack detection (NIST FATE Morph, Tier 3)*. Mr. Avellino further elaborated that this text was located within the documentation and likely pertained to the qualitative aspect of the evaluation.

He also confirmed that he was involved in the reply to the request for information (RFI) made after the award but did not see the final reply that went out. He quoted from the wording extracted from the documentation submitted by NetU. The document is “*Border Control System Proposal.pdf*” page

6. *“The arrival and departure check module includes integration with Biometrics software development kits (SDKs) from known manufacturers in order to ensure that biometric quality met during the enrollment process as required by EES regulation. For example, it can be integrated with the eu-LISA USK currently provided by IDEMIA, as well as embedded the Neurolink Verilook SDK that provides protection against face presentation and morphing attacks.”* Mr. Avellino made the emphasis on ‘for example’.

Additional Witness Testimonies

Testimony of Mr. Clint Sammut (234484M) as summoned by Dr Decesare

Mr. Clint Sammut (ID 234484) was called to the witness stand by Dr. Decesare.

Mr. Sammut declared that he was not involved directly in the tendering process itself but was involved in the drafting of Pre-Market Consultation (PMC) requirements. He testified that most of the software requirements had been identified by himself and his colleagues, for example, during the pre-market consultation. The requirements included the recommendation by FRONTEx regarding *morph attack detection* capabilities. These were also explained by FRONTEx to one of his colleagues who was versed on types of attacks in terms of border control. Mr. Sammut also added that as far as he knows, the *morph attack detection* is not imposed by the EES but does not know if it’s a requirement anywhere else.

He explained that eu-LISA provides all Member States implementing the EES with a User Software Kit (USK), which is essentially a kit dealing with biometric standards.

Mr. Sammut clarified that the USK is used to ensure that captured biometric data meets certain standards. When biometric data is captured, it must be processed through the USK to verify compliance with these standards. Although the USK does not alter the actual data, it indicates whether the data meets the required standards, such as those set by NIST.

Dr. Decesare inquired whether requirements:

1. that the solution must be fully compliant with the USK provided by eu-LISA in the context of the EES project and
2. that it must include morph attack detection,

are the same.

Mr. Sammut stated that these two requirements are not the same, although there may be overlaps. He noted that the USK deals with fingerprints but doesn't believe the face morphing attacks has anything to do with fingerprints.

Dr. Decesare further asked whether the eu-LISA USK deals with morph attack detection. Mr. Sammut replied: *“No, I think it's different. There may be overlaps because this is a biometric area. It's not really my area. We don't open the USK and see what's going on inside of it. For us, it's a black box. We just pass data through it, and we have to make sure that our contractor is using the USK correctly.”*

He also confirmed that he was not involved in the preparation of the financial estimate.

Testimony of Ms. Graziella Formosa (185488M) as summoned by Dr Decesare

Ms. Graziella Formosa (ID 185488M) was called to the witness stand as she was involved in the drafting and collating of the procurement document. She stated that she was not involved in calculating the estimated contract value but understood that this had been estimated based on previous market

research. She specified that the €11,000,000 figure was reached after examining the components involved in the process, that is the cost of the software, the hardware, the licenses, the maintenance and support for a seven-year period.

She also explained that the financial costing of the different components was based on ongoing contracts and market research, and after three particular suppliers were contacted, the adjudication board worked out an average based on the amounts they indicated.

Asked by Dr. Camilleri, Ms. Formosa confirmed that the first call had mistakenly estimated the cost as five million as they had not included the maintenance and support costs needed for the solution. Ms. Formosa also declared that there was no further research involved in changing the amount (estimated tender value) from € 5 million in the first call to € 11 million in this call.

Mr. Antonello Grech (466372M) as summoned by Dr Decesare

Mr. Grech explained that when their current border control system was to be discontinued, he contacted contractors for a new system without hardware: IDEMIA, PTL/SECUNET, and SITA. PTL's estimate was under €5 million with €500,000 in annual maintenance. Another supplier offered a similar estimate, while IDEMIA's quote was notably higher.

The first tender was issued with an estimated value of €5 million, which covered only the development of the system without hardware. Mr. Grech clarified that after no successful bids were received, they consulted with approximately eight interested contractors. During these meetings, they received feedback that the tender should also include hardware, maintenance costs, and additional development hours to accommodate changing regulations and laws that affect border control systems.

For the revised tender, they extended the maintenance period from five to seven years and calculated a new estimated value of €11 million.

When asked about the breakdown of the €11 million estimate, Mr. Grech stated that the software development portion was roughly between € 3-5 million. He stated that the figures from the interested contractors were different so they took an average that leaned toward the 'higher part'. The maintenance and support costs were calculated as a percentage of the software costs. Additionally, they included a substantial number of hours for future development based on current contractor rates. The licenses were under the maintenance and support costs, as per market research.

Dr. Inguanez asked Mr. Antonello Grech if they knew the suppliers contacted during the market consultation process. Mr. Avellino confirmed, stating that they knew IDEMIA through counterparts and had discussions with PTL and SITA, who were involved in border control systems.

When asked about the cost estimates provided during the preliminary market consultation, ***Mr. Antonello Grech*** clarified that PTL had cited "4 million, something with about half a million-maintenance agreement." , Dr. Inguanez inquired whether the other two suppliers (IDEMIA and SITA) had provided similar cost estimates, to which Mr. Avellino responded: "*SITA were in the same amount and IDEMIA was much higher.*"

Dr. Inguanez then sought to understand how the estimated procurement value of €11 million was determined, given that two suppliers had cited roughly €5 million while IDEMIA's estimate was much higher. He asked whether the difference was due to not including maintenance and services in the pre-market consultation.

Mr. Antonello Grech explained that during the premarket consultation, they focused primarily on the development of the border control system, making use of existing equipment like cameras, fingerprint readers, and passport readers. He noted, *"Then we realised, besides the development, when we're coming to that, we would need some hardware for the system as well as a maintenance and support agreement, which includes the licenses and also... the number of hours needed for any further development."* He recalled that these additional hours might have been *"50,000 or 10,000"* but was uncertain of the exact figure.

He further added: *"And the period for maintenance was up to seven years before it was five years, I believe. These all added up to roughly like 11 million, which was like the top that we could afford."*

When Dr. Inguanez asked whether they had used an average of the supplier estimates or the maximum to be safe, **Mr. Antonello Grech** stated: *"It was mostly towards the maximum so that we would be safe, but it was average. You know, the development part was nearly the average for each, then there was the maintenance, it was what it is, and then the additional hours we work it out roughly how much our present contractors are taking and came to the tender (estimated value)."*

Dr. Inguanez sought confirmation: *"So for the maintenance and the additional hours you took the hypothesis of the maximum amount that would be needed?"* to which **Mr. Antonello Grech** replied, *"Yes."*

Dr. Camilleri then sought clarification on several points. He first confirmed that the initial market research preceded the first call for tenders, which Mr. Avellino affirmed. Dr. Camilleri then asked whether NetU, the eventually recommended bidder, was involved in any discussions or market research at that time, to which **Mr. Antonello Grech** responded: *"No, I did not even know about NetU at that time."*

Dr. Camilleri sought further details about the outcome of the initial tender process. He wanted to know whether the lack of interest stemmed from no submissions or if any bids failed to meet the criteria. **Mr. Antonello Grech** explained that while around eight or nine companies initially showed interest, only PTL eventually submitted a bid. However, due to the absence of financial details in their submission, it was immediately disqualified, prompting the issuance of a new tender.

Testimony of Mr. Peter Steffans as summoned by Dr Decesare

Mr. Frank Steffens (German identity number L71JMF71J) explained that he is the Head of Product Management in the Homeland Security division at Secunet, Germany's leading cybersecurity company. He has been involved in biometrics, passports, and ID documents since 2006 and is responsible for Secunet's border control portfolio, which is in operation in various European countries including Germany, Switzerland, Austria, Czech Republic, and others.

When asked by Dr. Decesare about the eu-LISA USK project, Mr. Steffens explained that it is a software library provided by eu-LISA to Member States, designed to measure the quality of biometric images, specifically fingerprints and facial images. Member States can integrate this library into their local border security architecture to measure the quality of biometrics captured during the enrollment of third country nationals for the entry-exit system. He emphasised that high quality is crucial because these live-captured images are stored in the central entry-exit biometric database where various biometric functions are processed, such as identifying duplicates or detecting if the same person appears with different identities. Given the large size of the database, the quality must meet specific requirements established by European regulations.

Regarding morph attack detection, Mr. Steffens clarified that this is entirely different from the eu-LISA USK. He explained that morph attack detection targets facial images stored on passports rather than live-captured images. A morph attack occurs when a person collaborates with another individual (possibly someone on a watch list or intending to immigrate illegally) by merging their facial images together. This merged image is then used to apply for a passport, allowing both individuals to be verified by biometric algorithms using the same passport. Morph attack detection is specifically designed to prevent this type of fraud.

Mr. Antonello Grech summoned by Dr Inguanez for Further Testimony

Abnormally Low Bid Justification (NetU)

Mr. Antonello Grech, chairman of the Tender Evaluation Committee (TEC), was recalled testifying. Responding to Dr. Inguanez's questions about the abnormally low bid allegation, Mr. Grech explained that while he attended the evaluation meetings, he had no voting role, serving primarily in a governance capacity. He confirmed that the committee had requested clarifications from NetU regarding its financial bid and collectively decided the explanation was satisfactory.

When asked about the specific reasons for accepting NetU's justification (including questions by Dr. De Cesare and Dr. Camilleri), Mr. Grech noted several key points:

1. Hourly Rate: There was a significant difference in the hourly rate for external development hours between PTL's bid and those of NetU and SITA.
2. SITA's Lower Offer: SITA's offer was actually lower than NetU's.
3. Open-Source Licensing: NetU were using open-source licensing, potentially reducing costs.
4. Prior System Implementation: He confirmed that NetU implemented a similar border control system meant to achieve the same objectives that the Contracting Authority was seeking in this case. NetU had already developed and implemented a similar border control system for the Entry/Exit System (EES) in an EU Member State.
5. Hardware Costs: PTL's hardware costs were higher than those of the other two bidders, whose hardware costs were comparable.

Mr. Grech confirmed that while PTL also had experience with border control systems in other Member States, their solution relied on Secunet's system rather than their own. In contrast, NetU and SITA were offering their own proprietary solutions.

When Dr. Calleja asked whether the TEC had conducted any independent verification of NetU's clarification response regarding the abnormally low tender, Mr. Grech confirmed they had relied solely on the information provided by NetU.

Dr. Calleja then asked whether the TEC had formally documented its decision that NetU's offer was not abnormally low. Mr. Grech initially stated the committee had reached a decision that the bid was acceptable, but when pressed on whether this decision was minuted, he acknowledged: "*In this report it is not minuted*".

He expressed uncertainty about whether the decision might have been published elsewhere, prompting the Chairman to call a brief recess to allow Mr. Grech to check the documentation.

Review of Tender Evaluation Process and GCC Involvement

When questioning resumed, Mr. Grech provided a more detailed explanation of what transpired with the evaluation report:

"What happened was that the evaluation committee had done ... the report. And the GCC asked us to submit an abnormally low [clarification] in case of any appeals. This was submitted on epps. There was the reply as mentioned, the committee agreed to it and then there was an intervention so that we get it over with from the Permanent Secretary."

Mr. Grech clarified that ultimately *"the permanent secretary gave the approval to approve the report, which we approved. The report that had already been done, and this [the abnormally low issue] was not entered in that report."*

When Dr. Mifsud Bonnici sought to establish the timeline, Mr. Grech confirmed:

- The TEC submitted *"a report which was not completely approved for GCC recommendation"* around July 2024.
- NetU was the recommended bidder in this first evaluation report.
- The report was submitted to the GCC at the direction of the Permanent Secretary for Home Affairs.

When asked why the evaluation report was submitted to the GCC for approval, given that this was a negotiated procedure without prior publication, Mr. Grech explained:

"GCC had originally approved that we enter into a negotiated procedure on the epps with these companies. You have to upload the report, and this goes up to my knowledge to the GCC for that approval." He further clarified that it was Mr. Dalli (Director General of Contracts) who communicated this.

Mr. Grech testified that the GCC returned the evaluation report to the TEC. This was communicated through *"an Email where Mr. Dalli was asking us to open up another rectification with SITA and for this abnormally low [clarification to NetU.]"*

When pressed by Dr Mifsud Bonnici for specifics about this feedback, Mr. Grech referenced an email from Mr. Dalli to Ms. Graziella Formosa dated July 19, which stated: *"the GCC is of the opinion that while taking into consideration, the fact that this procedure is the responsibility of the pertinent contracted authority. Nonetheless, it strongly recommends that in the case of SITA, a technical rectification is sought. Additionally, an abnormally low clarifications is sought given that the recommended offer of NetU is € 6,000,000 something where the estimates [...]"*

Mr. Grech testified that following the GCC's feedback, there was an intervention by the Permanent Secretary. When asked to explain this intervention, he referred to an email. He explained that:

"The permanent secretary contacted the DG contracts, and she was asking why asking a clarification for non-preferred bidder would benefit the present situation because of the urgency she was saying. The reply by the DG was I therefore ask her to skip [...] and go back to GCC seeking approval to order as soon as the abnormally low declaration is in hand."

The Chairman provided a synopsis of this email, stating that "*the permanent Secretary over here is just pointing due to the urgency matter of this tender, whether it is necessary to put forward the rectification request to SITA and just put the clarification request to NetU for the abnormally low.*"

Mr. Grech confirmed several key points about the status of clarifications:

- The first evaluation report sent to the GCC did not address the abnormally low issue at all.
- The directive to request clarifications came from "*either the GCC or Mr. Dalli*"
- A clarification regarding the abnormally low bid "*for sure*" was requested from NetU
- Regarding SITA, "*there was a request for a technical rectification or something*" that was initially considered
- The technical rectification for SITA concerned "*a technical expert*"
- Following the Permanent Secretary's intervention emphasising the urgency of the project, the rectification request to SITA was ultimately not sent

Following Mr. Grech's reference to the Permanent Secretary's intervention email, a discussion ensued regarding its disclosure:

- Dr. Mifsud Bonnici requested "*a disclosure of the e-mail*"
- Dr. Inguanez objected to "*the full disclosure because we think the synopsis that the chairman has just given is enough,*" suggesting if disclosure was granted, that "*the e-mail circulated only to the lawyers involved and under confidentiality*".
- The Chairman noted the requests and indicated "*the board will decide on this matter*".

Final Submissions

Submissions by Dr. Decesare

First Grievance: Technical Non-Compliance

Dr. Decesare argued that NetU's bid was not technically compliant because it failed to meet mandatory requirements, particularly regarding the Morph Attack Detection requirement which had to be NIST certified and Tier 3 differential morphing capable.

He explained that the evidence showed NetU merely ticked "Yes" in their technical offer with a cross-reference to another section that was supposed to corroborate compliance. However, this cross-reference only led to a statement that "*the solution would comply*" rather than demonstrating actual compliance.

Dr. Decesare noted that the morph attack detection requirement was specifically included in the tender document by the Contracting Authority due to new developments in the sector and Frontex recommendations. He referenced Annex A of their reasoned letter of objection, which contains the NIST Face Morph Report explaining that:

- Face morphing merges two or more images, creating a composite that detection systems may fail to distinguish between different people entering the country.

- Face morphing is easily accomplished with widely available tools requiring minimal technical expertise, available at little or no cost on the internet and mobile platforms.
- This presents a significant national security risk which is being addressed through these algorithms.

Dr. Decesare distinguished between two types of face morphing algorithms:

1. Single image detection - which examines one photo (e.g., on a passport) to determine whether there are artifacts showing it is a morph. The NIST report notes "*reduced morph miss rates at the false detection rate of .01*" but acknowledges that "*many of the algorithms do not generalize well across different unseen morphing methods and error rates remain very high even on Tier 3 databases.*"
2. Two-image differential morph detection - which was specifically required by the tender. This compares a live photo taken at an e-gate with the passport photo to detect whether the passport photo was morphed. The NIST report indicates that "*recent developments in differential mode detection has shown promising results, as demonstrated by the most recent algorithms submitted by SECUNET, where morph miss rates ranging from 9% to 36% across all databases can be achieved at a false detection rate of 1 in 100.*"

He clarified that the NIST report categorizes morphs into three tiers:

- Tier 1: Low quality morphs created with readily accessible tools by non-experts
- Tier 2: Morphs generated using automated morphing methods
- Tier 3: Higher quality morphs created using either commercial grade tools with manual process or generated with automated methods and manual post-process to remove artifacts

The tender specifically required Tier 3 differential morph detection capability.

Dr. Decesare emphasised that Mr. Avellino confirmed during testimony that NetU's technical form did not reference any specific product meeting this requirement. While NetU mentioned potentially using "Neurolink" for morph attack detection (later corrected from "Umditi"), Dr. Decesare pointed out that this product is not listed in Tier 3 in the NIST report for differential detection. Mr. Avellino also confirmed that a similar approach was taken for another requirement relating to eu-LISA .

Dr. Decesare cited the Court of Appeal case (Cherubino vs. Department of Contracts, 6 February 2015, Appeal No. 400/2014/1), which established that merely declaring compliance without providing supporting evidence is insufficient. The court stated that the fact that the appellant company submitted that the declaration that all products being offered by the appellant were CE approved does not show evidence from literature submitted by the same that the products were in actual fact CE approved.

He explained the relevance to the current case: the technical offer required an additional column with reference to a page or paragraph number showing that the offer would meet the requirements. NetU merely reiterated compliance without providing evidence and Mr. Avellino testified that even for other requirements, there was simply a statement that they would use third-party manufacturers (e.g., IDEMIA for eu-LISA USK and Neurolink for morph attack detection) as examples of what they

could use, not confirmation of what they would use. Neurolink is not listed in Tier 3 in the NIST report for differential. Therefore, it does not meet the requirements even if it were going to be used by the recommended bidder to meet that requirement.

Dr. Decesare argued that compliance must exist at submission time, He referred to multiple cases, some of which are mentioned in paragraph 4.4 of the appeal.

- Case 1481-SVP-1379, and Case 789-CT 3218/2014
- A recent Court of Appeal judgment (632/2023/1, Luxury Living Technologies Ltd vs. Ministry for Environment, Energy and Enterprise, etc.) where a bidder was disqualified for submitting an acknowledgment of a screening request rather than the required screening letter for solar photovoltaic installations. Even though the appellant later obtained the screening letter, the court held this did not satisfy the requirements because tender requirements must be met at the time of submission.
- EU case C-14/17 affirming that the principle of equal treatment and duty of transparency requires that tenderers must be in a position of equality both when formulating their tenders and when those tenders are being assessed
- EU case C-448/1 states that objective and transparent evaluation depends on the Contracting Authority being able to verify effectively whether tenders meet the criteria based on information and proof provided by tenderers
- Maltese case 8/16 and case 139/23/1 confirming that compliance is required at submission and that the principle of self-limitation does not permit a Contracting Authority to assess information not provided in the required format

Dr. Decesare noted that his client (PTL) engaged a qualified NIST Tier 3 subcontractor to meet this requirement. In contrast, NetU did not rely on subcontractors for this specific requirement, with the only nominated subcontractor being Smart Technologies, which does not appear in the NIST list.

Second Grievance: Abnormally Low Tender

Dr. Decesare addressed the significant discrepancy between the original estimated contract value (5 million) and the current tender (11 million), which evidence presented that day indicated was due to maintenance and support costs.

Dr. Decesare noted that the justification provided by NetU to the Contracting Authority, as confirmed by evaluation committee members during the hearings, was that the software solution proposed by NetU had been developed by NetU itself "*without dependency on 3rd party companies, subcontractors and therefore avoiding additional costs and overheads.*"

However, Dr. Decesare pointed out that in direct reply to questions regarding two specific mandatory requirements, namely eu-LISA USK and morph attack detection, the evaluation committee members acknowledged that while NetU had simply stated they would be compliant, they had in fact referenced "*amongst others, for example, a number of other third party suppliers.*"

Dr. Decesare emphasised that none of those third-party suppliers submitted any confirmation of their involvement, a fact confirmed by witness testimony. Consequently, there was no evidence presented

to the evaluation committee that such reliance on third parties was justified. Furthermore, testimony revealed that IDEMIA, one of the third-party suppliers referenced for the eu-LISA USK, was "*actually the most expensive during the consultations for this project.*"

Dr. Decesare further noted that testimony confirmed there was no investigation conducted by the evaluation committee to determine whether the components required as mandatory technical specifications were properly considered by NetU when formulating their offer.

The arguments presented in defense of this failure were that the tender would allow for "*future development and integration,*" and therefore NetU was not required to have these components at the outset. Dr. Decesare countered this assertion by submitting that these were specific requirements explicitly marked as mandatory in the tender documents and technical offer form. He emphasised that the tender documents used the word "shall" to denote mandatory status, in addition to explicitly listing them under "*mandatory requirements*" and "*other mandatory requirements.*" Therefore, these components had to be both included and explained in technical literature as well as properly priced in the offer.

Conclusion

Dr. Decesare concluded that the evidence demonstrated NetU's offer was both technically non-compliant and abnormally low, warranting exclusion.

Regarding the deposit, he noted that submissions had been made concerning the €5,000 requested above what is specified in law, which he understood had been accepted. He also requested a full refund of the deposit regardless of the board's final decision, citing Mr. Avellino's testimony that "*perhaps the requirements were not clear*".

Submission by Dr. Inguanez

First Grievance: Technical Non-Compliance

Dr. Inguanez began by highlighting the proper function of the Public Contracts Review Board (PCRB) and the test it should apply when reviewing evaluation decisions. He cited two significant Court of Appeal judgments:

1. Saniclean Joint Venture vs. Saint Vincent de Paul Long Term Care Facility (Appeal No. 97/2020, decided on 20th July 2020), where the Court stated: "*Il-qorti tara li kollox ma' kollox l-evalwazzjoni li għamel il-kumitat ta' l-għażla kienet raġonevoli u l-board ma kellux jissotwixxi id-diskrezzjoni tiegħu għal dik tal-kumitat*" (The court sees that overall the evaluation made by the selection committee was reasonable and the board should not substitute its discretion for that of the committee).
2. Executive Security Services Limited vs. Aġenzija Servizzi (Appeal No. 205/2021, decided on 7th March 2022), where the Court reiterated: "*Qabel xejn irid issir referenza għal prinċipju kardinali f'materja simili illi fejn l-evalwazzjoni li jkun għamel il-kumitat tal-għażla kienet raġonevoli għalhekk il-board jew tribunal tat-tieni istanza m'għandux jissostitwixxi id-diskrezzjoni tagħhom għal dik tal-kumitat*" (First of all, reference must be made to the cardinal principle in similar matters that where the evaluation made by the selection committee was reasonable, therefore the board or tribunal of second instance should not substitute their discretion for that of the committee).

Dr. Inguanez emphasised that the test the PCRB must apply is not whether they would have evaluated differently had they been in the place of the Evaluation Committee members, but rather whether the evaluation and decisions made during the process were reasonable based on the tender requirements and the principle of self-limitation.

Regarding the first grievance concerning the Morph Attack System, Dr. Inguanez quoted the requirement: "*The solution shall support differential morphing attack detection (NIST FATE, morph Tier 3).*" He argued that the wording "*shall support*" inherently indicates a future aspect, as Mr. Avellino had explained in his testimony. Dr. Inguanez reasoned that since the solution is not an off-the-shelf product but rather specific to border control systems (with the Malta Police Force being the only potential client in Malta), it would be unreasonable to expect tenderers to have a ready-made solution or even separate components at hand.

He explained that the purpose of such requirements is to create a binding relationship once the contract is awarded. When a tenderer confirms that their solution "*shall support*" differential morphing, this becomes a binding contract condition, as the tender offer is attached to the contract. This is how the Contracting Authority protects itself for the future.

Dr. Inguanez noted that the Tender Evaluation Committee did not simply rely on a yes/no answer but also considered NetU's proposal form, which explained how they would meet the criteria through reliance on IDEMIA solutions. While NetU had also referenced Verilook (or similar), which is not on the NIST list, the evaluation committee verified that IDEMIA is indeed on the NIST list and determined that NetU met the tender requirements.

Addressing PTL's reference to the Luxury Living case (Appeal 632/2023), Dr. Inguanez argued that the cases cannot be equated. He read from the tender condition in that case, which stated that where a bidder is not yet in possession of an appropriate development permission, "*a screening letter issued by the Planning Authority shall be submitted.*" In that case, neither a development permission nor a screening letter was submitted, which is why the Court of Appeal ruled against the appellant. Dr. Inguanez contrasted this with the current case where the requirement "*shall support differential morphing*" indicates a future commitment.

He also cited the case of Leon Grech vs. Jobsplus (Appeal No. 66/2023, decided on 31st May 2023), where the Court of Appeal considered whether it is sufficient for a tenderer to commit to meeting a condition or whether the condition must be met at the time of tendering. In that case, the Court determined that the tender conditions only required a commitment, not having the machinery ready at hand. Dr. Inguanez argued that this approach is reasonable – "*why require tenderers to have trucks already available for a waste collection tender when they can commit to procuring them if awarded the contract?*"

Dr. Inguanez expanded his argument by explaining that the technical specifications in the tender were designed to establish future commitments rather than require pre-existing solutions. He emphasised that the tender documents outlined exactly what bidders needed to commit to implementing if awarded the contract. Dr. Inguanez maintained that requiring bidders to have these specialised systems already in place would have been unreasonable given the nature of the project. He further asserted that such a requirement would have disqualified all participants ("*not one tenderer would have passed this test*") in the tender process, as the technical specifications and the offers submitted

by all three tenderers clearly indicated commitments to future (building a solution) rather than existing solutions.

Second Grievance: Abnormally Low Tender

Regarding the abnormally low tender grievance, Dr. Inguanez noted that the law requires the Contracting Authority to request clarification if a tender appears abnormally low, which was done in this case. The General Contracts Committee (GCC), chaired by the Director of Contracts, directed the Contracting Authority to pursue this clarification as required by law.

NetU's explanation for their lower price included that they already had a similar solution being provided to another Member State. Dr. Inguanez argued that this meant NetU already had certain aspects of the software, experience, and could therefore better gauge how low they could bid. He also pointed out that during preliminary market consultation (in which NetU did not participate), both SITA and PTL quoted costs in the region of 5-6 million, similar to NetU's bid in this tender. When the actual bids were received, PTL quoted around 11 million, while NetU quoted around 6 million and SITA quoted even lower, suggesting that PTL was the outlier.

Dr. Inguanez concluded by questioning how far a tender evaluation committee is obliged to investigate, arguing that conducting a thorough investigation into the finances of the recommended bidder would not be lawful or practically feasible. The law requires requesting an explanation, which was done, and the reasons given were reasonable - if one company has a solution ready while another must build from scratch, there is naturally a financial advantage.

Submission by Dr. Camilleri

First Grievance: Technical Non-Compliance

Dr. Camilleri explained that the Malta Police Force was seeking a border control system, primarily a software solution, that would work seamlessly with hardware already in place. This system needed to meet EU-wide requirements for border control systems. The original tender required experience providing similar projects in other EU Member States, though this requirement was later removed to allow wider participation.

Dr. Camilleri emphasised the importance of reading the phrase "shall support" in its entirety. He argued that "shall" indicates a future obligation but must be read in conjunction with "support." The term "support" is significant because the system will need to be developed to work seamlessly with existing hardware, including fingerprint readers and passport readers. This development component is so crucial that it was mentioned in the context of the contract value estimates.

In this context, Dr. Camilleri submitted that "shall support" means the obligation is in the future and involves supporting, not actually providing the system itself at the tendering stage. The system must support what is already in place, with a commitment to ensure integration. Since this requires future development, it would be contradictory to require this feature at the moment of tendering.

Dr. Camilleri argued that the case law cited by the appellants was not applicable in this context. He distinguished between cases where specific documents were required and the current situation where only a commitment to future support was needed. He stated, that in the case which was quoted, a screening letter was required and there one fully understands why therefore the Contracting Authority and the evaluation committee insisted on that screening letter. Here however, we are not

speaking of a specific document which was required, but only a request that the tenderer be in a position to in the future support this particular feature. NetU committed to provide this support.

Dr. Camilleri referenced relevant legal precedents, including PCRB Case Number 1891 delivered on July 10, 2023, and a Court of Appeal judgment in Cherubino Limited vs. Department of Contracts from October 3, 2017. In the latter case, the court ruled that a license was not required at the moment of tendering because it wasn't specifically requested in the call, as requiring it would be overly restrictive

Dr. Camilleri pointed out that "shall support" appears in other requirements in the tender, such as shall support verification of VISA as per Schengen border code. This terminology is deliberately used when the solution must fit with an existing system. There is a whole host of requirements, but this particular term is used on four occasions with reference to certain specific requirements.

Second Grievance: Abnormally Low Tender

Regarding the second grievance concerning the allegedly abnormally low tender, Dr. Camilleri addressed this from both procedural and substantive perspectives.

Procedurally, he noted that the issue was raised during the evaluation process, not at the appeal stage. The Contracting Authority issued a request for clarification, which NetU responded to with explanations. These explanations were considered prior to the final decision being taken.

Dr. Camilleri acknowledged the debate about whether this decision was properly documented but maintained that the process was correctly followed: *"Reasons were asked for, were given, were considered and were considered prior to the decision being taken and confirmed .. and that meets the requirements of the law because the law does not request any specific procedural requirement for the validity of this process."*

He argued that once the PCRB is satisfied that questions were asked and justifications given which were deemed acceptable by the Contracting Authority, *"the board can stop here."* Nevertheless, he proceeded to address the substantive aspects.

On the merits of NetU's explanations, Dr. Camilleri noted that of the three bidders, PTL's offer was very high, while SITA and NetU's offers were in the same region, with SITA's actually being lower. This alone indicates the offers were not abnormally low.

The estimated contract value of approximately €11 million comprised two key components: the system itself and its maintenance. Market research involving three potential bidders indicated the solution would cost between 4 and 5 million, with maintenance at roughly half a million per year for seven years (3.5 million). This totals around 8 million, slightly higher than both SITA and NetU's offers but well below the estimated 11 million, which Dr. Camilleri described as a *"very generous estimate"*

Dr. Camilleri also highlighted that PTL relies on a third-party solution, which involves a margin that other bidders like NetU and SITA avoid by having their own solutions. Additionally, NetU has experience providing and developing similar solutions in other EU Member States, putting them in a better position to accurately assess costs.

Conclusion

Dr. Camilleri concluded that NetU's price was not abnormally low but based on experience and within their capability to provide: "*We are confident, Mr. Chairman, that we are in a position to provide what is requested by the Contracting Authority at the price we quoted. It is definitely not abnormally low.*"

He asserted that the tender evaluation committee and Contracting Authority were reasonable in accepting NetU's arguments, and the process was both procedurally correct and substantively justified.

Submission by SITA

Dr. Calvin Calleja on the first Grievance

Dr. Calleja urged the board to take a step back and examine the fundamental nature of what was being discussed. He referenced the classic directive, specifically Recital 104, which provides a clear distinction between performance conditions and award criteria:

- Award criteria are required for comparative assessment between bids
- Performance conditions are fixed objective requirements to be carried out during contract performance of the contract.

Dr. Calleja emphasised that the NIST report requirement was listed under the specifications section as a software requirement, making it a binary exercise rather than a best price quality ratio (BPQR) criterion. The evaluation committee simply needed to verify whether the solution would "*eventually support morph detection,*" with bidders required to answer 'yes' or 'no'. This did not involve any comparative assessment between the offers submitted by PTL, SITA, or NetU.

Dr. Calleja disagreed with the appellant's assertion that compliance had to be demonstrated at the bidding stage. He referenced the Leone Grech Judgment, particularly paragraph 15, which established that the board must assess compliance requirements on a case-by-case basis. Whether compliance must be demonstrated at the bidding stage depends on the specific wording adopted by the contracting authority in the tender dossier.

To support this position, Dr. Calleja cited two precedent cases:

1. Waste Collection Limited (158/2013) - In this case, the board and court found that compliance was required from the beginning because the tender dossier explicitly stated: "*proof of conformity is to be submitted with the tender.*"
2. Davico versus Princess Operations (271/2021/1) - The Court of Appeal determined that compliance was not required initially because the contracting authority required submission of insurance policies for vehicles that were to be supplied within 12 weeks after the tender was awarded.

Dr. Calleja applied this precedent to the current case, noting that Mr. Avellino had testified that contract performance was split into two phases, with the solution required within phase one, which had a maximum time limit of one year. This gave the eventual contractor a full year to satisfy this performance condition.

Dr. Calleja also highlighted Article 15.15 of the tender dossier, which specifically refers to "*the contractor*" rather than "*the bidder*", indicating that the requirement applies after contract award. The wording states "*the contractor shall be responsible for the successful delivery,*" presupposing that the contractor has already been selected.

Finally, Dr. Calleja noted that the NIST report is not a "*done deal*" or closed matter. Referencing clause 2.2 entitled "*Algorithms,*" he pointed out that the NIST report is open to submissions by economic operators worldwide who wish to submit their solutions for approval free of charge.

Dr. Calleja concluded his first argument by stating that even if the NIST report requirement was not a performance condition, the Tender Evaluation Committee was correct to rely on the self-declaration. He cited two cases to support this position:

1. Met Biologics case (625/23)
2. Melchior Dimech case (431/23/1)

In these cases, the Court of Appeal clearly established that a bidder's capability to satisfy requirements at the time of bid submission is irrelevant; what matters is the bidder's promise to perform the condition if awarded the contract.

Dr. Mifsud Bonnici on the first Grievance

Dr. Mifsud Bonnici began his submission by acknowledging the arguments already presented by others on "*this side of the fence*" and establishing his key premise: the Contracting Authority has discretion in drafting tender conditions, including whether requirements must be satisfied at the tender stage or later, and how compliance should be evaluated (via self-declaration or document submission).

He characterised the appellant's argument as one typically made by either an incumbent or someone who has misunderstood the tender conditions. To support this assertion, he cited a recent case with similar arguments.

Dr. Mifsud Bonnici referenced the Cardona Engineering Works case (23/2024/1), decided by the Court of Appeal on June 17, 2024. This case followed the reasoning of the Leone Grech case, where an argument was made that submitting a logbook to verify vehicles at the tender stage was insufficient, and that declarations for subcontractors were also required. He emphasised that the Court of Appeal was clear in its ruling: the Contracting Authority determines the tender conditions. If a bidder disagrees with these conditions, they should pursue a pre-contractual remedy; otherwise, by participating, they accept the conditions in full and must satisfy them as written.

Dr. Mifsud Bonnici then referenced what he described as the "*leading and seminal case*" from EU law: SC&V Construct (C-403/21), decided on January 26, 2023. He highlighted two important paragraphs:

1. Paragraph 59: Establishes the principle that Contracting Authorities have discretion to decide whether something is a performance condition, technical specification, or selection criterion. The only limitations are that requirements must be linked to the subject matter of the contract, be proportional, and not artificially narrow competition.
2. Paragraph 65: Makes the critical point that tender requirements cannot be interpreted to require bidders to comply with all performance conditions at the tender stage, as this would be "*completely disproportionate.*" The ECJ stated that obliging tenderers to satisfy all contract

performance conditions at submission would impose an excessive requirement that would discourage economic operators from participating, thereby infringing the principles of proportionality and transparency.

Dr. Mifsud Bonnici connected this jurisprudence to the Leone Grech case, noting that it established that interpreting tender requirements to demand documents at the tender stage narrows and restricts competition.

He concluded by asserting that the appellant is attempting to impose its own interpretation of the specification and how it should be satisfied at the tender stage, with the ultimate goal of excluding the recommended bidder so that the Contracting Authority would have to select the appellant's "*very high financial offer*."

Dr. Mifsud Bonnici concluded his submission on this point, indicating he would move on to another topic.

Dr. Calvin Calleja on the second Grievance

Dr. Calvin Calleja began his submission by stating that regarding the ground concerning abnormally low investigations, they would be taking the line advocated by the appellant, namely that the contracting authority breached its obligations to properly carry out the abnormally low investigation.

Dr. Calleja acknowledged that the Board is thoroughly familiar with Regulation 243, making it unnecessary to go through the grounds one by one. He referenced testimony from both Mr. Grech (chairperson of the Tender Evaluation Committee) and Mr. Avellino (who gave evidence the previous week) confirming that:

1. A clarification request regarding the potentially abnormally low tender was indeed issued.
2. A clarification response was received from the recommended bidder.
3. It is not being contested that the Contracting Authority initiated the abnormally low investigations

However, Dr. Calleja submitted that these investigations fell short of legal requirements. He argued that the Tender Evaluation Committee treated the abnormally low investigations as merely a "*tick box exercise*," believing that by initiating the process, they had satisfied their legal obligations.

Dr. Calleja emphasised that good administration is not about "tick box exercises" or simply receiving information and stopping there. He explained that the law requiring these investigations exists for specific purposes:

1. To ensure the eventual contractor complies with environmental and social laws in the country of performance.
2. To verify that the recommended bidder is not benefiting from unlawful state aid.

Dr. Calleja contended that these substantive investigations were not properly carried out by the Tender Evaluation Committee. When pressed, the committee repeatedly stated that the recommended bidder relied on open-source licensing and had previous experience, which they deemed sufficient explanation for the abnormally low offer.

Dr. Calleja highlighted that they had asked Mr. Grech to explain whether the decision regarding the abnormally low tender investigation was minuted, emphasising that transparency in the Contracting Authority's decision-making process is essential for proper evaluation of the decision's correctness.

To support his position, Dr. Calleja cited two cases decided by the Court of Justice of the European Union:

1. Veridos versus Bulgaria (669/20), particularly paragraphs 43 and 44, where the court stated that if a Contracting Authority initiates the first stage of investigation (suspecting an abnormally low offer), after receiving the clarification response, it must:
 - Record the result in writing
 - Formally adopt a reasoned decision admitting or rejecting the tender in question

Dr. Calleja emphasised that Mr. Grech's testimony revealed this decision was "*conspicuously absent*."

2. Commission versus SOPRA Steria (101/22), which despite having a slightly different factual matrix (involving a bidder who had requested information on the abnormally low offer prior to filing an appeal), established that when a Contracting Authority receives a request for information on an abnormally low offer, it is obliged to provide:
 - An adequate statement of reasons why it deems the recommended bidder compliant with environmental and social laws.
 - Verification that the bidder is not the recipient of unlawful state aid.

Dr. Calleja concluded that the evidence presented to the Board demonstrated that these decisions and documentation were absent, which is why they believe the abnormally low investigations carried out by the Tender Evaluation Committee failed to satisfy legal requirements.

Final Intervention by Dr. Decesare

Dr. Decesare began his submission by addressing what the tender document required and what the solution needed to consist of at the outset versus implementation time. He asserted that the submissions made by representatives of both SITA and NetU confirmed what was considered when making the appeal - that none of the bids actually met the requirements specified in the tender document.

Dr. Decesare invited the board to examine the tender documents in detail, emphasising that:

- The technical offer form specifies what must be included in phase one.
- It does not indicate that morph attack detection requirements come at a later stage.
- The tender documents specified that for these requirements, bidders needed to do more than confirm compliance - they needed to reference the page (and number) showing how they would comply.

He emphasised that the solution requested by the Malta Police Force, as confirmed by the representative who mentioned Frontex, needed to have morph attack detection capability. This requirement exists due to IT developments in morphing technology.

Dr. Decesare warned that if the Board does not acknowledge this as an "*ab initio*" requirement, the likely outcome would be a product supplied without morph attack detection, necessitating modifications later. He stressed that as an EU tender, it could be investigated by the European Court of Auditors if mandatory requirements are not met at the outset.

Regarding NetU's experience, Dr. Decesare noted they had heard from Secunet and representatives of the Contracting Authority that Secunet is a market leader in this sector with experience across multiple jurisdictions. Secunet is currently implementing similar projects.

He pointed out that Malta already has a border control system as an EU state, but it obviously doesn't meet the requirements specified in the standard, otherwise procuring another system would be unnecessary.

Dr. Decesare argued that the submissions regarding abnormally low tenders, both from NetU's legal counsel and in the evidence presented, were based purely on assumptions:

- Assumptions about using only open-source software
- Assumptions about knowing what this type of system requires, enabling better pricing than other bidders.

He contrasted this with Secunet, which has a solution and components required for the tender that qualify as NIST Tier 3. Dr. Decesare emphasised that NetU, not being mentioned anywhere in the NIST report, cannot confirm from their experience that they know what needs to be delivered or how to price their offer.

Dr. Decesare strongly refuted a statement made by the Contracting Authority's legal counsel claiming that NetU relied on IDEMIA (which is listed in the NIST report tier 3) to provide morph attack detection. He stated this was "*completely incorrect*" with "*absolutely no testimony*" confirming this. The only testimony hinting at IDEMIA being responsible for morph attack detection came from Mr. Avelino, which was corrected during the proceedings. The text read from emails regarding the request for information showed that the recommended bidder did not rely on IDEMIA and only vaguely referred to Neurolink, not specifically for morph attack detection requirements.

Dr. Decesare addressed the emphasis placed on integration and future hours, noting that witnesses confirmed these future hours were intended for possible future developments and changes in EU law requiring updates to the border control system over time. The witness also confirmed that the €11 million budget was based partly on these future hours (not significant) and mainly on maintenance support (equivalent to around €5-6 million) plus hardware and other software. He stressed that the possibility of future developments has nothing to do with the specific requirements currently listed in the tender document.

Regarding the assumptions made by the contracting authority on NetU's offer, Dr. Decesare referenced:

- Case 95/2021/1 (the TrueEvo case) of the Court of Appeal on abnormal tenders
- Case 450/2023/1 (the Star Fuels case) decided by the board against abnormally low bids

Dr. Decesare addressed the Contracting Authority's counsel's suggestion that the board has limited technical evaluation powers and should only assess whether the evaluation committee acted reasonably.

He submitted that:

1. The evaluation was not conducted reasonably.
2. The Court of Appeal in *OK Limited* (Application 12/17, page 9) stated in very clear terms that the board was set up specifically to deal with these kinds of requests and to assess whether an offer claimed to be technically non-compliant was actually non-compliant - not simply to review the process adopted and whether it was reasonable and proper.

Dr. Decesare concluded his submission at this point.

Final Intervention by Dr. Inguanez

Dr. Inguanez first responded to Dr. Decesare's arguments regarding the NIST list and NetU's relationship with IDEMIA. He states that the appellant is making the argument that IDEMIA is on the NIST list but are assuming that NetU is "*relying on the capacities of IDEMIA*" in the formal sense of reliance on third parties. He clarified that contrary to this appellant's assumption. Instead, he explained that the morphing software manufactured by IDEMIA would simply be used as one component in NetU's solution - essentially functioning as a plug-in.

To illustrate this distinction, Dr. Inguanez provided two analogies:

1. A tender for laptops requiring interoperability with government systems: A bidder might offer laptops installed with Microsoft software without needing to formally rely on Microsoft's capacities through a joint venture or formal commitment. This is simply a matter of supply.
2. A tender for nurses' uniforms: If the uniforms are manufactured by a third company, this represents a simple supply chain relationship rather than formal reliance on third-party capacities.

Dr. Inguanez then addressed SITA's arguments regarding the abnormally low bid investigation, which he summarised as consisting of two main points:

1. The investigation cannot be merely a "*tick the box exercise*" where a clarification is requested and then simply moved on from.
2. SITA cited the "*Veridos case*" from the ECJ to argue there is a requirement to minute a reasoned decision.

Regarding the first point, Dr. Inguanez acknowledged that there is "*no contestation*" that the process cannot be a mere tick-box exercise. He stated that the testimony presented showed that the Tender Evaluation Committee had indeed considered the reasons provided by NetU and found them to be reasonable and justified. It was not simply a matter of requesting clarification, filing it, and continuing without proper consideration.

Regarding the Veridos judgment, Dr. Inguanez provided context that in that case, a tenderer requested the annulment of a procurement procedure because it was not given a reasoned decision whereby

the Contracting Authority decided that a bid was not abnormally low - a situation similar to the present case.

While acknowledging that paragraph 44 of the judgment states that where there is suspicion of an abnormally low tender, the Contracting Authority must formally adopt a reasoned decision admitting or rejecting the tender in question, Dr. Inguanez emphasized that the judgment continues in paragraph 47 with a crucial qualification:

" In that regard, the fact that a tender is not regarded as being 'abnormally low', without this being set out in a specific statement of reasons, cannot, as such, lead to the annulment of the procedure for the award of a contract, since the EU legislature has not imposed on contracting authorities the obligation to adopt an express reasoned decision finding that there are no abnormally low tenders."

Dr. Inguanez submitted that what the ECJ is saying in this case is that while any decision must be reasoned (as a matter of basic administrative law), there is no obligation to issue a separate decision stating the reasons and publishing it. He argued that in the present case, the decision is recorded in NetU's replies, which the Evaluation Committee relied upon because they found them justified, as testified to during the proceedings. Furthermore, there was a formally adopted decision awarding the contract to NetU.

Dr. Inguanez concluded that the Veridos judgment does not support SITA's arguments but rather contradicts them, as the ECJ clearly stated that *"EU Legislature has not imposed on Contracting Authorities the obligation to adopt an expressed reasoned decision."*

Final Intervention by Dr. Mifsud Bonnici

Dr. Mifsud Bonnici emphasised a critical procedural issue: neither the Appellant nor SITA were given access to the responses provided by NetU to the request for clarification regarding the abnormally low tender investigation. He noted that objections were made on the basis of confidentiality, resulting in these responses not being disclosed.

As a consequence, the opposing parties had to rely solely on *"very high level summaries"* provided by the evaluators and the chairperson. Dr. Mifsud Bonnici argued that this limited access to information is precisely why a formal decision needed to be recorded and documented properly.

Dr. Mifsud Bonnici characterized as a "grave lapsus" the fact that the evaluation report doesn't even contain a minute stating that the committee found NetU's responses to be satisfactory. He argued that this absence, in itself, constitutes a significant procedural failure that merits quashing the decision so that the procedure can be conducted properly, at least regarding this issue.

Dr. Mifsud Bonnici stressed that this concern isn't merely about formality, noting that *"procurement isn't just substance over form at all stages."* He explained that proper documentation of the decision was essential to allow the board and the opposing parties to scrutinise that decision *"properly and effectively,"* which he maintained is their right.

He pointed out that when the chairperson was questioned repeatedly about the logic behind this omission and why the decision wasn't documented, no explanation was provided for the absence of what should have been a minuted decision.

Dr. Mifsud Bonnici concluded by emphasising that the case law cited by others must be considered within the specific context of this case, where the procedural deficiency directly impacted the ability of the opposing parties to effectively challenge the decision.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 25th of February 2025, and the second hearing held on the 4th March 2025.

Having noted the objection filed by PTL Limited (hereinafter referred to as the "Appellant") on the 12th of August 2024 and refers to the claims made by the same Appellant with regards to the tender of reference P. 4074/2021 listed as case No.2084 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Steve Decesare and Dr Stefan Cutajar
Appearing for the Contracting Authority:	Dr Daniel Inguanez, and Dr Miguel Degabriele,
Appearing for the Recommended Bidder:	Dr Joseph Camilleri

Whereby, the Appellant contends with respect to:

a) ***First Grievance - Technical Non-Compliance***

- Reference to *Section 1 – Instruction to Tenderers*
- One of the “*Other Mandatory Requirements*” listed in the Technical Offer Form was that: “*The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3).*”
- The Recommended Tenderer (and every other tenderer) therefore had to confirm that its solution was compliant with this requirement (through a Y/N answer) **and** refer to the section or page number within the technical offer where compliance can be ascertained by the Evaluation Committee.
- PTL, pursuant to the Request for Information, requested an extract of this section of the Recommended Tenderer’s Technical Offer from the Contracting Authority, which failed to provide same. Instead, PTL received a reply simply stating that:

“All bidders were required to confirm in their Technical Offer that their proposed solution will support differential morphing attack detection. The evaluation committee too of submissions highlighting that the Arrival & Departure Check module integrates with biometric SDKs from trusted manufacturers

to comply with EES Regulation standards, including support for eu-LISA USK by IDEMLA and the Neurolink Verilook SDK, which guards against face presentation and morphing attacks.”

- This reply did not address the query- that is, it does not prove that the solution supported differential morphing attack detection (NIST FATE Morph, Tier 3).
- Finally, the Recommended Tenderer was also required to submit a Self-Declaration Form confirming that it shall be abiding by the Technical Specifications/Terms of Reference.
 - Reference to *Section 2 – Special Conditions*
 - In terms of Article 15: Scope of the Services, it is expressly stated (in article 15.1) that the scope of the services is defined in Section 3 (Terms of Reference).
 - In terms of Article 15.5, the Contractor shall be responsible for the successful delivery, implementation and configuration of the service requirements in order for the solution to meet the requirements set out in the terms of reference and within the timeframes specified in the implementation plan.
 - The execution of the contract is to commence upon signature of the Contract Agreement and no extension is permitted (Article 18).
 - Reference to *Section 3 – Specifications/Terms of Reference*
 - In Section C. Software Requirements, the functional and technical requirements of the solution are listed. These include, amongst others, the following:

“The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3).”
 - As clearly indicated by the word “shall”, the requirements were mandatory. In addition, the tenderer needed to be compliant at the time of tendering and not at a future date.
 - It is submitted that, from publicly available information, the Recommended Tenderer was (as a minimum) not compliant with the requirement set out above — that is, the requirement that their solution supported differential morphing attack detection (NIST FATE Morph, Tier 3).
 - Reference is made to the report on Face Analysis Technology Evaluation (FATE) published by the National Institute of Standards and Technology (U.S. Department of Commerce) on 6th June 2024 (a copy of which, downloaded from https://pages.nist.gov/frvt/reports/morph/frvt_morph_report.pdf) — that is, after the deadline for submission of tenders which was 10th May 2024 (and, therefore, up-to-date as at deadline for submission of tenders).
 - The NIST Report classifies solutions as Tier 1 (low quality), Tier 2 (automated) datasets and Tier 3 (high quality) datasets.
 - The Tender Document expressly required **NIST FATE MORPH, Tier 3** — that is, high quality datasets — as explained above.
 - The NIST Report includes a list of the companies which have solutions supporting differential morphing attack detection which qualify as Tier 3 — High Quality Morphs.

- **The Recommended Tenderer’s solution is not listed as Tier 3** — indeed, it is not listed at all in the NIST Report.
- The Recommended Tenderer’s offer was therefore not compliant with the requirements set out in the Tender Document and ought to have been disqualified.

b) ***Second Grievance - Abnormally Low Tenders***

- ***Recommended Tenderer’s offer is, at least prima facie, abnormally low***

- Firstly, the Recommended Tenderer’s offer is:
 - (a) €4,689,500.00 less than, and
 - (b) equivalent to 57% of, the estimated contract value.
- Secondly, comparing the Recommended Tenderer’s offer to the other valid offers (only one valid offer, that of PTL), the Recommended Tenderer’s offer is:
 - (a) €4,586,445.94 less than, and
 - (b) equivalent to 57.9% of, the value of the other valid offers.
- These numbers alone – extremely material differences between the Recommended Tenderer’s offer on the one hand, and the estimated contract value and value of other valid offers on the other, is sufficient to require the Contracting Authority to investigate this offer in accordance with the PPR and case-law.
- There is no doubt that this offer is, at least *prima facie*, significantly abnormally low.
- Thirdly, the Contracting Authority must compare the offer with the particular object of the Tender Procedure. The Tender Procedure is for complex supplies and services, some of which are subject to change (and, possibly, increases in costs).
- It is difficult to understand how any bidder could implement such a solution at a price that is well below market price.
- Therefore, on the basis of the PPR, decisions and guidance, as well as relevant case-law (in each case as set out above), the Contracting Authority was obliged to examine whether the Recommended Tenderer’s offer is economically sustainable and allows for proper performance in accordance with the tender requirements.
- In PTL’s (and its subcontractor’s) extensive expertise and experience, the offer is not economically sustainable and suggests a lack of proper understanding of the technical requirements and, or significant costing errors on the part of the Recommended Tenderer.
- The risk of such a situation, apart from a breach of other tenderers’ right of equal treatment, is that the Recommended Tenderer being unable to carry out the obligations incumbent upon it pursuant to the Tender Document and seeking to do the bare minimum to avoid significant losses, to the detriment of the well-being of patients and, potentially, the taxpayer.

- It is in the board's remit and duty to carry out such an examination, in order to ensure that the principles of transparency, fairness and equal treatment are preserved. Reference made to *X Clean Limited* case.

c) ***Third Grievance - Deposit***

- Without prejudice to the above, in terms of which we submit that the Board should uphold our objection in its entirety and return the deposit, PTL submits that (a) the deposit should in any event be returned due to the Contracting authority's failure to provide the requested information, and, or (b) the deposit requested by the Contracting Authority is unlawful.
- In terms of Regulation 262(2) of the PPR, the maximum deposit shall in no case exceed €50,000. The deposit requested from (and paid by) PTL is €55,000. This is therefore in breach of the PPR.

The Board also noted Contracting Authority's Reasoned Letter of Reply filed on 22nd of August 2024 and its verbal submission during the hearings held on 25th February 2025 and 4th March 2025, in that:

a) ***First Grievance: that the bid of NetU Consultants (the Recommended Bidder) may not be technically compliant***

- Reg. 270 of the PPRs expressly requires that an appeal application "*shall contain in a very clear manner the reasons for their complaints*". Rather than raising any complaint or presenting evidence in respect to the Recommended Bidder's technical compliance, the present appeal simply restates some conditions and sort of invites this Board to verify the compliance of the recommended bid.
- Previous decisions of this Board have rebuked appellants who lodge nebulous grounds of appeal only to raise proper grievances during the hearing of the appeal. See, for example, the Board's decision in **Case 1898 — CT 2364/2022 — Supplies – Tender for the Supplies of Implantable Bone Conduction Hearing Aids** (1 August 2023, page 6, para. e).
- Since the appeal application raises no discernible claim that the Recommended Bidder did not comply with particular tender conditions, the Appellant's first grievance is inadmissible.
- Without prejudice to the defence of the inadmissibility of the grievance, it must also be stated that the case law of the Court of Appeal has invariably held that the review bodies (this Board and the Court of Appeal itself) cannot, themselves, exercise the decision-making power that is legally vested in the administrative authorities. Reference was made to *Cherubino Limited v. Id-Direttur (Generali) tal-Kuntratti et* (appeal no. 426/2014, 6 February 2015, page 8), *SaniClean Joint Venture v. St Vincent de Paul Long Term Care Facility et* (appeal no. 97/2020,

20 July 2020, page 19), and *Executive Security Services Ltd v. Aġenzija Servizz.Gov et* (appeal no. 205/2021/1, 7 March 2022, of para. 5).

- Moreover, in procurement processes where the award criterion is the BPQR, the case law has also confirmed that the evaluation board must necessarily undertake a subjective exercise and, consequently, has an element of discretion or leeway which should not be, as a rule, disturbed. Reference was made to *SaniClean Joint Venture v. St Vincent de Paul Long Term Care Facility* (page 13) and *Executive Security Services Ltd v. Aġenzija Servizz.Gov et* (para.6 and para 12).
- It follows that the first grievance must be rejected in so far as it simply requests this Board to conduct an evaluation of the Recommended Bidder's bid with respect to certain conditions; something which is not within the Board's power to do.
- In any case, and without prejudice to the previous submissions, the technical criteria which the Appellant pinpoints in its appeal have been satisfied by the Recommended Bidder.
- The appeal cites one of the "Other Mandatory Requirements" that "The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3)". The Respondent Contracting Authority confirms that the Recommended Bidder ticked "Y", confirming compliance, and provided a reference to its own technical offer which supports that confirmation.
- As a secondary argument, by reference to public documents which have nothing to do with the current procurement procedure, the appeal suggests that it may be the case that the Recommended Bidder did not possess the technology offered in compliance with that condition, at the time of tendering. According to the Appellant, the word "shall" in this technical condition means that the Recommended Bidder was required to be compliant at the time of tendering.
- Any bidder's offer must obviously comply with all tender conditions. But this is not the same thing as requiring bidders to have all the technologies and equipment offered at the time of tendering. In the judgment of *Leone Grech v. Jobsplus et* (appeal no. 66/2021/31, 31 May 2023) the Court of Appeal considered that it is sufficient that the technology and equipment offered satisfies the tender conditions. To the contrary, to require the bidders to possess that technology and equipment at time of tendering would run contrary to the principle of open competition (para.20).

b) ***Second Grievance: that the bid of the Recommended Bidder is abnormally low***

- According to Reg. 243 of the Public Procurement Regulations a contracting authority should investigate whether a bid is abnormally low if it *prima facie* appears to be so.
- That a bid appears to be abnormally low cannot in itself result in the exclusion of the recommended bid. Where tenders appear to be abnormally low, Reg. 243 obliges contracting authorities to require the tenderer to explain the price or costs proposed in the tender. It is

now settled case law that, even where an evaluation board considers a bid to be "obviously abnormally low", it must "*seek from the tenderer, before coming to a decision as to the award of the contract, an explanation of his prices or to inform the tenderer which of his tenders appear to be abnormal, and to allow him a reasonable time within which to submit further details.*" – judgment in the case *Transporoute v. Minister for Public Works* (Case 76/81, 10 February 1982, EU:C:1982:49, para. 18).

- In fact, and in line with these requirements, since the Recommended Bidder's offer was lower than the estimated procurement value, the Respondent Contracting Authority sought clarification on the part of the Recommended Bidder to justify its financial price. As will result from the evidence that will be exhibited during the course of these proceedings, the Recommended Bidder's clarification justifies its price.
- What makes a tendered price abnormally low is that it would render the bidder unable to procure an economic advantage from the performance of the contract. In the judgment of ***Star Fuels Limited v. Wasteserv Malta Limited et*** (appeal no. 450/2023/1, 22 January 2024, para. 15), the Court of Appeal considered that where the performance of the contract is assessed, the tendered price would return a profit is a key factor to analyse whether a bid is abnormally low.
- This said, in the case **Tax-Fin-Lex** (Case 367/19, 10 September 2020, EU:C:2020:685, para. 35), the ECJ considered that even a €0 bid could be justified by reason of the bidder's anticipation of "*obtaining access to a new market or references if the tender is accepted.*"

c) ***Third Grievance: that the deposit, in terms of Reg. 273 of the Public Procurement Regulations (the PPRs), could not have exceeded €50,000 and should, in any case, be refunded to it***

- As has already been stated, Reg. 273 of the PPRs imposes a capping of €50,000 on the deposit on appeal. Therefore, the Respondent Contracting Authority is in agreement with the Appellant that the sum of €5,000 should be refunded immediately to the Appellant.
- As regards the refunding of the rest of the deposit, the Respondent remits itself to the discretion of this Board in view of its decision with respect to the first two grievances

The Board also noted the Recommended Bidder's Reasoned Letter of Reply filed on 22nd of August 2024 and its verbal submissions held during the hearings held on 25th February 2025 and 4th March 2025, in that:

a) ***Submissions on the First Grievance***

- PTL essentially argues that “from publicly available information” the Recommended Bidder does not have the technical capability to provide an offer which can “*support differential morphing attack detection (NIST FATE Morph, Tier 3)*”. NetU contends that this grievance is without merit and appears to be based both on a mistaken interpretation of the tender requirements as well as on lack of knowledge of NetU's offer.
- Indeed, there is no doubt that the offer of NetU fully satisfies this requirement. This is clearly declared in NetU's response in the submitted “*Bidder's Technical Offer form*” and is further confirmed in other sections of its offer.
- Reference to PTL's appeal, namely that “...*tenderer needed to be compliant at the time of tendering and not a future date...*”, is invalid. PTL ignores, on purpose, the particular nature and circumstances of the present tender. “*The solution **shall support** differential morphing attack detection (NIST FATE Morph, Tier 3)*” does not imply that the tenderer needed to be compliant at the time of tendering. In a tender of this nature, where development and customization to the needs of the client are clearly part of the scope (indicatively, Table 1 in the Financial Bid form is called “*Table 1 – Cost of Development of System*”), it is not expected that all features of the solution be available at the time of tendering as long as that specification can be provided as part of the customization process. The situation would, naturally, be different in the case where the equipment or software offered cannot be customized to meet a specification, and no development or customization can be applied to address this requirement.
- It is also noted that in the specific requirement, the term “*shall support*” is included. Significantly, in various other requirements in the Technical Offer form, the RFP does not refer to “*support*” but uses stronger terms such as “*shall allow*”, “*shall be capable of*”, and “*shall provide*”. The Recommended Bidder notes that the term “*shall support*” is used very carefully by the Contracting Authority in four (4) specific cases. The remaining three (3) requirements are:
 - The solution shall support checks of SIS-Recast (SIS) as per Regulation (EU) 2018/1861.
 - The solution shall support checks of SIS-AFIS (SIS) as per Schengen Border Code.
 - The solution shall support verification of VIS (VIS) as per Schengen Border Code.

In the above requirements, the solution capabilities depend on the interaction of the software provided with third-party systems of the Malta Police Force, such as for performing checks on SIS-RECAST (for Schengen Alerts), SIS-AFIS (for biometric matching), and VIS (for Schengen Visa verification), and thus **support** for this integration is required. Regardless of the functionality provided by any solution, the actual **integrations** must be developed and/or

customized at a later stage, as part of the implementation of the system according to the specific requirements of the Contracting Authority for using the Malta Police Force Enterprise Service Bus (ESB).

- Furthermore, the Recommended Bidder refers to other requirements that due to their very nature, can only be met at implementation phase rather than at time of tendering. Reference is made, for instance, to the following requirements from the “*Other Mandatory Requirements*” section of Bidder’s Technical Offer:
 - “*The solution shall be compliant with the Interoperability requirements as per Regulations (EU) 2019/817 and (EU) 2019/818 (Phase 2).*” – Although some components are ready, the availability of all components by eu-LISA is expected in Q4 2026. Therefore, it is not possible for the proposed system to be compliant with all Interoperability requirements at the time of tendering, but rather only with the components which are already in place. Needless to say, the timing of this does not depend on any of the bidders.
 - “*The solution shall integrate with future systems using web-services APIs (SOAP/REST) such as the TM Maritime Single Window (Phase 3).*” – Here a clear reference to future systems is made, therefore it will be possible to comply only following future development and customization.
- The Contracting Authority, in its response to PTL’s Request for Information has clarified clearly its expectation with regards to this requirement: “All bidders were required to confirm in their Technical Offer that their proposed solution will support differential morphing attack detection.”

b) ***Submissions on the Second Grievance***

- A financially competitive offer is not necessarily “**abnormally**” low;
- Quoting Recital 103 of Directive 2014/24, what may **appear** to be abnormally low, **might** be based on unsound assumptions and practices, but this is not necessarily the case;
- Indeed, Regulation 69, incorporated in our law in regulation 224 of the Public Procurement Regulations does not oblige the Contracting Authority to outrightly reject an “abnormally low” tender but requires it ask the bidder to: “*explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services.*”
- If the tenderer fails to provide an explanation, then this is deemed to be an acceptance that the tender is “abnormally low”. On the other hand, where an explanation is given, there is an actual **positive obligation** on the Contracting Authority to accept the offer in the sense that: It may **only** reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in sub-regulation (2).
- It remains the prerogative of the Contracting Authority to determine whether the explanations provided “satisfactorily account for the low level of price or costs proposed”. This is what

happened in this case. In fact, during the evaluation process, NetU was notified by the Contracting Authority that the Evaluation Committee had noted that the Financial Offer submitted in reply to the financial requirements as per Clause 5 D (i) of Section 1, Instructions to Tenderers, was substantially lower than the estimated value of the tender as determined by the Contracting Authority, and gave to NetU the opportunity to justify and explain how NetU was able to afford such an offer in terms of the above-quoted regulation 243.

- NetU has replied to this letter, providing all the required justifications and explanation regarding its price, in full compliance with the Public Procurement Regulations. Evidently, NetU's response was considered satisfactory by the Evaluation Committee, taking into consideration the recommendation for award. NetU contends and has properly justified and explained in NetU's response, that the price offered by NetU is not abnormally low, is economically sustainable, it is costed properly, it can be performed in accordance with the tender requirements and applicable legal obligations and complies in full with the Public Procurement Regulations.
- In this regard, NetU makes some further observations:
 - i. It is correct to say that there are judgments which emphasize the Contracting Authority's valuation of the tender as the most proper "marker" for the estimated price. That said, it is well known that given the different potential solutions, especially in a complex contract, the financial offers may vary widely. The RFP itself states that the published Estimated Procurement Value is not restrictive and final on the Contracting Authority. Economic Operators are free to submit financial offers above or below the Estimated Procurement Value. However, the Contracting Authority **reserves the right to accept or reject Financial Offers exceeding the Estimated Procurement Value.**

It is therefore ironic that the Contracting Authority's estimate is taken as a benchmark but, at the same time, the Authority reserves the right to reject offers if they exceed the estimate, making it more of an upper threshold, than a median or average.
 - ii. This is further confirmed by the fact that prior to the present call for a negotiated procedure, the Contracting Authority had issued a similar call, with the same scope, in which the estimated value was given at around €5 Million. This is another indication that the offer made by the Recommended Bidder – which is higher than €6M – should not be considered abnormally low.
 - iii. It is also significant that SITA BV's offer is even lower than NetU's. PTL dismisses this by arguing that only valid offers should be used as comparators. It is respectfully submitted that while this is a convenient argument for PTL to make, it is not a sound one. SITA BV's offer was not rejected for being "abnormally low", or for proposing technical solutions which were "too cheap". From its appeal, it appears that SITA

BV's offer was rejected on the basis of the qualifications of key experts. It is unlikely that this was a factor with a major impact on the pricing of its offer. Therefore, the value of SITA BV's offer certainly cannot be ignored or dismissed. At the very least, it is an indication that another bidder considered itself in a position to provide a solution at a much more competitive price than PTL, thus undermining the "abnormally low" argument.

- iv. It is also noted that since the software solution proposed by NetU has been developed by NetU, there is no dependency on third-party companies / subcontractors, avoiding therefore additional costs and overheads.

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.

First Grievance - Technical Non-Compliance

The Appellant (PTL Limited) contends that the Recommended Bidder's (NetU Consultants Ltd.) offer was not technically compliant with the mandatory requirement that "*The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3)*". The Appellant argues that compliance, including evidence thereof, was required at the time of tender submission, and that the Recommended Bidder is not listed in the relevant NIST report for such a solution and merely ticking "Yes" with a self-referential confirmation is insufficient.

The Board affirms the principle that whether compliance with a tender requirement is mandated *ab initio* (at the time of bid submission) or can be fulfilled during contract performance fundamentally depends on the precise wording of the tender document itself and the overall context of the procurement. This principle is clearly established in the various case laws referenced during the hearings, including *Leone Grech vs. Jobsplus*, *Cherubino vs. Department of Contracts*, *Luxury Living Technologies Ltd vs. Ministry for Environment, Energy and Enterprise*, *Davico versus Princess Operations*, *SC&V Construct (C-403/21)*, *Met Biologics*, and *Melchior Dimech*. These judgments consistently demonstrate that tender requirements must be interpreted within their specific context, with careful attention to the exact wording chosen by the Contracting Authority.

The Board notes the following key aspects from the evidence and submissions:

- The tender document, specifically the Technical Offer Form under "Other Mandatory Requirements," stipulated: "*The solution shall support differential morphing attack detection (NIST FATE Morph, Tier 3)*". Bidders were required to confirm compliance with a 'Y/N' answer and provide a reference to their technical offer where compliance could be ascertained.

- The Recommended Bidder marked 'Y' (Yes) to this requirement and, in the column for 'Reference in Proposal', stated: "*Please refer to point 24 in Section 2.3 of document 'Border Control System Proposal.pdf' in Section 1.3.1 of the technical section of our offer*". Point 24 of the referenced document stated: "*It is confirmed that the proposed solution will support differential morphing attack detection NIST FATE Morph, Tier 3*".
- Mr. Adrian Avellino (member of the Tender Evaluation Committee - TEC) testified that the TEC interpreted the phrase "shall support" to indicate a future capability or a commitment to integrate such functionality during the project's implementation phase. He explained this interpretation was due to the nature of the project, which involved national API integrations and customisations unique to Malta that could only occur post-award, citing other "shall" requirements (e.g., for national VISA integrations) that were similarly understood.
- The Recommended Bidder's separate proposal document ("*Border Control System Proposal.pdf*", page 6), stated: "*The arrival and departure check module includes integration with Biometrics software development kits (SDKs) from known manufacturers. For example, it can be integrated with the eu-LISA USK currently provided by IDEMIA, as well as embedded the Neurolink Verilook SDK that provides protection against face presentation and morphing attacks.*" Mr. Avellino noted IDEMIA is listed under NIST FATE Morph, Tier 3, while Neurolink Verilook SDK is Tier 1, emphasising the "*For example*" phrasing suggested illustrative integration capabilities.
- Dr. Inguanez, for the Contracting Authority, argued that "shall support" indicates a future commitment, making it a binding contract condition. He cited *Leone Grech vs. Jobsplus* where a commitment, not possession at tender stage, was deemed sufficient. Dr. Camilleri, for the Recommended Bidder, echoed this, emphasizing "support" implies future development for integration with existing hardware and that the term "shall support" was used carefully in specific instances requiring interaction with third-party systems or future developments.
- Dr. Decesare, for the Appellant, cited *Cherubino vs. Department of Contracts* and *Luxury Living Technologies Ltd vs. Ministry for Environment, Energy and Enterprise*, arguing compliance must be evidenced at submission and a mere declaration is insufficient.
- Dr. Calleja, for SITA (Interested Party), argued this requirement was a "performance condition" rather than an "award criterion," referencing Recital 104 of Directive 2014/24/EU. He stated that performance conditions are fixed objective requirements for contract execution, not for comparative bid assessment. He cited *Leone Grech, Davico versus Princess Operations*, and importantly, *SC&V Construct (C-403/21)*, where the ECJ held that obliging tenderers to satisfy all contract performance conditions at submission would be disproportionate and restrict competition. He posited that if not a performance condition, a self-declaration was sufficient, citing *Met Biologics* and *Melchior Dimech*.

The Board agrees with the Contracting Authority and the Recommended Bidder that the Evaluation Committee's interpretation of "shall support" in the context of this specific tender was reasonable. The phrase, coupled with the nature of the project, suggests a commitment to deliver the specified functionality during contract performance.

The Board also finds merit in SITA's argument distinguishing between award criteria and performance conditions; this requirement appears more akin to performance conditions. According to established procurement principles, technical specifications, award criteria, and contract performance conditions play distinctly different roles within the procurement process. As clarified in the jurisprudence cited during the hearings and reflected in procurement guidelines, award criteria enable the contracting authority to compare the relative advantages of different tenders through weighted scoring, whereas performance conditions specify how the contract is to be performed after the award. The reference to point 24 in the Recommended Bidder's proposal, which explicitly confirmed the solution "will support" the required detection, coupled with the examples of integration capabilities, was deemed sufficient by the TEC.

The Board does not agree with the Appellant's contention that the requirement, as worded in this tender, mandated fully demonstrable capability and submitted proof of such capability at the tender submission stage. The cases cited by the Appellant, such as *Luxury Living Technologies Ltd vs. Ministry for Environment, Energy and Enterprise*, pertained to requirements for specific, existing documents to be submitted, which is distinguishable from a requirement to "support" a future-state functionality.

Therefore, the Board does not uphold the Appellant's first grievance.

Second Grievance - Abnormally Low Tender

The Appellant contends that the Recommended Bidder's financial offer of approximately €6,000,000 was abnormally low when compared to the estimated tender value of €11,000,000 and the Appellant's own bid of over €10,000,000, suggesting a lack of economic sustainability or an underestimation of the technical requirements.

The Board notes the following:

- The Contracting Authority, upon noting the discrepancy and following a recommendation from the General Contracts Committee (GCC), requested the Recommended Bidder (NetU) to justify its price, in accordance with Regulation 243(1) of the Public Procurement Regulations.
- NetU provided a multi-page written explanation, citing factors such as their prior experience having already developed and implemented a similar Entry/Exit System in another EU Member State, their understanding of testing procedures, the use of open-source components (reducing licensing fees), and consequently a lower risk profile and more accurate estimating capability.

- Testimony revealed that an earlier tender for a similar system (without hardware and with a longer maintenance period) had an estimated value of approximately €5 million. SITA BV, another bidder in the current tender, submitted an offer even lower than NetU's. These points suggest NetU's bid was not an isolated outlier.
- With respect to State Aid and other regulations, the Board confirms that NetU specifically provided declarations in reply to these regulations.
- The Board therefore opines that the appellant's grievance is unfounded at this stage.

Therefore, the Board does not uphold the Appellant's second grievance.

Third Grievance - Deposit

The Appellant contends that the deposit of €55,000 requested by the Contracting Authority and paid by the Appellant exceeded the maximum amount of €50,000 permitted by Regulation 273 of the Public Procurement Regulations.

The Board notes:

- Regulation 273 of the Public Procurement Regulations (S.L. 601.03) clearly states that the deposit for an appeal "shall in no case be more than fifty thousand euro (€50,000)".
- The Appellant was requested to pay, and did pay, a deposit of €55,000.
- The Contracting Authority, during the hearing, acknowledged this error and stated there was "*no objection to the refund of the overpayment*" of €5,000.

The Board agrees with both the Appellant and the Contracting Authority that the €5,000 paid in excess of the legally stipulated maximum deposit was requested in error. This amount must be refunded. As the Board has not upheld the Appellant's substantive grievances, the Board does not agree that the remaining €50,000 of the deposit should be reimbursed. The Appellant's additional argument for a full refund due to alleged lack of clarity in requirements, citing Mr. Avellino's testimony that "*perhaps the requirements were not clear,*" is not accepted by the Board as a sufficient ground for full reimbursement in this context. The Board determines that Mr. Avellino's isolated remark suggesting unclear requirements was a mere slip of the tongue that contradicted his otherwise detailed and thorough explanation of the evaluation process and therefore rejects the Appellant's argument for a full refund on this basis.

Therefore, the Board partially upholds the Appellant's third grievance, solely in respect of the €5,000 paid in excess of the maximum permissible deposit.

The Board,

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

- a) Does not uphold Appellant's Letter of Objection and contentions,
- b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender,
- c) Directs that €5,000 out of the €55,000 deposit paid by Appellant be reimbursed..

Mr Kenneth Swain
Chairman

Dr Ing. Damien Gatt
Member

Mr Richard Matrenza
Member