

PUBLIC CONTRACTS REVIEW BOARD

Case 2096 – 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 Antoine Cremona, Dr Clement Mifsud Bonnici, and Dr Calvin Calleja, acting on behalf of Ganado Advocates, acting for and on behalf of SITA BV (hereinafter referred to as the "Appellant"), filed on the 12th 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 noted the reasoned letter of reply filed by Dr Steve DeCesare, acting on behalf of Camilleri Preziosi advocates, acting for and on behalf of PTL Limited (hereinafter referred to as an "Interested Party"), filed on the 22nd 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 23rd of August 2024;

Having heard and evaluated the testimony of the witness Mr. Sandro Calleja (TEC Member) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the first hearing on 28th March 2025;

Having heard and evaluated the testimony of the witness Mr. Jonathan Brincat (Proposed Key Expert 8 for SITA) as summoned by Dr. Calvin Calleja (SITA legal representative) for the Appellant, during the first hearing on 28th March 2025;

Having heard and evaluated the testimony of the witness Mr. Russell Camilleri (Proposed Key Expert 9 for SITA) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the first hearing on 28th March 2025;

Having heard and evaluated the testimony of the witness Mr. Keith Cutajar (Technical Expert) as summoned by the Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the first hearing on 28th March 2025;

Having heard and evaluated the testimony of the witness Mr. David Gatt (Manager, IT Department, Department of Contracts) as summoned by the Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the first hearing on 28th March 2025;

Having heard and evaluated the testimony of the witness Mr. Sandro Calleja (TEC Member) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the second hearing on 28th May 2025;

Having heard and evaluated the testimony of the witness Mr. Antonello Grech (TEC Chair) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the second hearing on 28th May 2025;

Having heard and evaluated the testimony of the witness Ms. Joyce Dimech (Permanent Secretary, Ministry for Home Affairs, Security and Employment) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the second hearing on 28th May 2025;

Having heard and evaluated the testimony of the witness Mr. Adrian Dalli (Director General, Department of Contracts) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the second hearing on 28th May 2025;

Having heard and evaluated the testimony of the witness Ms. Graziella Formosa (TEC Secretary) as summoned by Dr. Clement Mifsud Bonnici (SITA legal representative) for the Appellant, during the second hearing on 28th May 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 sitting of the 28th of March 2025 (first sitting) and on the 28th of May 2025 (second sitting), hereunder reproduced:

Minutes

Tender P4074/2021 – Negotiated Procedure for the Procurement of a Border Control System for the Malta Police Force

The tender was issued on the 18th of April 2024, and the closing date was the 10th of May 2024.

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

On 12th August 2024, SITA BV (TID 209918) lodged an appeal against Malta Police Force, the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected for being disqualified.

A deposit of €50,000 was paid.

There were three bids.

On the 28th of March 2024, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Dr Ana Thomas, and Dr Ing. Damien Gatt as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: SITA BV. (MT1813-5629)

- Dr. Clement Mifsud Bonnici – Legal Representative
- Dr. Calvin Calleja – Legal Representative
- Dr. Kelly Cini – Legal Representative
- Dr. Rhys Jenkins – Company Legal Representative
- Mr. Owen Cilia – Company Representative

- Dr. Russell Camilleri – Witness
- Dr. Jonathan Brincat – Witness
- Dr. Keith Cutajar - Witness

Contracting Authority: Malta Police Force

- Dr. Daniel Inguanez – Legal Representative
- Mr. Antonello Grech – Chairperson Evaluation Committee
- Mr. Sandro Calleja – Evaluator
- Mr. Robert Grixti -- Evaluator
- Mr. Adrian Avellino – Evaluator
- Ms. Graziella Formosa – Secretary Evaluation Committee
- PS. Cristine Pollacco – Evaluator
- Ms Stefania Sgandurra (Director General) – Representative
- Insp. Clint Sammut- Representative
- Mr. Roderick Stoner – Technical Advisor
- Supt. Jurgen Vella - Representative
- Miguel Pellegrini Petit – Legal Officer

Department of Contracts.

- Dr. Mark Anthony Debono – Legal Representative

Recommended Bidder: NetU Consultants Ltd. (HE44217)

- Dr. Joseph Camilleri – Legal Representative
- Dr. Matteo Muscat Filletti – Legal representative
- Mr. Demetris Nissiotis – Company Representative
- Mr. Michael Papadopoulos – Company Representative
- Ms. Androniki Kameri – Company Representative (online)

Interested Party – PTL Ltd (C3545)

- Dr. Steve Decesare – Legal representative On line
- Dr. Stefan Cutajar –Legal Representative
- Mr. Denis Vella – PTL Representative

Introduction and Procedural Matters

The Chairman welcomed the parties and invited them to put forward their initial submissions.

Initial Submissions

Appellant's Submission (SITA BV) by Dr Calvin Calleja and Dr Mifsud Bonnici

Introduction and Background

Dr. Calvin Calleja, representing the appellant SITA BV, began by providing context for the Board, noting their likely familiarity with the procurement from the related appeal filed by PTL (Case 476). He outlined the key facts: the Malta Police issued a second negotiated procedure in April 2024 for an entry-exit system for third-country nationals, SITA BV received a letter of rejection on August 2, 2024, and filed its appeal within the prescribed time period.

Dr. Calvin Calleja stated that SITA's appeal, though comprising 8 grounds, would focus on three main categories:

1. *Ex Post Facto Change in Requirements (Grounds 1 & 3)*

The Contracting Authority allegedly changed tender requirements ex post facto. The tender dossier required bidders to submit a CV, statement of availability, and key expert form for each key expert. SITA submitted these. However, the rejection letter cited SITA's failure to submit MCSA certificates. Dr. Calleja argued, "*This Board will know that the rules of the game are defined by the tender dossier and by any clarifications that are issued by the Contracting Authority before the closing date. For this reason alone, SITA should not have been disqualified.*"

2. *Alleged Technical Non-compliance*

SITA maintained its bid was compliant and remained so even after a rectification request. The disqualification was allegedly due to Key Experts 8 and 9 not possessing requested certifications. Dr. Mifsud Bonnici added, "*what we are saying is that the key expert that this side nominated were not only meeting the requirements but one could say they were even overqualified.*" The appellant stated their intention to substantiate this claim with evidence during the next stage of the proceedings.

3. *Procedural Irregularities:*

Dr. Mifsud Bonnici addressed the third category, strongly refuting suggestions that SITA's goal was to "*bring down the procedure*" or force a "*re-match*." The appeal's purpose is to highlight irregularities in the evaluation itself, consistent with the "*goalpost shifting*" argument. The core irregularity was that the evaluation committee introduced new conditions "*halfway through the process*" and only notified the bidder of this new documentary requirement (the CSA certificate) in the final rejection letter.

Regarding the requested remedy, the appellant is explicitly not seeking a cancellation of the tender, which Dr. Mifsud Bonnici described as the "*nuclear option*," as their primary goal is to "*preserve competition*." The appellant requests that the rejection decision be squashed and that a fresh re-evaluation of all submitted bids be conducted by a new tender evaluation committee. Since all bidders have already submitted their technical and financial offers, a re-evaluation is the most appropriate way to save the procedure while ensuring a fair and lawful outcome. The appellant acknowledged the Board's ultimate discretion on the matter.

Dr. Mifsud Bonnici concluded the opening submissions by noting that the appellant had procedural points to address at a later stage.

Contracting Authority's Submission (Malta Police Force)

Introduction and Approach

Dr. Daniel Inguanez, representing the Malta Police Force as the Contracting Authority, delivered concise opening submission. He stated, *"I will be very brief in my initial submissions because I think a lot of the questions that are being raised in the appeal have to be answered by evidence and there is not really point of law."* He addressed each of the appellant's above 3 categories of grievances.

Response to Allegations of "Goalpost Shifting"

Dr. Inguanez clarified the Authority's position regarding the first set of grievances. He stated, *"We maintain that we did not change the goalpost."* He emphasized that the Contracting Authority and the evaluators have a duty to verify that the tender conditions were satisfied, *"including by requesting supplementary documentation,"* and asserted, *"that is what happened here."*

Technical Compliance and Document Equivalency

Addressing the second set of grievances, Dr. Inguanez noted that the central issue is whether the documents submitted by the appellant, in the absence of certificates, are equivalent to what was requested in the tender. He stated, *"I think what this Board is being called to determine is whether the document submitted by the other party, by the appellant, because they did not submit certificates, are equivalent to what was being requested."* He added that this is the main point of contention and will be answered through the evidence presented.

Procedural Irregularities and ePPS Audit Trail

Regarding the allegations of irregularities, Dr. Inguanez remarked that the suspicions or allegations raised likely stem from the ePPS ID audit trail. He noted, *"SITA clearly went through the audit trail and found some points which are being raised."* He reiterated the Authority's position as stated in their reply: *"the allegations are unfounded, and this will also be answered through the evidence that will be brought including by evaluation committee members to explain what actually happened because obviously the ID audit trail only shows you what was inputted through ePPS which sometimes does not give the whole picture."*

NetU (Recommended Bidder's) Submission

Dr Joseph Camilleri, for NetU, stated that he had nothing to add at this point and will make his submissions later.

PTL (Interested Party's) Submission

Context and Importance of the Tender

Dr. Stefan Cutajar, representing PTL Ltd. as an interested party, began by emphasizing the project's significance. He noted that the tender for a border control system is a *"system of national importance and the security of the country."* He also highlighted that it was an EU-funded project, arguing that *"therefore even further attention had to be reserved to full compliance with the principles in EU procurement law."*

Position on SITA's Appeal

Dr. Cutajar clarified that PTL is "*not fully aligned with the appellant's decision in terms of its first five grievances.*" However, he stated that PTL is partly in agreement with the points raised in SITA's grievances 6 and 7.

PTL's Primary Arguments

PTL's core argument focused on the compliance of the recommended bidder. Dr. Cutajar asserted that the recommended bidder should not have been deemed technically compliant. More importantly, he argued that "*the financial offer was abnormally low and that the investigation made by the tender evaluation committee was not sufficiently deep and exhaustive.*" He contended that the clarification process did not sufficiently justify the price offered.

Regarding the final grievance concerning procedural irregularities, Dr. Cutajar stated that PTL reserves the right to comment later, as they did not have "*enough documentation, and enough facts to put forward a comprehensive thesis*" at the time of their reply.

Requested Remedy and Desired Outcome

Dr. Cutajar outlined PTL's objective in the proceedings. PTL will seek to demonstrate that the Board has sufficient evidence to revoke the recommendation to award the contract. The desired outcome is for the Board to:

1. Confirm PTL's argument that the offer submitted by the recommended bidder (NetU) is not technically and financially compliant.
2. Confirm that SITA is not technically compliant.

Order a "*fresh evaluation process that takes into account these findings,*" a position on which PTL agrees with the appellant, SITA.

Appellant's intervention on Procedural matters

Request for Consideration of Evidence from Case 476

Dr. Mifsud Bonnici requested that all evidence collected in case 476 (the PTL appeal) be considered in this case, citing similarities between the two. He stated, "*we do not repeat, some witnesses we do not summon, I am suggesting it for the sake of efficiency.*" Dr. Daniel Inguanez (for the Contracting Authority) and Dr. Joseph Camilleri (for the Interested Party, NetU) raised no objections. The Chairman minuted that the request was upheld.

Request for Completeness of Procurement File

Dr. Mifsud Bonnici expressed a desire to ensure all correspondence, emails, letters, and minutes relating to this procurement procedure were included in the procurement file. He specified, "*in particular and by no means is this an exclusive category, any correspondence that was exchanged with the Director of Contracts or with the General Contracts Committee or with the Ministry that is responsible for the Contracting Authority, needs to be included in the procurement file so that the PCRB has full access.*" He further requested that proceedings from a previous negotiated procedure and a market consultation related to this project also be part of the file for "*full visibility.*"

Responses:

- The Contracting Authority's counsel, Dr. Daniel Inguanez, confirmed that correspondence with the Department of Contracts was already in the file. He stated they had no objection to adding documents from the previous procedures but did not have them on hand
- Dr. Mark Anthony Debono, for the Department of Contracts, cautioned that evaluation should focus on the current negotiated procedure and cited Regulation 242(3) regarding disclosure limits for information not in the public interest.

Chairman's Ruling:

The Chairman assured all parties that the Board would ensure its files contained all requested information, "*whether upheld or not, so that the Board has the full context and picture*". He agreed to include the additional documents for context but reiterated that the Board's decision would be based on the grievances related to the current negotiated procedure.

Disclosure of Specific Email Thread

Dr. Mifsud Bonnici then raised the issue of a specific email thread (the correspondence exchanged between the Contracting Authority, the Permanent Secretary, and the Department of Contracts) previously requested by SITA, for which disclosure was initially objected to by the Contracting Authority and upheld by the PCRB. Dr. Inguanez, while maintaining an "*in principle*" objection to disclosing internal correspondence, agreed not to object to this specific email thread being circulated "*only to the lawyers with specific direction not to reproduce it,*" to avoid lengthy testimonies. This was agreed by Dr. Mifsud Bonnici.

Witness Testimonies

Testimony of Mr. Sandro Calleja (ID 27175M) – TEC Member (Summoned by Dr. Clement Mifsud Bonnici)

Witness Details

Mr. Sandro Calleja introduced himself as an ICT executive with the Ministry of Home Affairs, a certified information systems auditor, and a Microsoft Certified Systems Engineer with 30 years of IT experience. He confirmed he served as a technical member of the Tender Evaluation Committee (TEC) for this procurement.

Committee and Evaluation Process

The Tender Evaluation Committee was chaired by Mr. Antonello Grech. Other members included Adrian and Robert, whose full names Mr. Calleja did not recall as he stated, "*I do not work with them on a daily basis, we worked only on this project.*" The composition of the committee changed initially, with Mr. Christopher Bell, the CIO of the Ministry for Home Affairs and National Security, being replaced by Robert "*before any of this process started*" and "*before the bids closed.*"

Mr. Calleja described the evaluation methodology as an exercise where "*everyone did on his own and then we met and discussed the findings between each other.*" The committee met approximately 6 or 7 times, with most meetings conducted virtually and lasting 2, 3, or 4 hours each. The evaluation covered administrative, technical, and financial parts sequentially. Mr. Calleja confirmed he was not involved in drafting the letter of rejection but had seen it.

Testimony on Key Expert Requirements and Disqualification

Documentation and Interpretation

When questioned about what documentation was requested from bidders for key experts, Mr. Calleja stated, *"it was requested a CV... And to support the CV, one has to submit the certificates."* He affirmed this was his position and that this interpretation was shared unanimously by the committee, based on what he described as being listed in the evaluation grid as mandatory requirements that *"we had to check that they are available."*

Key Expert 8

Mr. Calleja identified Mr. Jonathan Brincat as the key expert who lacked MCSA certification. He explained that MCSA stands for *"Microsoft Certified System Administrator"* and described it as *"the oldest certification which could have been submitted,"* noting there is also *"Microsoft certified solutions associate."* He characterised the certification level as *"entry to medium level"* and detailed that *"MCSA is Microsoft in nature, so the Microsoft certifies you for this certification. It is about servers, active directory, sequel server and"*

Mr. Calleja noted that MCSA *"is no longer in force as at today. It was replaced with Azur 800 and 801"* in 2023, which was *"before the negotiated procedure was issued."* However, he clarified that older certifications remained valid, stating, *"if you have an engineer like which did the certification 20 years ago, I will present my Microsoft system administrator certification and I would have been eligible for this tender."*

Instead of MCSA certification, SITA submitted CCNA certification for Mr. Brincat. Mr. Calleja explained, *"CCNA, the certification that was presented is from CISCO, it is about networking, routing, switching and security, so they are different, they are not equivalent."* He further clarified, *"The equivalent to CCNA is Com... Network Plus, for example. One is for server administrators, the Microsoft certified and here we are specifying that they have to be on Microsoft technologies and on the CCNA it is about CISCO and networking technologies."*

Rectification Request

The TEC issued a rectification request to SITA. Regarding Key Expert 8, the request stated, *"Also, the submitted documents do not include copies of the MCSA certificates."* When asked whether it was necessary to include *"or equivalent"* in this wording, Mr. Calleja responded, *"I was happy with this wording"*. Following the rectification request, SITA *"submitted the same documentation"* and *"had the opportunity to change this if they wanted to in this rectification, but they did not."*

Key Expert 9

For Key Expert 9, Mr. Calleja stated that the requirement was for an expert *"in possession, holds a certification in the DBMS, in the Database Management System being proposed in the solution. And this was mandatory."* He explained that SITA's proposed solution involved *"Microsoft SQL..."* but the certification provided was for *"Oracle not Microsoft sequel."* He noted, *"The correct certification would have been a certification from Microsoft-on-Microsoft sequel server."*

When presented with a certificate of completion from Oracle University, Mr. Calleja interpreted it as *"course attendance,"* stating, *"Oracle University course. It is a course. It does not say 'Mr...' certified database."* He maintained, *"this is a course attendance"* and explained the distinction: *"A certification you do training, you do an examination, you fulfil requirements, and you get the certification from the body."*

Other Bidders

Mr. Calleja confirmed that both NetU and PTL submitted the required certificates with their initial bids. When asked whether this was why no rectification was requested from these bidders, he confirmed, "Yes correct."

Administrative Clarification (Turnover):

SITA received a clarification request regarding turnover information, which stated: "*In this regard you are kindly requested to rectify your position by supplying information on the yearly turnover covering the requested period namely 2021, 2022. Unaudited accounts for 2023 could be acceptable.*"

When asked to identify the tender provision requiring submission of accounts, Mr. Calleja stated, "*It is not here.*" However, he explained the committee's rationale: "*Together because some companies may not be necessary at the end of the year make it to have audited accounts exactly at the end of the year. So even unaudited accounts would have been accepted as well.*"

He initially stated that management accounts would be acceptable but then clarified his position on audited versus unaudited accounts: "*For 2021 and 2022 legally you should present the audited accounts because if you are not auditing your accounts, you will not be that serious.*" However, he later confirmed, "*No, we did not specifically ask for audited accounts.*"

Cross-Examination:

- By Dr. Inguanez (Contracting Authority): Dr. Inguanez clarified the technical differences between certifications. Mr. Calleja reiterated that CCNA is "*CISCO certified network associate... about networking, routing, switching, and security*" while MCSA concerns "*Microsoft technologies*". He confirmed that SITA "*had the opportunity to change this if they wanted to in this rectification, but they did not*" for Key Expert 8. For Key Expert 9, Mr. Calleja explained that SITA's proposed solution used "*Microsoft sequel server*" but the certification provided was for "*Oracle,*" confirming these are "*different products.*"
- By Dr. Camilleri (Recommended Bidder): Dr. Camilleri established that TEC members had "*different skills, different areas of expertise*" and that Mr. Calleja's particular area was "*on the technical aspect of the offer.*" Mr. Calleja confirmed that SITA had two options during rectification: "*provide certification confirming that the key experts provided did in fact meet the requirements of the tender*" or "*changing the identity of the key expert with someone who would have this certification.*" He maintained that "*attendance for a course only, is not accepted and you will not become a certified person in that matter.*"
- By Dr. Stefan Cutajar (for PTL Ltd.): Mr. Calleja recalled SITA's turnover response as a "*statement.*" After checking notes, he stated that for Key Experts 8 and 9, according to his notes, the experts were not changed by SITA during rectification. He did not recall any challenge to tender specifications by any party.
- Re-examination by Dr. Mifsud Bonnici: Mr. Calleja maintained it was "*normal procedure*" for certificates to be submitted with the bid, but then stated, "*I believe it is not in this or any other tender that exists. It is normal practice that we operate in that way.*" Regarding the letter of rejection for Key Expert 9, which stated, "*whereby a new resource was being proposed,*" Mr. Calleja, after reviewing his notes, eventually agreed with Dr. Mifsud Bonnici that the wording "*a new resource was being proposed*" in the letter of rejection was "*incorrect.*"

At this point, Dr. Mifsud Bonnici suspended Mr. Calleja's testimony to call other witnesses.

Testimony of Mr. Jonathan Brincat (ID 342885M) – Proposed Key Expert 8 for SITA (Summoned by Dr. Calvin Calleja)

Mr. Brincat introduced himself as an IT professional since 2003, proposed as a system engineer. His academic background includes a Diploma in ICT, a Diploma in Business Management, and an MBA.

Qualifications and MCSA

He was aware of the Key Expert 8 requirements: MQF Level 5 in ICT/Engineering and MCSA or equivalent. He described MCSA as *"a vendor specific certification... the entry level certification for systems administrators."* He stated, *"MCSA certification has been retired in 2023... the relevance of it nowadays is little to none."* He listed his certifications: *"LPAC02 certification for operating systems virtualisation and infrastructure. The Oracle 1G database administration. I have certifications in SAP for business systems and also CISCO certified networking certification, CCNA."*

Work Experience

Mr. Brincat detailed experience on large-scale national and EU projects, including a platform for Maltese hospitals (2024), emergency services platforms (ongoing, for police, hospitals, civil protection, army), and high-level events like the EU Presidency (2017), Araiolos, and African Summit. He confirmed working with Microsoft SQL systems since 2006. In these projects, he handled Microsoft server-based and Linux-based operating systems, Microsoft SQL, MySQL, and Oracle databases, and various storage and virtualization applications. He stated his role was *"to handle the solutions end-to-end so I handled both the system, the network and also the storage."*

Cross-Examination:

- By Dr. Inguanez (Contracting Authority): Mr. Brincat confirmed he acted as both network and system administrator in his projects. He confirmed he does not possess MCSA certification but holds CCNA. He emphasised the importance of practical experience: *"The experience required has much more weight on it because simply reading the book and getting the certification does not give you enough experience to be able to implement and maintain such systems."* Regarding an Alert Solutions certificate of attendance (for a two-day course on business objects held in 2012), he confirmed attending and that there was a test on the last day. For his CCNA, he attended a 3-month rapid course and then went through exams for certification.
- By Dr. Stefan Cutajar (for PTL Ltd.): Mr. Brincat confirmed awareness that Microsoft replaced MCSA with Azure 800 certification, which he does not possess, nor Azure 801.
- Re-examination by Dr. Calvin Calleja: Mr. Brincat confirmed he had to pass tests to be issued with the certificates he mentioned, including the Alert Solutions one. He stated for the Alert Solutions test, *"There is no particular mark... You have a certain number of questions, and you have to get those questions correct."*

The Chairman thanked Mr. Brincat.

Testimony of Mr. Russell Camilleri (ID 212385M) – Proposed Key Expert 9 for SITA (Summoned by SITA)

Mr. Camilleri introduced himself, stating: *"I have been working in the IT industry for the last 20 years and currently I provide IT services including SITA."* His proposed role in the tender was to provide database administration support.

Qualifications and Requirements

- Tender Requirements: Mr. Camilleri confirmed his understanding of the requirements: *"the education requirements were that the candidate needed to have an MQF level 5, that was basically it for education."* Regarding certification, he stated: *"for certification, it required we have a certification on the database which was being provided which in this case would be Microsoft Sequel Server 2016."*
- Educational Background: He holds a Bachelor's degree in Business and Computing (2007), a Master's degree in IT (2012), and a Doctorate (2022).
- Certifications and Experience: He listed certifications in ITIL, Oracle 11G, and Azure SQL. Regarding his database experience, he testified: *"I have been working on databases since I started working in IT so from 2006. I have worked on various flavours of databases including sequel server, starting from Sequel Server Version 2000 and going upwards."* He provided services to SITA from 2006 to 2013 as a full-time employee and continues contractually.
- Relevance of Certifications: He explained the transferability of database skills: *"Oracle Databases, Sequel Databases, MySQL and so forth, they are all categorized relational databases, so they are still the same type of databases. The technologies might differ a bit, however most of the commands and the principles apply for each and every one of them."* He described his Oracle certification course as a three-day program followed by an exam, which he passed to receive a *"certificate of completion."* He confirmed that the document previously discussed in Mr. Sandro Calleja's testimony was this certificate.

Cross-Examination

- By Dr. Inguanez: When asked about his Azure certification date, Mr. Camilleri stated it was June 18, 2024.
- By Dr. Cutajar: Mr. Camilleri confirmed that the "certificate of completion" from Oracle University was the certificate he held from them.
- Re-examination by Dr. Mifsud Bonnici: Regarding his Azure preparation, Mr. Camilleri stated: *"I prepared it two days prior. I applied for the course, we went to the learning institute, I passed the exam in two hours."*

Testimony of Mr. Keith Cutajar (ID 98288M) – Technical Expert (Summoned by the Appellant)

Mr. Cutajar introduced himself as *"a technical professional in the field of IT, Cybersecurity and digital forensics"* who has served as a court-appointed expert for over 11 years. He explained his engagement: *"I was tasked to have a look at the technical requirements of the tender, have a look at the key experts which they have proposed and assess their relevance etc to the subject in scope, that is the technical expertise."*

Methodology

To assist the Board, he prepared a PowerPoint presentation, dividing it into two sections – Key Expert 8 (systems engineer) and Key Expert 9 (database administrator) – and *"mapped every tender requirement, one by one, against the qualifications and experience found in the two CVs."*

Analysis of Key Expert 8 (Systems Engineer)

Requirements Identified:

- MQF Level 5 in ICT or Engineering

- Microsoft MCSA certification or equivalent
- Minimum 4 years ICT experience
- Knowledge of various technologies (servers, operating systems, networks)
- Experience on large-scale projects

Mr. Cutajar noted the MCSA requirement and its status: "*The certification was retired by Microsoft itself on the 19th of September 2023, not because there was anything in particular but as you know technology evolves and one needs to also evolve and revive certifications.*" MCSA was replaced by the Azure 800/801 series.

Proposed Experts' Suitability:

- Stepan Matsievskii : Described as "overqualified" due to holding the MCSE (Microsoft Certified Solutions Expert), a higher-level certification than the required MCSA.
- Jonathan Brincat: While not holding the MCSA, Mr. Cutajar argued he possessed equivalent certifications and experience that mapped to the core principles of the modern Azure certifications:
 1. Enterprise/Infrastructure: Covered by his Linux certification.
 2. Enterprise/Databases: Covered by his Oracle certification.
 3. Cloud/Enterprise: Addressed by his SAP Business Objects certification.
 4. Networking: Covered by his certifications and experience in Telecoms.
- He also highlighted Mr. Brincat's "*personal presidential appreciation*" for his work on the EU Presidency and African Summit projects as evidence of his experience on large-scale projects involving government Microsoft infrastructure.

Analysis of Key Expert 9 (Database Administrator)

Requirements:

- An MQF Level 5 qualification.
- Certification in the specific Database Management System (DBMS) being proposed.
- A minimum of 3 years of experience in systems administration (Linux & Windows).
- Knowledge of Linux Shell scripting.
- Able to communicate well in the English Language
- Has 3 or more years' hands on relevant experience.

Proposed Expert's Suitability (Dr. Russell Camilleri):

- Qualifications: Dr. Camilleri holds a PhD in IT (MQF Level 8), significantly exceeding the Level 5 requirement.

- Certifications: He possesses a certification in Oracle DB11G and, crucially, a certification for the proposed Microsoft platform solution.
- Experience: His CV demonstrates vast experience since 2006 with a wide array of database systems, including "Snowflake, Oracle, DB2, Microsoft SQL, My Sequel... Mongo DB."
- On Equivalency: Mr. Cutajar argued that the fundamental skills are highly transferable between database systems. He stated, "*the syntax does not change from Oracle, Mongo, Microsoft, whatever, it remains the same. It is international,*" referring to the standard Structured Query Language (SQL).

Conclusion

Mr. Cutajar concluded that from a technical perspective, all proposed experts possessed the sufficient and reasonable expertise required, meeting or exceeding the tender's demands.

Cross-Examination

- By Dr. Inguanez: Mr. Cutajar confirmed he was engaged by SITA specifically for this appeal.
- By Dr. Camilleri: Mr. Cutajar agreed that both certification and experience were required. When pressed on the requirement for "*certification in the DBMS being proposed in the solution*" and shown Dr. Camilleri's Oracle certificate of completion, he confirmed the certificate was for Oracle, not the proposed Microsoft solution. He argued the underlying SQL language was internationally standard and transferable.
- By Dr. Cutajar: When asked about the difference between the Azure 800/801 certifications and Mr. Brincat's, Mr. Cutajar explained that while Brincat's certifications covered the same domains (cloud, enterprise, networking, etc.), they were not the specific Azure certifications. He stated that while Mr. Brincat's certifications are not "*equivalent*" in name, his collective knowledge and experience would allow him to administer the technology effectively. He confirmed that the CCNA certification is specifically focused on networks.

Testimony of Mr. David Gatt (ID 5879M) – Manager, IT Department, Department of Contracts (Summoned by the appellant)

Mr. Gatt introduced himself: "*I am a manager at the IT Department at the Department of Contracts and specifically my tasks include making sure that the tender system is working correctly and providing assistance for users who encounter issues.*" He confirmed he has occupied this role for 10 years.

ePPS Audit Trail

- Authenticity and Re-evaluation: Mr. Gatt confirmed the audit trail's authenticity and explained the duplication: "*That happened because this tender was re-evaluated and when a re-evaluation happens, there needs to be another re-opening.*" He stated he was not aware of the specific reason for the re-evaluation.
- User Management Logs: He explained that entries for "*associate users to CFT*" and "*dissociate users from CFT*" on July 29th, 2024, log when user roles in the tender process are changed: "*There is a number of persons who are always associated in specific roles during a tender process. And those users can be changed with other users and those actions are marking the change of one user to another*".

- Commitment to Provide User Information: Mr. Gatt committed to inquiring with the system's Greek service provider to obtain and submit a comprehensive list of all government-side users only associated with the tender, including:
 - Full names and surnames (not abbreviations from audit trail)
 - Dates of their association with the tender
 - Dates of disassociation (where applicable)
 - He clarified this information would need to be obtained from the system providers.

Clarification Process Investigation

- July 29th Clarification Request: Mr. Gatt confirmed that entries showing "*create evaluation clarification*" and "*view evaluation clarification*" indicated "*the evaluation team is asking a question to one of the bidders*" - specifically, a request for clarification regarding an abnormally low offer.
- August 1st Response Verification: When asked to identify the log entry for the recommended bidder's (NetU) submitted on August 1st, 2024, Mr. Gatt explained he could not immediately locate the entry without the bidder's specific username. After reviewing the August 1st entries, he stated: "*Here there is nothing on the 1st of August by that username. However, I cannot confirm that... I cannot confirm if that reply was actually sent on the 1st.*"
- He committed to verifying the exact date and time of the clarification response submission and reporting back to the Board.

Cross-Examination

- By Dr. Inguanez (Contracting Authority): Mr. Gatt confirmed his knowledge limitation: "*whatever you know about this tender process you know from the IT audit trail, correct?*" He responded: "Correct" and confirmed he had no knowledge of substantive evaluation events.

Adjournment

After a short discussion regarding the availability of further relevant witnesses, the Chairman declared the hearing adjourned to the 28th of May 2025, at 9:00 AM.

End of Minutes of first hearing

Second Hearing- May 28, 2025

On May 28th, 2025, the Public Contracts Review Board (PCRB) composed of Mr. Kenneth Swain as Chairman, Dr Ana Thomas, and Dr Ing Damien Gatt as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: SITA BV. (MT1813-5629)

- Dr. Clement Mifsud Bonnici – Legal Representative
- Dr. Calvin Calleja – Legal Representative
- Dr. Kelly Cini – Legal Representative
- Dr. Rhys Jenkins – Company Legal Representative (online)
- Mr. Flavio Moretti – Company Representative

Contracting Authority: Malta Police Force.

- Dr. Daniel Inguanez – Legal Representative
- Ms Stefania Sgandurra (Director General) – Representative
- Mr. Antonello Grech - Chairperson Evaluation Committee
- Mr. Sandro Calleja – Evaluator
- Mr. Robert Grixti -- Evaluator
- Ms. Graziella Formosa – Secretary Evaluation committee
- PS. Cristine Pollacco – Evaluator

Department of Contracts

- Dr. Miguel Degabriele – Legal Representative

Recommended Bidder: NetU Consultants Ltd. (HE44217)

- Dr. Joseph Camilleri – Legal Representative
- Mr. Demetris Nissiotis – Company Representative
- Mr. Michael Papadopoulos – Company Representative
- Ms. Androniki Kameri – Company Representative (online)

Interested Party – PTL Ltd C3545)

- Dr. Steve Decesare – Legal representative
- Dr. Stefan Cutajar –Legal Representative
- Dr. Pauline Debono – PTL Representative

Introduction and Procedural Matters

- The Chairman reconvened the sitting.
- Dr. Clement Mifsud Bonnici, for the appellant SITA, exhibited a timeline document based on evidence already on file to facilitate proceedings.
- Dr. Daniel Inguanez clarified his role for the record, stating, *"I am usually the lawyer for the Department of Contracts but in this case, I am representing the Malta Police Force... to be clear I am not speaking to the Department in this case."*

The Chairman noted that summonses had been issued for the Permanent Secretary, the Director General of Contracts, and other officials, and that some were not yet present when the sitting began.

Witness Testimonies

Testimony of Mr. Sandro Calleja (ID 27175M) – TEC Member (Summoned by Dr. Clement Mifsud Bonnici)

Appointment Process

- Mr. Calleja testified that he was appointed to the Tender Evaluation Committee (TEC) by the Permanent Secretary, receiving a formal letter of appointment.

Regarding the engagement of Mr. Roderick Stoner as a technical expert

- Mr. Calleja stated, *"I was not involved in choosing Roderick Stoner."*
- MITA's Role: He explained that the TEC requested an expert, and he believed MITA was asked and subsequently recommended Mr. Stoner. He could not be certain who made the final appointment but testified that Mr. Stoner was already a member when the committee was formally declared, albeit without a vote.
- Stoner's Appointment: Mr. Calleja confirmed that when committee members were declared, Stoner *"was one of the members, without a vote."* He was *"not aware of how Mr Stoner received his appointment as a technical expert"* and *"found him there and basically you had to work and collaborate during this process."*
- Scope of Work: Stoner's role was *"strictly and solely requested to advise on technical matters"* - specifically *"specifications of the servers and the technologies being used, regarding those matters only"* and *"related to technical hardware aspect only."*
- Key Experts Assessment: Mr. Calleja confirmed that he personally assessed the certification of key experts, stating that the committee *"did not resort to external counsel."*

Tender Procedure and Evaluation Timeline

- Procedure Type: When asked about the tender procedure, Mr. Calleja described it as "BPQR" and characterized it as *"a normal procedure"* - *"nothing extraordinary about it, nothing extreme about it."*

- Evaluation Duration: The evaluation took *"a couple of months"* from tender opening. Mr. Calleja explained they *"finalised the tender to proceed onto next part of the tender closure. Then we had to freeze the matter. We re-opened the tender without changing anything what we have made in it and then we had closed it again."*

GCC Communications and Recommendations

- Email Correspondence: When asked about July 2024 email correspondence between TEC, GCC, and Permanent Secretary regarding bid evaluation, Mr. Calleja stated: *"I was not copied in it."*
- SITA Rectification: Mr. Calleja testified he was *"not aware"* that the GCC had recommended seeking an additional rectification request from SITA on its technical offer.
- NetU Clarification: Mr. Calleja confirmed awareness of the GCC recommendation to seek clarification from NetU regarding its abnormally low offer, stating this was done *"on the clarification of the GCC I think."* He explained that NetU's response was received *"within a week"* with a one-week deadline being standard for all clarifications.
- Communication Structure: Mr. Calleja noted that GCC communications *"are not addressed to the TEC members"* but rather *"to the Chairman of the adjudication committee,"* explaining his limited involvement in this process.

Witness Recollection

- Mr. Calleja acknowledged limited recollection of specific details, stating *"This has been a year ago and I do not recall the specifics about what happened a year ago."*

Note: The testimony concluded with the lawyer requesting to suspend further questioning of Mr. Calleja due to his limited recollection and suggesting Mr. Grech would be better positioned to provide detailed testimony.

Testimony of Mr. Antonello Grech (ID 466372M) – TEC Chair (Summoned by Dr. Clement Mifsud Bonnici)

Appointment Process and Committee formulation

TEC Member Appointments

- TEC Member Appointments: Mr. Grech testified that when forming the technical members, *"we asked the Government, the Permanent Secretary and further up that we need people to be members of the TEC board. I was appointed as a chairman. They asked MITA to provide someone and they provided Adrian. From the Ministry they provided Sandro and Robert and from the Malta Police Force we brought Neville Xuereb and Christine Pollacco."*

Mr. Stoner's Nomination Process

- MITA's Recommendation: Adrian Avellino from MITA recommended Mr. Stoner, stating *"Adrian came and told us that we would need another person to be a technical expert on the hardware and he recommended Mr Stoner. Then we sent the suggestions to the Contracting Authority, to the Permanent Secretary and she approved them."*
- No Committee Discussion: When asked if he discussed Stoner's appointment with fellow TEC members, Mr. Grech clarified: *"No no no. It was all the suggestion of the representative of MITA, Adrian. From day one it was, Adrian Avellino."*

- Pre-Constitution Timing: This appointment occurred "*prior to your constitution as a tender evaluation committee.*"

Authority Structure

- Mr. Grech clarified that "*The Permanent Secretary appointed them*" and that "*the head of the Contracting Authority approved and then sent it to the Permanent Secretary.*"

Evaluation Timeline and GCC Interaction

- Initial Evaluation: The evaluation took approximately two to three months, with the evaluation report submitted towards July for Department of Contracts approval.
- Report Finalisation Instructions: Mr. Grech explained the process: "*we had done the evaluation report and everything, put it on the ePPS and then you have to do it finalised. And my instructions were, do not finalise at the moment so that it should be discussed. Then the discussions came back that we have to do the abnormally low and also to issue a technical clarification to SITA.*"
- Technical Issues Identified: He noted that "*in my report, as I stated before, there was a 3rd technical key expert who the TEC when they were doing their conclusion, they were going through everything, they noticed there was something not as the specifications.*"
- Process Complications: Regarding the clarification request process, Mr. Grech stated: "*we could not send it out because the report was not finalised. What we had to do was that we had to finalise the report, to be discarded by the Department of Contract, something technical I do not know why it had to be then, to send it out, get the reply, then we had a small meeting with TEC.*"

Specific Timeline Confirmations

- Clarification Request: Issued to NetU on 29 July 2024
- NetU Response: Received 1 August 2024 at 18:37 pm
- Award Recommendation: Issued 2 August 2024 at 9:00 am
- GCC Approval: Received 2 August 2024 at 10:07 am

Ex Post Approval Confirmation

- The recommendation was issued at 9:00 am with GCC approval received at 10:07 am the same day. When asked if this was "ex post" approval, Mr. Grech acknowledged: "*If it is like that yes, I do not remember exactly exactly. I am telling you when the approval is.*"

GCC Approval Email Content

- Mr. Grech read from the approval: "*your request, definite approval is now being given to enter into a negotiated procedure with NetU consultants for the award... at the estimated amount granted in terms of regulation 154 (1)C of the Public Procurement Regulations.*"
- Correspondence Confirmation: The Contracting Authority confirmed that Mr. Dalli's email of 31 July 2024 at 11:46 am was the last correspondence before the 2 August approval, with no further correspondence between these dates.

Process for NetU's Abnormally Low Offer

- Mr. Grech stated he had a "recollection" of a virtual meeting to discuss NetU's five-page response, received on the evening of 1 August, but could not recall the exact timing.
- Meeting Arrangements: When asked about TEC meetings to review NetU's response, Mr. Grech stated: "*most of the meetings were online. So, I might get confused. There were other things that were discussed by email as well between us, between meetings if somebody finds something.*"
- Calendar Invite Verification: The hearing was temporarily recessed to retrieve calendar invites and email documentation, with the Contracting Authority's lawyer stating they would "*be sending confirmation of his calendar invite but we are still finding it because one has to log into the Teams account etc.*"
- Electronic Signatures: Mr. Grech clarified the finalization process: "*I was thinking now, I cannot exactly remember how we conducted the thing, but I am for sure that we contacted all the members so that we would have it signed as soon as possible and finalised... Signed electronically.*"

Specific Claims when questioned about the review of NetU's Response

- Previous Projects: NetU claimed implementation of Cyprus border control system in 2003 and a system for Hellenic police in Greece. Mr. Grech confirmed: "*That was given originally when we asked them where they had done systems and they had given them ad inizio, from the beginning and we had checked about them.*"
- Hardware/Software Partnerships: Regarding NetU's claim of "*longstanding partnerships with their manufacturers,*" Mr. Grech admitted: "*We did not verify if they had, we did not go to the supplier to ask him.... . We took their word for it*"
- Open-Source Software: NetU mentioned using Payara platform community edition application server. Mr. Grech confirmed they did not verify NetU's past use of open-source software.
- eMRTD Readers: NetU claimed to be "*working with several eMRTD readers including those from [redacted suppliers].*" Mr. Grech stated they did not verify this but noted "*we have it what they done in their technical offer because they were specifically in the negotiated procedure document that they have to work with these.*"
- He explained his position: "*my mind was at rest in a certain way that the other economic operator was lower than NetU, so that was in line with what we had.*" He clarified NetU was not the cheapest: "*SITA was the cheapest.*"
- When questioned about technical details, he frequently stated: "*I was the chairman, not the [evaluator]*" and "*I was the Chairman. But I know that the respond while it was lower, they gave the reasons why they were lower.*"

Witness Testimony Suspension

- After an exchange between the Chairman and counsel, the Chairman announced that—purely for “practicality purposes” and with the agreement of the parties (“as long as it is reserved I have no issue”—further cross-examination of Mr Grech would be paused. This pause allowed

the agenda to move forward and enabled the Permanent Secretary, who had been waiting to testify, to be formally excused from attending the remainder of that sitting.

Testimony of Ms. Joyce Dimech (ID 4366G) – Permanent Secretary, Ministry for Home Affairs, Security and Employment (Summoned by Dr. Clement Mifsud Bonnici)

Background and Preparation

- Position: Permanent Secretary at the Ministry for Home Affairs, Security and Employment (Malta Police Force within her responsibility)
- Ms. Dimech began by noting, *"I was called at short notice, and I left the meeting I was in to attend this sitting. I did not receive any notification despite being told that I did. And I have not refreshed my memory."... "I will answer what I can answer but I may need to refresh my memory by looking at any documents you will be questioning me about"*
- She confirmed limited formal procurement training: *"I have not received formal training as an evaluator... I have never acted as an evaluator in the last few years."* However, she had prior involvement in procurement reforms at the Office of the Prime Minister, including single bid bonds and ministerial procurement unit establishment.

The Negotiated Procedure Context

- This was a negotiated procedure for implementing Malta's entry-exit system to comply with EU requirements for the *"common entry exit system for the European union which would be a serious breach and will be jeopardizing the Schengen border entry exit monitoring."*
- Timeline: Tender submission deadline was May 10, 2024, with evaluation occurring through July 2024

Role and EU Pressure

- Ms. Dimech described severe EU pressure: *"we were being threatened, threatened literally by the technical committees at EU level that other member states may sue Malta for any damages they may have suffered due to our inability to have this system in place."* She noted Malta *"were the only member state who would be failing to meet the requirements."*
- Her role was supervisory oversight: *"I was pushing this to be done. I was overseeing it and I was pushing the competent technical people to make sure that it got done."*
- She clarified her position: *"This procurement process was a negotiated procedure which was managed by the Contracting Authority and I the supervisor of the Contracting Authority. It was the Malta Police Force."*
- Ms. Dimech explained the authorization structure: *"This procurement process was a negotiated procedure which was managed by the Contracting Authority and I the supervisor of the Contracting Authority. It was the Malta Police Force and they would need my authorisation for the evaluation committee, for the actual report to be uploaded in this case because they needed endorsement given that it was not going to Contracts before being uploaded on the system."*

Progress Meetings and Coordination

- She held regular, informal progress meetings ("*usually a half hour informal*") with "*usually 4, 5 persons at most,*" including "*people from the police, people from our EU affairs directorate*" and sometimes "*Antonello Grech.*"
- Meeting frequency increased toward evaluation completion: "*there were regular meetings, not so frequent as towards the end we were approaching the finalisation of the evaluation... because time was running out*".
- These meetings were about broader implementation: "*the system we had to have in place, was not just this negotiated procedure, it a bigger thing at national level. It involves on site hardware and other systems that will plug into the main system, not just this one.*"

Limited Procurement Involvement

- She stressed her limited substantive involvement: "*I never saw any procurement files, never. And I never wanted to see... I was briefed verbally, not shown any documents or given access to anything.*"
- She did not have an ePPS account and was not directly associated with the procurement process.
- Her knowledge was limited: "*It was more progress, like we are at the drafting stage, or we are stuck because the contracts have this. That type. Not details. I was not even aware of the actual content of the technical evaluation.*"

Email Communications

July 23rd Email

- Responding to DG Dalli's email of July 19th, which relayed two specific recommendations from the General Contracts Committee: "*a technical rectification for SITA*" and "*an abnormally low clarification to NetU who happens to be the recommended bidder.*" The Chairperson of the tender evaluation committee, Mr. Antonello Grech, had reacted to Mr. Dalli's email and passed it to her for approval, she stated "*I have no objection provided this is the proposed way forward endorsed by contracts,*" explaining "*I usually authorise certain positions provided they are in line with what is being advised and what is proper and correct.*" She confirmed this approach because she wanted "*the procedure to take place the evaluation in accordance with standard operating procedures, with procedures and with the law.*"

July 27th Email

- Her position was based on feedback from progress meetings, conveying the message "*I had to ask why we were waiting and delaying going back to GCC and I said, I read the email now, but I hope it is understood as it was written. I said, do what needs to be done quickly and don't delay unnecessarily. That is the message I wanted to convey in this email. It is not intended to advantage or disadvantage any bidder or to interfere in any way with the technical evaluation or with the administrative evaluation of any bid.*"

July 31st Email

- Her "*full speed ahead to have contract signed*" was sent "*because Contracts had given clearance for the contract to be signed in the previous email.*" "*As far as I was concerned, we had reached a milestone, and we were signing the contract. And I think there was a weekend somewhere there, I am not sure of the days, but I said let us get*

it done." When asked if there was anything outstanding from the evaluation process at this stage, she responded "No" and clarified "As far as I was concerned" there were no outstanding issues.

EU Timeline Revisions

- She confirmed EU deadlines were later extended because other member states also failed to meet them, but could not recall the specific new implementation date, noting "*It is a public knowledge; I mean people from the police can maybe confirm it.*"
- The revision occurred "*after this process was initiated.*"

Testimony of Mr. Adrian Dalli (ID 480479M) – Director General, Department of Contracts (Summoned by Dr. Clement Mifsud Bonnici)

Background and Preparation

- Mr. Dalli noted he "*was prompted just half an hour ago about this, but I will provide you because I need to check better my correspondence. Because I was called just 20 minutes ago, and I had to come.*"

Negotiated Procedure and DOC Role

- Mr. Dalli explained that his department's role is to approve the use of a negotiated procedure based on criteria in the regulations, such as technical reasons, absence of competition, or urgency, specifically referencing "*articles 151 to 154, according whether it is works or supplies.*"
- He confirmed this tender was approved under Regulation 154(1)(c) due to extreme urgency related to EU deadlines for the Entry/Exit System.
- The first request for approval was received "*on 23rd January and then there was a request for a second negotiated procedure around April.*"
- He clarified that the Department of Contracts' role was to approve the use of the procedure and provide advisory support, but the Malta Police Force was the Contracting Authority responsible for issuing and managing the tender.
- He clarified the DOC's supporting role: "*our role is also of advisory... we assisted the Contracting Authority in the PMC. We had a meeting also with the EU Funds Permanent Secretary because it is a very important function.*"
- Regarding the DOC contact details on the tender documents, he explained: "*It is a template and obviously our role is also... to help the Contracting Authority.*"
- He confirmed that before making decisions, he "*assess[es] together with the General Contracts Committee. Although the remit is on the Director General, we discuss these types of requests.*"
- Regarding his assessment process, he explained: "*we seek whether there is budget approval, we seek whether there is Permanent Secretary approval, we then assess the size or otherwise whether to grant its approval on this basis.*"

- He emphasized the importance of budget approval: "*We do not issue approve if we do not have the Budgetary approval at our end*" and "*I do not process them if I do not have budgetary approval in place.*"
- He confirmed that despite being a negotiated procedure, there was competition with "*7 or 8 bidders which emanated mainly from the PMC*" and noted that "*although it was short listing of three, finally, there were competition between 7 and 8 bidders.*"
- He explained that the Contracting Authority "*made an analytical exercise*" by "*first issuing the PMC*" (Preliminary Market Consultation).

Access and Confidentiality

- Mr. Dalli affirmed that, in principle, access to bids on the ePPS system should be restricted to the members of the evaluation committee and any formally approved technical experts: "*The contracting authority and the respective evaluation committee had access.*"
- When asked about system access tracking, he stated: "*I need to check*" regarding whether the system logs who has access.
- When questioned about whether tender evaluation committees are free to discuss procurement evaluations with anyone, Mr. Dalli clarified the restrictions in place. He explained that "*the evaluation committee one should stick with the respective committee and the respective expert appointed.*" This statement came after he confirmed that evaluation committees "*are responsible for the evaluation of the process*" and that "*The evaluation committee has got the access*" to offers and bids. When asked why access should be restricted to the tender evaluation committee, he emphasized that they have access to offers and bids because "*they are responsible for the evaluation of the process.*"
- Regarding the use of technical experts in procurement processes, Mr. Dalli explained the approval mechanism in place. When asked about standard operating procedures for tender evaluation committees needing to consult external parties on procurement issues, he stated that "*It is the role of the technical expert in this regard, and I approve also the use of the technical expert in normal CT tender in this regard.*" He further clarified that both technical experts and evaluation committees require his approval, explaining that "*even the evaluation committee*" needs approval, and this is "*because it is a CT tender which is issued by the Department of Contracts on behalf of the respective ministry.*"

Dr. Inguanez Intervention

- Mr. Dalli confirmed that "*according to the timeline... the formal approval is 1st August*" following a GCC session on 30 July. He agreed to verify the exact time of the approval.

Continuation of the Testimony of Mr. Antonello Grech (ID 466372M) – TEC Chair (Summoned by Dr. Clement Mifsud Bonnici)

Cross-Examination

- By Dr. Inguanez: Mr. Grech confirmed that the evaluation went to the GCC twice in this case, stating *"we had prepared it, we put it on the ePPS but we did not finalise it."* On July 19th, the GCC recommended *"that in the case of SITA a technical rectification is sought"* regarding Key Expert 10, to which Mr. Grech replied to Mr. Dalli explaining *"SITA has already been disqualified on two other key experts" and received agreement "in line with the regulations."* The TEC did not seek clarification from SITA on Key Expert 10 because SITA was already disqualified on other grounds. However, a clarification request was issued to NetU about their abnormally low offer, and NetU submitted its response on August 1st. The second evaluation report submitted to the GCC was identical to the first: *"we did not change it. We just resubmitted the same that had been there before and finalised it,"* and definite GCC approval was received on August 2nd, 2024.
- By Dr. Camilleri: Mr. Grech confirmed that SITA would have been excluded regardless due to "key expert 8 and 9," agreeing that *"whatever the reply or clarification which SITA would have provided, the ultimate result would not have changed."* He acknowledged there was *"urgency, there was the pressure and were already so that for this to be closed and go on with it,"* and confirmed the abnormally low offer was the only remaining issue to consider. He also agreed that much of NetU's justification was based on information already available in the technical offer which the TEC had already considered. Regarding technical solutions and software specifications, Mr. Grech noted his limitation as Chairman: *"I did not go through each and every one technicality."*
- By Dr. Decesare: Mr. Grech testified that the TEC did not consult with any technical experts regarding NetU's abnormally low offer submission. For example, they did not check whether the open-source software mentioned could be used for the system. During this cross-examination, Mr. Grech volunteered: *"But if you want to know everything, personally, not even the techno knows this and nobody knows this, with my colleagues when I was abroad, I checked about each system that was mentioned from all the suppliers."*

Re-examination by Dr. Mifsud Bonnici

- Mr. Grech admitted the failure to originally request rectification for Key Expert 10 was an oversight: *"Originally no because we would have issued a clarification with the others."* The issue was discovered late in the process when *"finishing the bidding, and I told them to go over again, one tech member said, last time I did not... but key expert 10 we had asked for EQF level 6 or something and one of these do not have."*
- He clarified that his informal verification activities were personal conversations: *"these are things that I never even said to the tech, never. I am saying them the first time here"* and *"we become friends these people, you know, and we talk."* The timing varied for different companies - Secunet and ... discussions occurred before the PMC, while NetU discussions were *"definitely after the PMC because before the PMC I had never heard of them"* and specifically *"between the PMC and the tender evaluation."*
- He confirmed the second evaluation report was identical to the first and did not include any reference to NetU's clarification response, stating *"I do not believe we included" any analysis of NetU's response.*
- When questioned about assessing whether technical aspects enabled competitive pricing (by NetU), he responded *"Personally, no because I was the Chairman. It is the committee who does."*

Testimony of Ms. Graziella Formosa (ID 185488M) – TEC Secretary (Summoned by Dr. Clement Mifsud Bonnici)

Role and Participation

- Ms. Formosa identified herself as a project manager and secretary for the TEC.
- She confirmed that eight economic operators were invited to participate in both the first and second negotiated procedures. In the first call, only one operator (ETL) submitted a bid, which was found to be technically non-compliant. In the second call, three operators submitted bids.

EU Deadlines

- She provided the updated timeline: *"the original timeline for implementation was 6th October 2024 and... this timeline has been revised... the entry exit system at present is for October 4th this year"* - approximately a one-year extension.
- She explained that there were meetings at EU level ongoing simultaneously with their procurement process, and timelines were being revised continuously due to other member states failing to implement the system.

Meetings and Documentation

- Regular TEC Operations: She confirmed they used to hold weekly meetings, or if not weekly then every fortnight, to discuss the bids. She would send summary status updates to the Permanent Secretary and Head of the Contracting Authority (Director General) about their current position.
- Status Update Examples: These updates included information such as *"today we have discussed the administrative part of the 3 bids. Next week we are meeting to start the technical."*
- Distinction from Progress Meetings: She clarified she was not present for the progress meetings that Ms. Dimech mentioned, and that her updates related specifically to the evaluation of bids, separate from those progress meetings.

Meetings/Minutes/ communication Between NetU Response and Award Period

- Regarding the period between NetU's response (18:37 on 1 August) and the award recommendation (9:00 am on 2 August), Ms. Formosa conducted searches but found no evidence of TEC coordination.
- When specifically asked about locating the timestamp of the virtual meeting mentioned between 1st and 2nd August: *"The meeting, I could not trace the meeting on Teams but then eventually after NetU submitted its response, each evaluator concluded his tasks on ePPS and the report was approved."*
- She confirmed that she checked her calendar and did not find a link for a Microsoft Teams meeting during this period.
- As secretary of the TEC Board, she was asked whether she had taken minutes of TEC meetings, to which she initially responded *"Yes, there are minutes."* However, when specifically asked to consult those minutes for any meeting between 1st and 2nd August 2024, she confirmed after checking: *"No there were no minutes."*

Email Correspondence Analysis

- When asked about email correspondence between TEC members during the whole evaluation process, she initially stated "*I do not remember.*"
- She explained their normal communication pattern: "*Yes we used to hold weekly meetings, if not weekly every fortnight in order to discuss the bids and then I used to send just a summary to the Permanent Secretary, to the Head of the Contracting Authority, as to where we stand at that point in time.*"
- She confirmed that as secretary, she would normally be copied on emails setting up meetings and any TEC correspondence.
- When directly asked to check for emails between 1st August and 2nd August between TEC members regarding NetU's response: "*I cannot find.*"

Alternative Communication Channels

- When questioned about informal communication methods, specifically whether the TEC had "a what's app group or a Signal group," she confirmed they did not use such channels.

Award Recommendation Document

- She stated she drafted the recommendation of award document, whose soft copy was named "*recommendation letter to SITA.*" The document properties showed the author as "FormG027." When asked why it was named as such, she replied, "*I do not know. I cannot recall.*"

Cross-Examination By Dr. Inguanez

- Ms. Formosa confirmed she does not remember ever meeting, discussing, or having any correspondence with TEC members on the date subsequent to NetU's response.
- She confirmed that for the report to be finalised on ePPS, it requires the individual electronic approval of each TEC member. If one TEC member on 2nd August had decided not to opt in, the tender evaluation would not have been finalised.

Chairman Direction

The Chairman directed the Contracting Authority to provide the Board with any Microsoft Teams calendar invite for the alleged meeting between 1 August and 2 August 2024, if it exists, and any outstanding correspondence from that period. Mr. Dalli was also directed to provide specific timing details for the GCC approval process.

Final Closing Submissions

Submissions for the Appellant (SITA)

Dr. Calvin Calleja opened with the Maltese saying "*il-qattusa għaġġelija frieħ għomja tagħmel,*" translating to "*haste makes waste*" (literally "*the hasty cat gives birth to blind kittens*"). He argued that "*unfortunately, this has been the consequence of the Contracting Authority's decision in the delivery of this project. In its haste to usher through this tender procedure and to select a recommended bidder, the Contracting Authority has only paid lip service to the procurement rule book.*"

He submitted that the Contracting Authority "*has exercised rights that it quite frankly does not have, and it has neglected obligations that it was obliged to adhere to,*" preventing itself from acquiring best value for money in a project involving EU funds.

Withdrawal of Grounds

Dr. Calleja stated SITA was withdrawing grounds 6 and 7 of appeal (NetU's technical experience and abnormally low bid) but would address the abnormally low investigation within the context of procedural irregularities under ground 8. He noted that grounds 5 and 9 had been largely superseded:

- Ground 5 regarding disclosure had been decided, and
- Ground 9 regarding the deposit had been rectified by the Contracting Authority.

Dr. Calleja therefore stated "*the Board has to decide the 1st to the 4th grounds of appeal and the 8th.*"

Note: Dr Calleja argued that the rejection letter incorrectly demanded a €55,000 deposit, well above the statutory cap, cited as the first "*red flag*" of irregularity. The tender dossier also carried Department of Contracts contact details despite not being a CT-issued call.

Unlawful Request for Certificates (Grounds 1 & 3)

Dr. Calleja argued that the tender dossier specified only three documentary requirements for key experts: "*the statement of availability, key expert form and the CV,*" as confirmed in a clarification on 22 April 2024.

He submitted that the TEC's request for certificates was "*an improper imposition of a fourth requirement.*" He distinguished between selection criteria and award criteria, noting that Regulation 229 and Rule 16.2 allow supporting documents for selection criteria only, with "*no such right... for award criteria, which key experts fall under.*"

Dr. Calleja cited the Board's decision in Case 2090 (Chalet Decision), quoting from page 22: "*Given this absence of clear instructions, the PCRB is of the view that the appellant should not be penalised for failing to submit documentation that was not explicitly requested in the tender document.*"

He argued that the TEC violated the principle of self-limitation by "*superimposing a fourth documentary requirement*" when the Contracting Authority had listed only three requirements at pre-tendering stage. He noted that while Regulation 239(6) allows verification of information, "*the law intentionally... does not speak of the Contracting Authority's right to request supporting documentation.*"

Technical Compliance (Grounds 2 & 4)

Made "*without prejudice*" to the first grounds, Dr. Calleja maintained SITA's key experts were technically compliant, relying on expert testimony from Mr. Keith Cutajar, "*the only technical expert to give evidence in this case.*"

For Key Expert 8 (Mr. Brincat)

- The tender required two individuals for key expert 8
- SITA submitted "key expert 8 system engineers" document with covering letter confirming compliance

- Mr. Brincat's identity as the allegedly non-compliant expert was only revealed during Mr. Sandro Calleja's testimony
- Dr. Calleja argued Mr. Brincat's CV constituted sufficient declaration of compliance
- In cross-examination, Mr. Brincat "*testified under oath that for all his qualifications he had to sit for exams and invariably pass*"

Key Expert 9 (Dr. Camilleri)

Requirements were: EQF level 5 academic qualification, DBMS certificate in proposed solution, and optional EQF level 6 qualification.

Dr. Calleja emphasized Dr. Camilleri's qualifications:

- Bachelor of Science in Business and Computing
- Master's in Information Systems and Technology
- PhD in IT
- Oracle Database 11G certification
- ITIL certificate

He noted that Oracle and Microsoft both use SQL language, making qualifications transferable, and that Dr. Camilleri obtained the Azure certificate "*within 48 hours and may I say with flying colours*" after tender submission (exhibited as A14).

Irregularities and Ground 8

Dr. Mifsud Bonnici described the procedure as "*rife with irregularities,*" seeking "*a fresh re-evaluation with a new tender evaluation committee*" based on already submitted bids. He acknowledged approaching "*dangerously close to what I think are circumstances which could warrant the cancellation of the tender,*" referencing precedents in IOT Malta vs Kunsill Lokali Valletta (388/2018) and Board cases 1540 and 1541.

Evaluation Irregularities- Violation of Self Limitation

Dr. Mifsud Bonnici argued the TEC "*completely ignored its duty of self-limitation*" by:

- Imposing unwritten conditions (requesting financial statements not required by tender, later withdrawn within days as apparent "*lapsus*")
- Mr. Grech conducting unauthorized "*discussions about bids or rather economic operators that submitted a bid in this process with counterparts in Cyprus and Greece*"

Evaluation Irregularities- Abnormally Low Offer Assessment Failure

Timeline of Events: Dr. Mifsud Bonnici detailed the critical timeline: clarification request sent 29 July with subject line "clarification re: abnormally low offer," NetU responded 1 August at 18:37, and "*by the morning of the 2nd of August we already had everything closed and submitted to all bidders.*"

Complete Lack of Assessment: He argued there was "*no assessment at all. There was nothing to be minuted or recorded,*" evidenced by the complete absence of minutes, emails, or meeting records, and the fact that "*the evaluation report, the second one, was not changed.*" The process was treated

"like a checklist, something we had to do" rather than a proper evaluation of NetU's abnormally low offer response.

Bias and Interference

Dr. Mifsud Bonnici submitted that Ms. Dimech's intervention created bias, with "*a clear direction as to what to do*" - "*full speed ahead*" to contract signature. He argued this "*tainted the evaluation's independence*" despite acknowledging Ms. Dimech's "*best of intentions*."

He noted unusual practices including "*progress meetings*" and "*status update*" emails, stating "this is the first time I ever encountered a situation of the sort" where evaluation committees normally "*work independently without interference*."

Misuse of Negotiated Procedure

Procedural Analysis

Dr. Mifsud Bonnici argued the procedure was misused to avoid Department of Contracts oversight, noting:

- Three-month evaluation period "*matches the period of validity which is applicable to an open tender*"
- 22-day bidding period exceeded minimum 15 days for accelerated procedures
- Malta Police Force as Schedule 16 entity should have used Department of Contracts for contracts exceeding €750,000

He cited case law: C 352/13 *Consiglio Nazionale Degli Ingegneri*, the MCSI case (23/2022/1), and case 106/2022/1

He argued it was not "*impossible to comply with the open procedure time limit*," submitting that *Government could have used accelerated open procedure with its 15-day minimum, making the extreme urgency justification invalid*

Conclusion

Dr. Mifsud Bonnici concluded that "*all roads lead to re-evaluation*," arguing that whatever ground the Board upholds, the evaluation "*was not done correctly, not in accordance procedure*" and should be resubmitted for re-evaluation.

Submissions for the Contracting Authority (Malta Police Force)

Dr. Daniel Inguanez urged the Board to consider "*the objectives of public procurement law and also of the remedies system which is put into effect by EU*." He outlined the core principles as equal treatment of bidders, free competition, not advantaging any bidder over another, and the principle of self-limitation of evaluators.

He characterized procurement processes as a "*necessary evil*" - a bureaucratic burden on government, noting the urgency in this case but explaining that EU law tackles this through a remedies system designed for "*speediness and effectiveness*." He emphasized that "*any form of cancellation of decision even the annulment of the evaluation process for issues which do not directly prejudice any bidder, would be disproportionate and contrary to the spirit of the law*."

On Certificate Requests

Dr. Inguanez contested SITA's argument that certificates weren't requested, pointing to the BPQR on pages 12 and 13 of the tender dossier. Under Key Expert 8, he noted "*a clear and express condition on scoring*" stating "*Two engineers shall hold MCSA or equivalent certification*" with scoring from "*0% to 100%*." Similarly, page 13 for Key Expert 9 required "*holds a certification in DBMS*" with percentage scoring "*0% to 100%*."

He argued the tender did require certificates, emphasizing that SITA's CVs "*did not state that they hold the certificates.*" The Police Force gave appropriate scoring of 0% initially, then verified the information "*to treat SITA even more nicely.*" He characterized SITA's attack on this verification as contradictory since "*verification could have only advantaged SITA itself and nobody else.*"

Citing Regulation 239 of the public procurement regulations, he argued verification was mandatory: "*the award criteria shall ensure the possibility of effective competition and shall be accompanied by specific agents that allow the information provided by the tenderers to be effectively verified. In case of doubt, contracting authorities shall verify effectively the accuracy of the information provided.*" He submitted "*it was not even discretionary. We had an obligation to verify this information.*"

Technical Compliance and self-limitation Principle

Using the analogy "*If I go to my mechanic to service my Toyota Aygo, I would be stupid to get a Ferrari mechanic,*" he argued that "*in technical fields, a Ferrari mechanic need not necessarily know how to treat a Toyota Aygo.*" He emphasized that "*high level knowledge does not mean I am competent to do work, let us put it this way, of a lesser extent or level.*"

He stressed the principle of self-limitation: "*if I have allocated points for holding an MCSA certificate, you either have it or you do not.*" He noted they didn't simply reject SITA but "*reduced points which was what the BPQR bound us to do. And we could not have acted otherwise.*"

On Irregularities

Contradictory Positions

Dr. Inguanez highlighted the contradiction in SITA's position, noting "*The first statement in this respect from SITA was we want a fresh evaluation. But then, Dr Mifsud Bonnici... argued for the cancellation of the process.*" He argued this was contradictory: "*if an irregularity truly exists and warrants cancellation, just because SITA is requesting it, we should not advantage SITA and give a fresh evaluation.*"

Negotiated Procedure and Department of Contracts

He addressed SITA's contradictory position on the negotiated procedure, noting they "*accused or alleged circumvention of the Department of Contracts*" while simultaneously scolding for "*seeking the Department of Contracts assistance when a negotiated procedure clearly could have been done without its assistance altogether.*"

He explained that approval was sought and discussed at GCC, with Mr. Adrian Dalli testifying that the Department of Contracts provided assistance throughout, even though "*there is no obligation at law.*" He emphasized the procedure "*has been conducted in a competitive manner*" with preliminary market consultation and all interested parties invited.

Estoppel Through Participation

Citing *Grossman Airservices vs Austria* (C-230/02, paragraph 37), he argued SITA's challenge was barred by their participation: *"a person that does not seek a review of a decision of a contracting authority but waits notification of the decision awarding the contract and then challenges it before the body responsible, is not escaping with the objectives of speed and effectiveness."*

He noted this case was even clearer: *"Here SITA participated fully. At the end of it is arguing for the nullity of the whole process but then arguing maybe just give me a re-evaluation and not the whole nullity."*

Administrative Errors

Regarding the €50,000 deposit error, he characterized it as human error: *"We all know that human errors occur. Not only that, when we realise these mistakes, we immediately admitted to it and invited to the refund of the deposit."* He argued attacking this irregularity was *"disproportionate."*

Key Expert 10

He noted this expert was *"actually admitted in the procedure and for which no points were deducted,"* explaining that the GCC suggested clarification requests that could have provided *"further grounds to reject SITA's bid."* He argued it was contradictory for SITA to invoke this since *"The fact that I did not issue a rectification request to you to add a further ground for rejection could be invoked by other parties possibly but by yourself?."*

Abnormally Low Offer

Citing *Transporoute vs Minister of Public Works* (76/81, paragraph 18), he argued that authorities need only *"seek from the tenderer before coming to a decision as to the award, an explanation of his prices..."* The ECJ stated no requirement exists *"to minute or motivate your decision to accept evidence that a bid is not abnormally low and this is in fact only logical and follows from the letter of the law because what is requested when faced with an abnormally low bid, is simply to seek an explanation."*

He explained the assessment was conducted by Mr. Avellino, with reasonable explanations provided by NetU. He noted SITA's contradictory position: *"It has renounced to its grievance on the abnormally low bid of NetU but then it is insisting on the fact that this brings about the nullity of the procedure but only to the extent that it gives me a re-evaluation."*

On Pressure

Dr. Inguanez distinguished between improper influence from economic operators versus legitimate ministry urgency: *"The influence which the public procurement regulations want to avoid is influence coming from the economic operators, from the market."* He argued ministry urgency was legitimate: *"the fact that I need them with urgency influences me but that is part and parcel of organising a procurement procedure."*

He referenced European Commission guidelines encouraging use of ministry employees for evaluations *"because it is those people who really know the needs of the Contracting Authority."* Regarding the Permanent Secretary's involvement, he noted the TEC *"is set up by delegation of the authority of the Permanent Secretary, it is set up to follow a mandate given by the Permanent Secretary."*

He challenged the pressure allegation with evidence that if pressure was so great "... *how would you explain then why the tender evaluation committee did not issue a clarification request to SITA allegedly because of this pressure but when it came to the allegedly low bid at NetU it did so, nonetheless?* "

Submissions for the Interested Party (NetU)

Dr. Joseph Camilleri noted that SITA had withdrawn appeals regarding NetU's technical capability and abnormally low offer, suggesting SITA was satisfied after seeing NetU's explanations. He specifically highlighted that SITA's original appeal "*at no point questioned the technical offer as put forwards by NetU,*" unlike other bidders' appeals.

Regarding the withdrawn grievances, he pointed out that SITA had withdrawn the 6th grievance (alleging NetU lacks professional and technical capabilities) and the 7th grievance (abnormally low offer) without explanation. He suggested the withdrawal occurred because "*SITA has been provided also with a version of the reasoning and the explanations given by NetU*" and if SITA had believed the reasoning was unacceptable, "*they would have insisted on this ground of appeal.*"

He argued SITA's procedural challenge was "*unacceptable*" as they had "*participated fully*" in the negotiated procedure, which "*constitutes an acceptance of that procedure.*" Crucially, he distinguished that SITA's original 8th ground of appeal questioned how the negotiated procedure was used (alleging procedural shortcomings), not whether it should have been used at all. He emphasized: "*there is a very clear difference between saying that...the negotiated procedure should not have been resorted to and saying that it was not used correctly.*"

On Assessment

He argued there was "*no evidence that the time pressure impacted the choice of bidder*" and that NetU provided a "*cogent and crystal-clear explanation*" based on its extensive experience. While acknowledging urgency existed (it was "*even in the public domain, we used to hear about it in the news, questions in parliament*"), he maintained that "*the urgency changed in some way or another the decision of the tender evaluation committee*" was unfounded.

Regarding the abnormally low offer clarification, he noted this actually demonstrated proper procedure rather than bias: "*If indeed the contracting authority wanted to...award the contract to NetU at all costs, it would not even have gone there.*" He pointed out compelling reasons why clarification wasn't even necessary, including that two bidders (NetU and SITA) offered similar prices with SITA actually being cheaper.

He noted the explanations contained "*information already on file and had already been submitted to the evaluation committee*" - facts that were "*already there, had already been checked, there were already letters of comfort for instance.*" The reasoning was based on NetU's experience implementing similar projects, allowing "*more accurate pricing.*"

Key Expert Requirements

Crucially, he pointed out that NetU had asked in "*Clarification no. 2 if work experience could substitute for the required certifications, and the Contracting Authority had replied 'no.'*" Therefore, accepting SITA's equivalency arguments "*would be discriminatory against other bidders who followed this clear instruction.*"

He provided specific examples of SITA's non-compliance:

- Key Expert 8: SITA provided "CISCO CNA Certified Network associate" which "refers on networking not equivalent with MCSA as had been requested"
- Key Expert 9: Required certification in the DBMS being proposed (Microsoft product), but SITA "submitted an Oracle certificate...a certificate of attendance"

He emphasized that SITA "even had the opportunity to rectify that, they even had the opportunity to change the key expert and propose new key expert having what was actually required by the contracting authority but they did not do so."

He concluded that accepting SITA's arguments "would be to the prejudice of and discriminatory against the other bidders, not just NetU or PTL but possibly other potential participants in this procedure," particularly given the contracting authority's "clear rejection of any alternative to the certification required."

Submissions for the Interested Party (PTL)

Contracting Authority's Right to Request Documentation

Dr. Stefan Cutajar supported the Contracting Authority's right to request documentation, citing Regulation 229(1)-(2) and Rule 16.3 of the general rules, which states evaluators may request literature "to corroborate the technical compliance of the offers."

He supplemented this argument by referencing the ESPD (European Single Procurement Document), noting it "states that the contracting authority has this right to request supporting documentation and it states so multiple times, including in the notes to economic operators and in the same statement signed by the tenderer."

He provided a practical example: "If I state that I am a warranted lawyer, the evaluation committee has every right to ask me to submit a copy of my warrant. This is not something which is ultra vires, and it does not go against the principle of self-limitation."

Crucially, he emphasized that the tenderer submitted the requested documentation "without objection" and "cannot now argue that the request was unlawful." He formally requested that the Board reject the first and third grounds of appeal.

SITA's Expert Replacement

He argued that "SITA replaced key expert 9 in a clarification response," which "constitutes a breach of the public procurement regulations" citing cases Manova, Slovensko, CAS Succi di Frutta, Lombardini, and Mantovani.

He noted that the technical offer was marked "Note 3" (non-rectifiable) and emphasized that since key experts constituted "30 marks" of the award criteria, such replacement was impermissible. While acknowledging this was a negotiated procedure with flexibility, he argued that "the principle of self-limitation and transparency and non-discrimination would still apply."

The rectification "allowed a result which was changed and the rank which was changed after the submission of the original tender."

Technical Non-Compliance

He emphasized that "CCNA is not equivalent to MCSA, they are products of CISCO and Microsoft... It is similar to say that Apple products and Microsoft products are the same."

He referenced testimony from Mr. Sandro Calleja who explained that *"the Microsoft certified systems administrator is the equivalent to Azure 800 and 801"* and found no evidence that key experts submitted by appellant were compliant with these certifications.

He noted that no *"equivalents"* were provided for either Key Expert 8 or Key Expert 9, and that despite *"the wealth of knowledge, experience and certification of the key experts provided, they were lacking in a fundamental requirement and nothing can compensate for this lack of fundamental requirement."*

Abnormally Low Offer Assessment - Dr. Cutajar's Submissions

Regarding the 7th ground of appeal (though withdrawn by appellant), Dr. Cutajar maintained that PTL's *"section 7 of the reasoned reply remains valid"* because the CA had obligations under section 7.6 to assess economic sustainability.

He highlighted that *"morph attack detection was the fundamental aspect of the other appeal"* and suggested *"the lack of this component in both offers is probably the reason why the offers were less than 57% of the estimated contract value."*

He argued that NetU's interpretation was that solutions would *"support at some point in the future certain upgrades such as the NIST Morph Tier 3, but nowhere did it promise to deliver the same."* Using an analogy: *"It is similar to saying that my motherboard will allow for increasing RAM, however the labour and the materials including the random-access memory itself to do so will be an expense which is not contemplated in my financial offer."*

He noted that *"NetU has not managed to get listed (to the NIST LIST)... since this tender was published, almost a year ago, let alone to do so in the 8 months of implementation of the first phase."*

Abnormally Low Offer Assessment - Dr. Steve Decesare's Submissions

Dr. Steve Decesare addressed the abnormally low offer assessment, citing Regulation 225(4) and ECJ cases C-285/99 and C-286/99 establishing that authorities have a duty to *"first identify suspect tenders, secondly to request an explanation and thirdly to assess the merits of the explanation."*

He argued the assessment was insufficient and that *"the Contracting Authority simply paid lip service to the response."* He agreed that the execution was simply a *"tick the box exercise."*

Critical Assessment Failures

Dr. Decesare noted that the Chairman of the Evaluation Committee explained that no further evidence was requested, *"not even consulting technical experts appointed by the Evaluation Committee itself to determine, for example, whether open-source software can be used for the system proposed by NetU."*

He argued that while NetU claimed experience justified its low price, *"nobody knew of NetU before this tender,"* whereas *"SITA and Secunet which is a subcontractor of PTL have much more experience in both EU and the global market."*

He submitted that the price differences resulted from different interpretations of critical requirements in section 1.2 of the terms of reference, and that *"it is evident that none of the two bidders intend to supply those requirements" either "at submission or as a minimum at the time of implementation."*

Final Rebuttal by the Appellant (SITA)

Replacement of Key Experts

Dr. Clement Mifsud Bonnici addressed PTL's submissions, clarifying that "*there is absolutely no issue on the replacement of key experts.*" He cited Public Procurement Policy Note 40, which applies to this tender *mutatis mutandis*, with "*a very clear footnote on page 5 which says that the rectification request to key experts may request the submission of newly nominated key expert including all relative information and documentation.*" He noted that if PTL had concerns about this possibility, they should have challenged it under Regulation 262.

Distinction of Criteria

He emphasized the importance of distinguishing "*between selection criteria and the technical offer. The key experts are a technical offer issue. So, what the ESPD says, what [Regulation] 229 says is frankly irrelevant.*" He argued one cannot use verification tools available for selection criteria "*for what we are alleging today, the verification of technical offer aspects*" because "*in the selection criteria, the system is designed in such a way that we rely on self-declarations.*"

Critical Timeline

Addressing Dr. Inguanez's submissions, he highlighted the significance of Ms. Dimech's email on 31 July stating "*full speed ahead to have the contract signed,*" noting that "*on the 31st of July the request for clarification has already been issued, it has already been sent, so the direction being given here is 'as soon as it hits your inboxes proceed to sign and award at all costs' and that is exactly what our submission is. That is why there was no assessment.*" He referenced Dr. Decesare's citation of case law requiring proper assessment.

GCC Approval Timing

He questioned the timing of the GCC approval, noting that while Mr. Dalli claimed approval was given on 1 August, the minute provided was dated 11 August. He argued, "*if this minute was concluded on the 1st of August and it was signed I would very much doubt that the GCC met after 7:00pm, discussed the issue, agreed on it and also signed this minute. In reality, I think what happened was [the report was] submitted or rather approved without seeing NetU's response and without seeing the evaluation report.*"

Dr. Mifsud Bonnici concluded by stating he found no issue with the Malta Police Force seeking assistance from the Department of Contracts but submitted that this gave them flexibility "*as to what they want to take on or ignore when it comes to the recommendations issued by department of Contracts,*" which was "*perfectly consistent with what I have submitted and certainly no inconsistency.*"

Hearing Conclusion

The Chairman thanked the parties for their submissions and declared the sitting closed, with the Board retiring to deliberate.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 28th of March 2025 (first hearing) and of the 28th of May 2025 (second hearing)

Having noted the objection filed by SITA BV (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. 2096 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Clement Mifsud Bonnici, Dr Calvin Calleja, & Dr Kelly Cini

Appearing for the Contracting Authority: Dr Daniel Inguanez, & Dr Miguel Pellegrini Petit

Appearing for the Recommended Bidder: Dr Joseph Camilleri & Dr. Matteo Muscat Filletti

Appearing for the Interested Party (PTL Limited) Dr Steve DeCesare & Dr. Stefan Cutajar

Whereby, the Appellant contends with respect to:

a) ***The First Ground of Appeal: The Contracting Authority Altered the Tender Conditions for Key Experts 8 Ex Post Facto and It Did Not Identify Which Key Expert 8 Was Being Disqualified***

- The Negotiated Procedure required bidders to nominate 2 system engineers as Key Experts 8 who, as a minimum, possessed: (a) academic qualification EQF level 5 or equivalent in a field related to ICT or Engineering and (b) MCSA or equivalent certification. Both these requirements were mandatory.
- The TEC sent a clarification request to the Appellant on the 27th of May 2024 asking for a copy of the MCSA certificate for both nominated individuals under the Key Expert 8 requirement.
- The submission of that certificate was not a requirement included in the Negotiated Procedure. The requirements pertaining to Key Experts were the completion and submission of: (a) the Key Expert Form (b) the Statement of Availability Form and (c) the Curriculum Vitae to confirm that the nominated individuals possessed the qualifications.
- These documentary requirements are clearly laid out under Section 5(C) on Specifications of the main tender dossier. They are also repeated in the Key Experts Form, which is a Note 2 document, where the Contracting Authority explicitly stated that:

Tenderers are to substantiate their claims, in respect to the proposed Key Experts, by complying with and submitting the following at tendering stage:

1. *relevant up-to-date CVs; [and]*
2. *duly filled-in Statement of Availability.*

- The Appellant is aggrieved by the fact that the Contracting Authority altered the tender conditions, and thus, shifted the goalposts of the Negotiated Procedure—not before the deadline submission by means of a clarification issued on the e-procurement portal as it would have been its right to do—but ex post facto.
- The Contracting Authority failed to provide a justification of its reasons for altering the tender conditions, and thus, shifting the goalposts in this matter. More concerningly, the Contracting Authority failed in its obligation to uphold the intertwined principles in Maltese and EU public procurement law of equality in treatment and transparency.
- Nevertheless, in order to comply with the Contracting Authority’s request, the Appellant submitted the requested certificates to prove that its Key Experts 8 not only satisfied the minimum requirements but exceeded them.
- The Appellant did not hear further from the Contracting Authority until the 2nd of August 2024 when it received its letter of rejection alleging that one of its nominated Key Experts 8 did not possess the necessary MCSA certification and that “*clarification was issued in this respect, but [the] response was not acceptable to the TEC. Holding an MCSA certification was mandatory for all the proposed System Engineers*”.
- The rejection letter falls short of the legislative and jurisprudential standards in public procurement. Not only does it fail to inform the bidder why its clarification was deemed not acceptable by the TEC, but more significantly, it fails to identify which **Key Expert 8** was deemed as not holding the requisite MCSA certification.
- The Negotiated Procedure required the nomination of 2 Key Experts 8 but the rejection letter merely states that “*one of the proposed resources lacks MCSA certification*”.
- This has deprived the Appellant of its right to seek an effective remedy. It is for this reason that the Appellant sought the disclosure, by means of its letter dated the 6th of August 2024, of evaluation extracts directly concerning its bid.

b) ***The Second Ground of Appeal: In Any Case, Both Nominated Key Experts 8 Satisfied the Tender Requirements***

- Without prejudice to the First Ground of Appeal, the allegation by the TEC that one of the Appellant’s Key Experts 8 does not hold MCSA certificates is simply wrong.
- The Appellant’s original Key Experts 8 submission—which is an independent document—unequivocally states that its Key Experts satisfy each and every criterion required by the Contracting Authority and the Negotiated Procedure. In fact, the Appellant took the initiative to rework the relevant requirements of the Negotiated

Procedure into the description for each individual expert. This was then substantiated with the Statement of Availability and the CV, as requested.

- This action alone should have been sufficient for the TEC. This satisfies the requirements that were laid out on Key Experts 8 in the Negotiated Procedure. The Contracting Authority chose to rely on the bidder's self-declaration and the document chosen to corroborate this self-declaration was the CV.
- In any case, the Appellant did not wish to jeopardise its position with the Contracting Authority. It is always difficult to challenge decision-making and to confront the Contracting Authority before the adjudication result is published.
- Therefore, the Appellant duly complied with its request for certificates for both Key Experts 8. To be faithful to this Honourable Board, both of the Appellant's Key Experts 8 hold the equivalent of MCSA certificates—with the equivalent certificate being a higher qualification to the minimum threshold requested in the Negotiated Procedure.
- With respect, the Appellant humbly remarks that it should not be penalised for having submitted the equivalent of a certificate. This was expressly allowed in the Negotiated Procedure itself. The Contracting Authority cannot exclude key experts as long as the solution proposed by the bidder satisfies in an equivalent manner the requirements defined by the technical specifications.
- However, it appears that one of the Key Expert 8's certificates was accepted by the Contracting Authority, but the certificate of the other Key Expert 8 was not. Both the identity of the rejected Key Expert 8 and the reason for rejection of his qualification remain mysteriously—and wrongly—undisclosed by the Contracting Authority.

c) ***The Third Ground of Appeal: The Contracting Authority Altered the Tender Conditions for Key Expert 9 Ex Post Facto***

- The Contracting Authority contends that the Appellant's nominated Key Expert 9 "*lacked DBMS certification*" and that "*despite the rectification opportunity, whereby a new resource was being proposed, SITA BV remained in compliance, since the certificate provided to the Contracting Authority during rectification stage, was that of a course attendance*".
- With respect, the Appellant is baffled by this reasoning. It did not submit certificates of attendance for Key Expert 9—and even if it did, that would not be a basis for disqualification in any case. The Appellant submitted the documentation requested by the tender dossier, namely: the Statement of Availability and the CV.
- In its singular document regarding Key Expert 9, the Appellant once more confirmed that its key expert holds the necessary DBMS certification: Also, holds Certification in the DBMS being proposed in the solution.

- In spite of this confirmation in the form of the self-declaration requested in the Negotiated Procedure, the TEC deemed fit to ask the Appellant to supply the actual DBMS certification itself.
- The Appellant is aggrieved by the fact that the Contracting Authority altered the tender conditions, and thus, shifted the goalposts of the Negotiated Procedure—not before the deadline submission by means of a clarification issued on the e-procurement portal as it would have been its right to do—but ex post facto.
- The Contracting Authority failed to provide a justification of its reasons for altering the tender conditions ex post facto, and thus, shifting the goalposts in this regard. More concerning, the Contracting Authority failed in its obligation to uphold the intertwined principles in Maltese and EU public procurement law of equality in treatment and transparency.

d) ***The Fourth Ground of Appeal: Key Expert 9 Complies with the Tender Requirements***

- Without prejudice to the Third Ground of Appeal, the allegation by the TEC that the Appellant’s Key Experts 9 does not hold DBMS certification is wrong.
- As explained above, the Appellant duly submitted the documentation requested by the tender dossier, namely: the Statement of Availability and the CV. In its singular document regarding Key Expert 9, the Appellant once more confirmed that its key expert holds the necessary DBMS certification: *Also, holds Certification in the DBMS being proposed in the solution.*
- The Appellant also complied with the TEC’s request and sent along a number of documents to reassure the TEC that the Appellant’s key expert possessed the necessary certification to serve as Database Administrator. These included certificates issued by the Oracle University, Snowflake, and refresher courses in satisfaction of this requirement.
- In addition, the CV for Key Expert 9 already indicated that the selected individual had experience in database management.
- For this Honourable Board’s background, these are certificates familiar to experts in the information technology industry. The purpose of these certificates is to prove that the holders are trained in database administration.
- The Appellant did not hear further from the Contracting Authority until the 2nd of August 2024 when it received its letter of rejection alleging that its Key Expert 9 did not possess the necessary DBMS certification and that the Appellant had allegedly submitted certificates of attendance.
- The TEC did not specify what sort of DBMS certification it was after. It simply requested the Appellant to submit “*certification in DBMS*” which is an ambiguous ask. DBMS is an

umbrella term which describes different competencies in different types of database systems.

- In any case, the Appellant fulfilled the requirement—albeit ambiguous—in the TEC’s clarification request by submitting DBMS certification.
- If the TEC was not looking to receive a specific type of DBMS certification, then this should have been clarified by the Contracting Authority and not outright disqualification.

e) ***The Fifth Ground of Appeal: The Contracting Authority Failed to Disclose All the Information Requested by the Appellant***

- Following receipt of the Letter of Rejection, the Appellant immediately wrote to the Contracting Authority asking for the disclosure of non-confidential information to be placed in a position where it could exercise its right to a rapid and effective remedy.
- The Appellant submitted 15 information requests. The Appellant structured the requests in a singular table under 3 separate categories: (a) the Recommended Bidder (b) the Procurement Procedure and (c) the Appellant itself.
- The Appellant communicated this table in the means of an annex attached to the covering letter.
- The Appellant needs this information in order to be able to exercise its right to a rapid and effective remedy. The right to effective review depends on the disclosure of sufficient information to enable the Appellant to determine whether the Contracting Authority’s decision is vitiated by errors or unlawfulness.
- The Contracting Authority provided most—but not all—of the information requested by means of its reply on Friday the 9th of August 2024—3 calendar days before the expiry of the deadline to appeal and just before a weekend in high summer.
- However, the Contracting Authority refused to disclose information requested in terms of the 11th, the 12th and the 14th information requests, that is:
 - *The correspondence exchanged between the Contracting Authority and the Department Contracts setting forth the duly substantiated reasons for the use of the negotiated procedure without prior publication.*
 - *The approval of the Department of Contracts for the Contracting Authority to issue the negotiated procedure without prior publication.*
 - *The unredacted minutes of the meetings of the TEC which concern the evaluation of SITA’s bid.*
- These requests do not concern confidential information or that which may otherwise be prejudicial to legitimate commercial interests of any third party or in competition.

- There is no valid reason for withholding such information. Apart from breaching the principle of transparency, the failure to disclose is effectively depriving the Appellant of its right to exercise a rapid and effective remedy in this matter.
- The Appellant reserves the right to raise further grounds of objection once the information requested in its letter dated the 6th of August 2024 is disclosed.
- The Appellant humbly demands this Honourable Board to order the Contracting Authority to disclose all the information requested in Annex A to its letter dated 6th of August 2024 and to declare that the time period for lodging an appeal with regard to any one of the information requests does not start to lapse until the information is provided.

f) ***The Sixth Ground of Appeal: The Recommended Bidder Does Not Have the Technical and Professional Ability Required to Carry Out This Project***

- One of the requirements of the Negotiated Procedure was for bidders to provide proof of 1 other project carried out in the past which is similar to the purpose of this procurement, that is, the installation and implementation of a functioning border control system.
- The Appellant's second information request requested the Contracting Authority to disclose the details provided by the Recommended Tenderer to satisfy this criterion. This was not confidential information as is stated by Regulation 40(2)(c) of the PPR and as substantiated by jurisprudence recently delivered by local courts (Ref to Court of Appeal, Saviour Galea et vs Kunsill Lokali Hal Lija et delivered on the 16th of July 2024)
- The Recommended Tenderer seems to have submitted a project with an implementation period between 2003 and 2005—more than 20 years past. As shall be shown in proceedings, the Appellant humbly submits that this project does not satisfy the requirement in the Negotiated Procedure under Clause 5(B)(c).
- Nor does the Recommended Tenderer satisfy the second tenet of the Technical and Professional Ability criterion. Tenderers were required to: *“provide a reference of satisfactory outcome from the end client for three (3) projects comprising both implementation and maintenance, and support services.”*
- By means of its third information request, the Appellant requested the Contracting Authority to disclose copies of the reference letters submitted by the Recommended Tenderer to evidence satisfactory outcome in 3 projects comprising *“implementation and maintenance, and support services.”*
- 2 of the reference letters submitted by the Recommended Bidder concern projects for an IT system for a Department of Town Planning & Housing of the Ministry of Interior (presumably for Cyprus) and for Case Management Software respectively.

- The Appellant submits that these projects are unrelated to the subject-matter of the Negotiated Procedure.

g) ***The Seventh Ground of Appeal: The Recommended Tenderer's Financial Offer Appears to Be Abnormally Low***

- Without prejudice to the other grounds of appeal, the Appellant submits that the Recommended Tenderer's financial offer appears to be abnormally low, and therefore, the TEC should have triggered an investigation in terms of Regulation 243 of the PPR.
- The purpose of the investigation is to ensure that the price offered by the Recommended Tenderer is economically sustainable. In other words, it is necessary to confirm that the apparently abnormally low offer is not due to, for instance, failure to cost properly, consider the specific obligations and requirements of the Negotiated Procedure or the receipt of unlawful EU State aid.
- Regulation 243 of the PPR, which is modelled on Article 69 of Directive 2014/24, imposes an obligation on the Contracting Authority to request explanations from a bidder whose financial bid appears to be abnormally low:

“Contracting authorities shall require economic operators 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.”

- In *X Clean Limited vs Dipartiment għall-Anzjanità Attiva u Kura fil-Komunità et* (Court of appeal, delivered on 21st August 2021) the Court stated:
- *“huwa aktar loġiku li l-prezz tal-offerta jitqabbel mal-prezz stmat mill-awtorità kontraenti milli mal-prezz tal-obra offerta. Dan għaliex il-prezz stmat huwa riżultat ta’ ricerca dwar il-kundizzjonijiet tas-suq u għandu għalhekk jitqies bhala realistiku.”*
- Therefore, if the estimated procurement value of the Negotiated Procedure is based on market research, the Recommended Tenderer's offer appears to be abnormally low and requires investigation by the Contracting Authority in terms of Regulation 243.
- As stated in *Medioblogic Company Limited vs Enemalta plc et* (Court of appeal, delivered on 14 March 2024):

“Il-prezz [...] huwa baxx biżżejjed li jitwarrbu hemm bżonn spjegazzjoni u verifika skont il-liġi qabel ma l-Awtorità kontraenti taqbel biex taqtiha l-kuntratt.”

- In this case, the Recommended Tenderer's offer is a significant €4,689,500 lower than the estimated procurement value which is equivalent to a 43% difference.
- Within this context, the Recommended Tenderer appears to lack significant experience in the implementation of border control systems, and therefore, it is not unreasonable to infer that the Recommended Tenderer may not have properly costed the specific obligations and requirements in the Negotiated Procedure.

- In view of the above, the Appellant respectfully submits that there is a likelihood that the Recommended Tenderer's financial offer may not be economically sustainable, and therefore, the Contracting Authority ought to have investigated the Recommended Tenderer's financial offer as an abnormally low offer.
- For the avoidance of doubt, and if the Appellant's offer were to be re-integrated in the evaluation process, the Appellant would welcome an opportunity to explain its financial offer to the TEC in terms of Regulation 243 of the PPR.

h) ***The Eighth Ground of Appeal: The Negotiated Procedure Was Conducted in an Irregular Manner***

- Without prejudice to the other grounds of appeal, and in the case that these Grounds are dismissed by this Honourable Board, the Appellant submits that it appears that the Negotiated Procedure is afflicted by various procedural irregularities which, at the very least, merit a re-evaluation of bids with a new tender evaluation committee.

Duplicate Entries

- The Contracting Authority received 3 bids in response to the Negotiated Procedure. In fact, the initial Opened Tender Details page showed 3 bidders: the Appellant, the Recommended Bidder and the Third Bidder.
- However, somewhere along the line the number of bids seemingly doubled where each of the 3 bids now carries a duplicate entry:

Envelope	EO name	Tender Id	Financial Value (EUR)
Single	SITA BV	209918	6,083,403.00
Single	SITA BV	209918	6,083,403.00
Single	NetU Consultants Ltd	209894	6,310,500.00
Single	NetU Consultants Ltd	209894	6,310,500.00
Single	PTL Limited	209919	10,896,945.94
Single	PTL Limited	209919	10,896,945.94

- The Appellant is aware that the Contracting Authority, through the Department of Contracts, has the facility to re-open the closed ePPS interface even after it has opened the tenders and evaluated them or is in the process of evaluating them.
- This is corroborated by a guidance note which was issued by the Malta Information Technology Agency (MITA—itsself a contracting authority) and is available online.

- This guidance note delineates the “*most salient steps*” of the ePPS process, regardless of the procurement procedure selected. Therefore, this guidance note is applicable to this Negotiated Procedure.

- According to Clause 14.2 entitled ‘Opening’ of this guidance note:

On accessing the ePPS, opening staff will be able to unlock tender through their task list by selecting ‘Unlock Tenders’.

The first PO/OS is to ensure all bids submitted have been selected by selecting the appropriate tick boxes and then selecting ‘Submit List of Tenders’.

The second PO/OS, on selecting ‘Unlock Tenders’ from his/her task list, will be able to unlock the tenders submitted by selecting ‘Approve list of Tenders’.

Once both opening staff have unlocked the tenders, a list of opened tenders will be visible and the opening report can be downloaded by selecting ‘Download’. The minutes of tender opening must be signed by opening staff and retained for the CA’s records.

- In this case, the list of opened tenders seems to have been created not once—but twice. This is the only explanation which at the time, accounted for the duplicate entries of each of the 3 bids.
- Having received the Letter of Rejection on the 2nd of August 2024, the Appellant proceeded to submit a request for information 4 days later, which included a request: “*an IT audit report identifying the audit logs in relation to this procurement procedure*”
- The ePPS audit trail was only provided by the Contracting Authority in its response on 9th August 2024 alongside replies to most—but not all—of the Appellant’s information requests, a mere 3 calendar days before the period for appeal lapsed.
- **The audit report confirms the Appellant’s suspicions. It revealed not only that tenders had been unlocked twice, but also that the tenders were evaluated twice.**
- **The original evaluation took 80 days to complete: from the 10th of May 2024 when tender submission closed till 29th of July 2024. However, it seems that the evaluation report was rejected and sent back for re-evaluation. This re-evaluation was completed by the 2nd of August 2024—within a 5-day span.**
- However, the Contracting Authority has not explained why the TEC carried out a second evaluation.

5 TEC Members

- There are also other irregularities in the procedure. According to the response provided by the Contracting Authority, the TEC was composed of 5 evaluators, a chairperson and

a secretary. However, a closer look at the audit trail will reveal that the composition of the TEC changed several times throughout the evaluation process.

- Furthermore, the technical expert appointed by the TEC to assist in its evaluation does not appear to have any expertise in border control systems, the subject-matter of the Negotiated Procedure.

Inadequacy of Evaluation Report

- The Appellant has also requested, and obtained, extracts from the TEC's Evaluation Report concerning its bid. The Contracting Authority also disclosed the average scoring given by the TEC to the Appellant's technical proposal.
- However, in the extracts of the Evaluation Report concerning the Appellant's bid, the TEC only dealt with the Appellant's submission on the Key Experts and not with other technical aspects which the TEC did evaluate and score.

Further Grounds of Disqualification

- When reviewing its own evaluation grid, the Appellant noticed that the TEC is alleging that there were other grounds of rejection not raised in the Letter of Rejection.
- This is not acceptable either at law or in principle. A bidder's request for information under the PPR does not give a contracting authority the right to raise additional reasons of rejection.
- Any and all reasons for rejection must be expressed in the Letter of Rejection. Otherwise, the Appellant will not be in a position to exercise its right to an effective and rapid remedy. If the Letter of Rejection is challenged successfully, then the Contracting Authority would simply pull out the third (or other) reason for rejection and disqualify the Appellant on that basis.
- The Appellant calls on the Board to order the Contracting Authority to disclose all reasons of rejection in a re-issued Letter of Rejection. The Appellant reserves the right to raise further grounds of objection within the legally prescribed time-limit for appeals.

Financial Evaluation

- If, as the TEC claims to be the case, the Appellant's bid was non-compliant, then it should never have proceeded to evaluate its financial offer. Clause 16.4 entitled 'Part 4: Financial Evaluation' of the General Rules states very clearly that only "*submissions which have qualified under Part 3 [Technical Compliance] shall have their financial offer evaluated.*"

- This is corroborated by the Standard Operating Procedures issued by the Department of Contracts entitled “*Guidelines for Tender Evaluation Committees*”. According to Clause 3.3 entitled “*Financial Evaluation*”, the TEC is only to evaluate the financial offers of bidders deemed to be administratively and technically compliant:

"tenders considered administratively and/or technically non-compliant need not be considered further."

- The inevitable consequence of this stringent procedure is that an offer which has been progressed to the evaluation of its financial component has a compliant technical section.
- The Appellant humbly submits that these facts are indicative that the Negotiated Procedure may have been conducted in an irregular manner falling short of the PPR, General Rules Governing Tenders, the Standard Operating Procedures of the Department of Contracts and general principles of equal treatment, transparency and self-limitation.
- TEC’s wrong decision to reject the Appellant’s bid and to recommend the award in favour of the Recommended Tenderer is nothing but a consequence of this manner of proceeding.
- At the very least, this Honourable Board should order the re-evaluation of the bids submitted with a new tender evaluation committee assisted with the right technical expertise.
- The Appellant’s suspicions are further heightened by the fact that the schedule of award uploaded on ePPS by the Contracting Authority on the 2nd of August 2024 is entitled “Letter of Recommendation to **SITA**.pdf”.

i) ***The Matter of Costs: Regardless of the Outcome of This Appeal, the Deposit Should Be Refunded to the Appellant in Its Entirety***

- The letter of rejection sent to the Appellant did not provide the necessary details to explain why its bid was rejected. This falls short of the legal requirements which regulate transparency and the rules of the best tenets of procurement nationally and in the EU.
- This is so to enable the unsuccessful bidder to determine whether to exercise its right to a rapid and effective remedy, and if so, to decide on which basis to exercise it.
- In the current state of play, the Contracting Authority deprived the Appellant of its right to such a remedy by, on the first ground of rejection: (a) failing to inform the bidder why its clarification response on Key Experts 8 was deemed not acceptable and (b) it fails to identify which Key Expert 8 was deemed as not holding the requisite MCSA certification.
- On the second ground of rejection, the Contracting Authority deprived the Appellant of its right to a rapid and effective remedy by claiming that it submitted course attendance certificates for Key Expert 9—which is not the case.

- For these reasons, the only way the Appellant could have obtained proper reasons as to why its tender was rejected was by filing this appeal. Therefore, regardless of the outcome of this appeal, the Appellant humbly demands that the Board refund the deposit of €50,000 paid on appeal in its entirety.
- Incidentally, even the amount of the deposit expressed as being payable in the letter of rejection: €55,000, was unlawful because it exceeded the €50,000 capping established at law.

The Board also noted Recommended Bidders Reasoned Letter of Reply filed on 22nd of August 2024 and its verbal submission during the hearings held on the 28th of March 2025 (first hearing) and of the 28th of May 2025 (second hearing) in that:

a) ***Submissions on the Sixth Grievance – recommended bidder allegedly lacks the necessary experience***

- By means of this grievance, SITA alleges that NetU does not have the necessary experience to qualify for this tender. In this regard, the requirement was that:

Tenderers shall provide to the Contracting Authority, details of at least one (1) project of a similar Border Control System implemented in another country. Such details must include a brief description of where the system was implemented and what functionalities it provides.

...

Tenderers shall also provide a reference of satisfactory outcome from the end client for three (3) projects comprising both implementation and maintenance, and support services. The reference letters should include also the contact details of the end clients including e-mail address and contact number. One of these three (3) projects can be the Border Control System implemented in another country.

- SITA alleges that (i) the Border Control System project cited by NetU is more than twenty (20) years old and (ii) NetU has failed to provide references for equivalent projects since, allegedly, two out of the three projects refer to unrelated projects. Both allegations will be addressed:

Similar Border Control System

- As stated, in terms of Clause 5(B)(c) in the Procurement Document:

*“Tenderers shall provide to the Contracting Authority, details of **at least one (1) project of a similar Border Control System implemented in another country.** Such details must include a brief description of where the system was implemented and what functionalities it provides.”*

- NetU has submitted a project of a similar Border Control System that has been implemented by NetU in another country (Republic of Cyprus). Contrary to what may be implied by SITA’s appeal, the system installed by NetU is currently in operation and fully complies and satisfies all the national and international responsibilities of the Republic of Cyprus (an **EU member state**) and accommodates all the operational needs and administrative policies of the Cyprus Police with regards to Border Control.
- While, as per NetU’s description in Section 3.2.1.1.3.2 of the Eligibility/Selection Section of the Offer, and as confirmed by the reference letter provided by the Cyprus Police (Contracting Authority/Recipient), the implementation of the first version of the system was effected during the period 20/5/2003 to 30/6/2005, NetU has, since then, undertaken multiple extensions and upgrades of the system, including the provision, implementation and deployment of new versions of the system. Indeed, the system provided by NetU fully complies and satisfies all the national and international responsibilities of the Republic of Cyprus, accommodates all the operational needs and administrative policies of the Cyprus Police and adheres to technology requirements and security standards. The latest version of the system, which is currently in use, successfully accommodates all the above, in line with the obligations of EU member states.
- Moreover, as also described in Section 3.2.1.1.3.2 of the Eligibility/Selection Section of NetU’s Offer, and as confirmed by the reference letter provided by the Cyprus Police (Contracting Authority/Recipient), currently NetU is extending the Border Control System to accommodate the Entry Exit System (EES) requirements (Contract D.O. 21/2021). The contract which will be awarded by the Malta Police Force is meant to achieve the same objectives.
- There is no doubt that the project (a similar Border Control System implemented in another EU country which is currently in operation) fully satisfies the requirement in the Negotiated Procedure under Clause 5(B)(c), contrary to what is wrongly stated in the appeal of SITA BV.

Satisfactory outcome of three (3) projects

- As stated, in terms of Clause 5(B)(c) in the procurement document:

“Tenderers shall also provide a reference of satisfactory outcome from the end client for three (3) projects comprising both implementation and maintenance, and support services. The reference letters should include

also the contact details of the end clients including e-mail address and contact number. One of these three (3) projects can be the Border Control System implemented in another country.”

- The requirement is clear. It requires three (3) projects comprising both implementation and maintenance, and support services. It does not specify that the three projects should be related to the subject-matter of the Negotiated Procedure (a border control system), as wrongly implied in the appeal of SITA BV (point 80). On the contrary, the specific statement that “*one of these three (3) projects can be the Border Control System implemented in another country*” implies *a contrariu sensu* that the projects need not be related to border control.
- Significantly, SITA does not allege that references to three (3) projects were not provided by NetU (they were!) but states that the said projects under this heading should be related to border control, which is clearly not the case.

b) ***Submissions on the Seventh Ground of Appeal***

- Through its seventh ground of appeal, SITA is claiming that the Recommended Bidder’s offer is “abnormally low”. One cannot but admire SITA’s cheeky brazenness in putting forward this ground of appeal, when its own offer is actually **lower** than NetU’s! SITA justifies this evident contradiction by alleging, without any hint of irony, that while SITA can be trusted to provide a technically compliant offer at a lower price than anyone else, this does not apply to NetU. In a gesture worthy of Napoleon, SITA first crowns itself as the self-declared leader in the field of border control, then from these lofty heights, tries to convince this Honourable Board that NetU’s offer, priced at **€6,310,500** is clearly “*abnormally low*”, but its own bid, priced at **€6,083,403** is not! This position is clearly without any basis in fact and in law. That said, rather than dismissing this argument out of hand, NetU will still address the “*abnormally low*” argument. (A similar ground of Appeal is being raised by PTL in its appeal. It has been separately replied by NetU in its reply to PTL’s appeal.)
- First of all, by way of general principles, the Recommended Bidder notes that:
 - 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 to approach 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 by the said bidder that its tender is “abnormally low”. On the other hand, where an explanation is given, there is a **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 evaluation, 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 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 considers the specific obligations and requirements of the Negotiated Procedure and complies in full with the Public Procurement Regulations S.L. 601.03, regulation 243 (including that the supply and implementation of the project will be undertaken without obtaining any state aid).
- SITA tries to imply that NetU is inexperienced in the field, and that therefore it might not be appreciating what the tender requirements involve or it might be basing its offer on costings which are too optimistic. This is a completely unfounded allegation. On the contrary, NetU has extensive knowledge of the contract scope, and possesses substantial prior experience in the implementation and maintenance of Border Control systems, e-LISA projects, as well as other similar highly complex projects. Border Control and Law Enforcement are major areas of NetU’s specialization, with more than 20 years of experience in implementing Police solutions, aided by an excellent knowledge of the

business processes of Border Control and Law Enforcement Authorities, as well as the European Union's relevant initiatives. NetU, as an experienced Border Control and Law Enforcement solutions provider, has already delivered specialized solutions in three European countries, (Cyprus, Greece and Croatia), and is currently promoting its Border Control and Law Enforcement specific solutions in other countries in Europe.

- With regard to Border Control Systems, NetU's experience commenced in 2003 when the first version of the Cyprus Police Border Control System was implemented. Since then, NetU has undertaken multiple extensions and upgrades of the system and is currently extending the system to accommodate the Entry Exit System (EES) and European Travel Information and Authorization System (ETIAS) requirements. In addition, NetU has implemented the Border Control System of Hellenic Police as part of the Greek National Schengen Information System (N.SIS).

Furthermore, NetU is experienced in the implementation of eu-LISA projects, such as the implementation of the National Schengen Information Systems (N.SIS) for Cyprus, Greece and Croatia, as well as the implementation of ECRIS system in Cyprus. The Recommended Bidder's experience in Border Control solutions also extends to API (Advance Passenger Information) and PNR (Passenger Name Records) systems, which it has also implemented in Cyprus.

- Furthermore, NetU has decades of experience in implementing mission-critical systems for public sector and government authorities. Indicative projects in Cyprus include the Department of Lands and Surveys Portal, the Integrated Information System for the Department of Town Planning and Housing, the Integrated Tax Administration System for the Tax Department (as part of a consortium), the Social Insurance System for the Ministry of Labour and Social Insurance, the Integrated Registry Platform for the Department of Registrar of Companies and Intellectual Property, the Financial Management System of the Treasury Department and many more. Several of these contracts also include the operation and maintenance of the system, including on-site support, 24x7 support, security, and availability management, based on a Service Level Agreement.
- This extensive knowledge and experience described in the above paragraphs:
 - a. Has allowed NetU to fully understand the contract scope, contract obligations and all the requirements in the Tender Documents;
 - b. Has been utilized in full during the preparation of the offer, and has allowed NetU to design and propose an ideal and optimal technical solution, in a price that provides maximum value for the Contracting Authority, while ensuring NetU's profitability;
 - c. Has allowed NetU to be fully aware of all possible risks involved in the

implementation of a contract of this nature, as well as the possible consequences arising from them, and to take them into consideration;

d. Will be leveraged in the maximum possible degree in the execution of the contract scope, thus guaranteeing the successful implementation of the contract by NetU, and the fulfillment of all contractual obligations.

- It is also worth noting that the software solution proposed by NetU has been developed by NetU, and therefore there is no dependency on third-party companies / subcontractors, leading to the avoidance of additional costs and overheads.
- A further significant point is 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 a further indication that the offer made by the Recommended Bidder – which is higher than €6M – should not be considered abnormally low.
- It is clear therefore that the allegation that NetU has offered a low price because it is incompetent, while SITA has offered an *even lower* price because it is so brilliant, is not only without any factual basis, but borders on the laughable.

The Board also noted the PTL Limited (the “Interested Party”) Reasoned Letter of Reply filed on 22nd of August 2024 and its verbal submission during the hearings held on the 28th of March 2025 (first hearing) and of the 28th of May 2025 (second hearing) in that,

a) ***First and Third Grounds of Appeal - The Contracting Authority altered the tender conditions for Key Experts 8 and 9 ex post facto***

- The First Ground of Appeal and Third Ground of Appeal deal with the request for supporting documentation in relation to Key Experts 8 and 9.
- The PPR expressly authorize the Contracting Authority to request supporting documentation from tenderers.
- Indeed, in Part VII (Choice of participants and award of contracts) of the PPR, which deals with selection criteria (including technical and professional ability), the PPR (Regulation 229.(1)) expressly provides as follows:

"A contracting authority may ask tenderers and candidates at any moment during the procedure to submit all or part of the supporting documents where this is necessary to ensure the proper conduct of the procedure."

- In addition, prior to awarding the contract, the Contracting Authority has the right to request supporting documentation (up to date as at the time of award) in terms of Regulation 229(2), and this in relation to each of Regulations 230, 231 and 232. Regulation 232 refers to technical and professional ability, a key element of which is the Key Experts.
- Finally, the Tender Document includes, as a constituent part thereof, the General Rules Governing Tenders. Rule 21 (Ethics Clauses) provides as follows:

"By submitting the offer the tenderer fully recognises and accepts that any false, inaccurate or incomplete information deliberately provided in the submission may result in an exclusion from this and other contracts funded by the Government of Malta and the European Union."

- SITA state (in paragraph 40.) that the Contracting Authority should have relied, exclusively, on the declaration made by SITA in this respect, as supported by the CVs. As explained above, the Contracting Authority is entitled to request supporting documentation at any time.
- It is submitted that, even if the PPR did not expressly provide that the Contracting Authority can request supporting documentation, a Contracting Authority has a right to investigate (including through a request of supporting documentation) whether a self-declaration made by a tenderer is factually correct or not. If it proves to be false, it has the right not only to disqualify but also to take other action (as set out in the PPR and the General Rules Governing Tenders).
- The Contracting Authority, as a matter of good governance and in order to ensure best value for taxpayers' money, must necessarily verify certain statements.
- The Contracting Authority in this case requested certificates to confirm that the persons who had been nominated as Key Experts 8 and 9 by SITA did in fact possess the certification SITA claimed they possessed when submitting its tender.
- PTL acknowledges that the submission of such certificates was not a requirement at tendering stage. However, a Contracting Authority is entitled to request supporting documentation as set out above.
- This does not, as SITA incorrectly claim, change the goal posts ex post facto. The Contracting Authority is simply requesting documentation to corroborate statements made by the tenderer.
- If the persons appointed as Key Experts by SITA comply with the requirements of the Tender Document, there should be no objection to submitting such certificates to corroborate such fact.
- It would be of great concern if a tenderer refuses to provide such proof, after claiming that its personnel are certified.

- Indeed, SITA did not dispute such request or refuse to provide said documentation (except in its SITA Objection, after it was disqualified). On the contrary, SITA claims to have complied with it.
- The same reasoning applied by the Board and the Court of Appeal in matters relating to the procurement procedure or tender documents, as set out in Section 5 below, is applicable by analogy to the process of clarification/rectification.
- The Court of Appeal, in its judgment regarding application number 632/2023/1 held as follows:

*"14. Fil-verità, dan febmitu l-appellanti għax mbux biss l-awtorità kontraenti qieset illi ma kellbiex thassar is-sejba u illi setgħet tkompli bil-process ta' evalwazzjoni u għażla, iżda wkoll l-appellanti stess qieset illi l-process kien għadu għaddej, **tant illi wiegħbet – għalkemm b'mod li taqies mhux għalkollox sodisfaċenti – għall-istedina tal-awtorità kontraenti biex tippreżenta xi dokumenti nieqsa**, għalkemm kemm l-istedina tal-awtorità u kemm it-tweġiba tal-appellanti saru meta l-offerti ma kinux għadhom jorbtu.*

*"15. Huwa kontradittorju u inkonsistenti l-atteggjament tal-appellanti li tqis li l-process għadu għaddej **meta ippreżentat id-dokumenti bit-tama li l-offerta tagħha tintlaqa' u tis illi l-process kien għa thassar meta ippreżentat daww id-dokumenti issa li taf li ntagħzel oblatatur ieħor.**" [emphasis added]*

- Once SITA did not contest the validity of the request and replied by providing what it considered to be the necessary documentation, the issue referred to in the First Ground of Appeal and the Second Ground of Appeal becomes a purely academic matter and cannot be upheld.
- It is submitted, with respect, that the First Ground of Appeal and the Second Ground of Appeal should therefore be rejected, both because the Contracting Authority was entitled to request such supporting documentation and because SITA did not object to, but actually complied with, such request.

b) ***Second and Fourth Grounds of Appeal - Key Experts 8 and 9 comply with requirements in Tender Document***

- In the Second Ground of Appeal and Fourth Ground of Appeal, SITA claim that the Key Experts nominated both as Key Expert 8 and Key Expert 9 satisfied the requirements in the Tender Document.
- It is not possible for us to verify whether, as a matter of fact, the persons nominated as Key Experts 8 and 9 do hold the relevant certifications.

- PTL therefore reserves the right to make submissions on whether the necessary personnel had the certification required after receipt of relevant information connected therewith.

Replacement of Key Expert

- In relation to Key Expert 9, it appears from paragraph 22.b. of the SITA Objection that SITA (through the clarification/rectification request) replaced the Database Administrator with a new resource.
- It is submitted that the replacement of a Key Expert is not permitted in terms of law and the Tender Document, and the Contracting Authority is precluded from permitting such a change.
- The general principle is that no amendments to a tender may be made after the deadline for submission. Regulation 62 provides as follows:

*"(1) Without prejudice to Part VI and regulation 235(2), the authority responsible for the tendering process must ensure that an economic operator must **ab initio** be eligible to qualify for a tender and must **consequently be in possession of all the requirements stipulated in the procurement documents by the closing date for the submission of the same.***

(2) Where information or documentation to be submitted by economic operators is or appears to be incomplete or erroneous or where specific documents are missing, contracting authorities in terms of the procurement document may request the economic operators concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit:

Provided that such requests are made in full compliance with the principles of equal treatment and transparency." [emphasis added]

- It is also a principle of procurement law that compliance must exist at the time of submission of the tender and not at some future date. This was confirmed by this Board in Case No. 789 (CT 3218/2014), where it expressly stated (multiple times) that compliance must exist at the time of tendering, and not at some future date:

*"This Board, after having heard verbal submissions made by both the Appellant and the Contracting Authority justifiably notes that it was credibly proven that at the time of the submission of the Tender Document, the preferred bidder Tiki-Taka Marketing did not have the necessary workforce to carry out the works as dictated in the Tender Document. It is the Board's opinion that a prospective Tenderer **should be compliant at the time of tendering and not at a future date.** In this regard, it has been credibly proved that the preferred bidder did not possess the necessary workforce to carry out the tendered works. A prospective bidder must be administratively and technically compliant at the time*

of submission of the tender and not be 'fully compliant' should the tender be awarded to him. In this respect, this Board upholds the Appellant's first contention." [emphasis added]

- Note 2 of the Tender Document is based on this Regulation 62(2). Note 2 in fact refers to clarification or rectification of any incorrect and/or incomplete documentation, and/or submission of any missing documents.
- The replacement of a key expert does not fall within the parameters of Regulation 62(2) and Note 2 — there is no incorrect and/or incomplete and/or missing document in this case.
- SITA simply did not submit a person as Key Expert 9 which met the requirements set out in the Tender Document, notwithstanding that it declared that such person did meet such requirements.
- Interested parties who did not, at the time of submission of bids, have the necessary key experts would have most likely (and rightly so) elected not to submit a bid.
- Tenderers cannot submit a bid with key experts which do not meet the criteria and, during the procurement process, through clarifications replace such key experts to bring themselves in line with conditions which existed prior to submission.
- If a Contracting Authority permits tenderers to do so, it would be favouring tenderers who submitted a tender knowing they were not compliant over all tenderers, including tenderers who were compliant and submitted a tender and tenderers who chose not to submit a tender since they knew they were not compliant. This would be a material change to the tender requirements which is prohibited.
- The CJEU case-law on clarifications/rectifications is clear. Reference is made to:

Case C-599/10 – Slovensko:

With reference to the principles of equal treatment, non-discrimination and transparency, the ECJ held in para. 37:

"To enable the contracting authority to require a tenderer whose tender it regards as imprecise or as failing to meet the technical requirements of the tender specifications to provide clarification in that regard would be to run the risk of making the contracting authority appear to have negotiated with the tenderer on a confidential basis, in the event that that tenderer was finally successful, to the detriment of the other tenderers and in breach of the principle of equal treatment." [emphasis added]

In its conclusions, the ECJ held:

"Article 2 of Directive 2004/18 does not preclude a provision of national law, such as Article 42(2) of the abovementioned Law No 25/2006, according to which, in essence, the contracting authority may ask tenderers in writing to clarify their tenders without, however, requesting or accepting any amendment to the tenders. In the exercise of discretion thus enjoyed by the contracting authority, the authority must treat the various tenderers equally and fairly, in such a way that a request for clarification cannot appear unduly to have favoured or disadvantaged the tenderer or tenderers to which the request was addressed, once the procedure for selection of tenders has been completed and in the light of its outcome."

Case C-131/16 – Archus. In its conclusions, the ECJ held:

"The principle of equal treatment of economic operators set out in Article 10 of Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors must be interpreted as precluding, in a public procurement procedure, the contracting authority from inviting a tenderer to submit declarations or documents whose communication was required by the tender specification and which have not been submitted within the time limit given for the submission of tenders. On the other hand, that article does not preclude the contracting authority from inviting a tenderer to clarify a tender or to correct an obvious clerical error in that tender, on condition, however, that such an invitation is sent to all tenderers in the same situation, that all tenderers are treated equally and fairly, and that that clarification or correction may not be equated with the submission of a new tender, which is for the referring court to determine."

- This was also confirmed by the Court of Appeal in application number 329/23/1 Polaris Marine Services Co Ltd (C-48840) v. Direttur Generali tal-Kuntratti 2. Direttur Generali - Dipartiment tas-Sajd u L-Akkwakultura u 3. United Equipment Company (UNEC) Ltd (C-10827) as follows:

"30. Jaqa' fuq l-offerent stess li joqghod ma' dak mitlub fis-sejba, b'dana fi huwa ma jistax joqghod jippretendi li l-awtorità kontraenti għandha toqghod issalvalu l-offerta jekk din tkun irregolari (ara J & J Gauci Granite Limited v. Grand Harbour Regeneration Corporation plc decisa mill-Qorti tal-Appell fil-20 ta' Marzu, 2023 u Steelshape Limited v. Direttur tal-Kuntratti et decisa mill-Qorti tal-Appell fis-7 ta' Anwissu, 2013).

"31. Minkejja dan kollu pero, jekk waqt l-għarbiel tal-offerti, l-awtorità kontraenti jirriżultatha xi żball ovvju f'xi offerta li jidher ex facie u li x'aktarx ikun biss ta' formalità, hija mbijiex imxekkeja milli ssewmi dak iż-żball jew litentieg kjarifika dwaru minghand l-offerent. Basta pero, li dik it-tiswija jew kjarifika ma tkunx fir-realtà opportunità biex l-offerent jithalla jidabbal offerta għida (ara Serviżi Malta Limited v. Direttur tal-Kuntratti et decisa mill-Qorti tal-Appell fil-15 ta' Lulju, 2019).

"32. Din il-possibilità ta' tiswija hija permessibbli biss, fuq is-sabha tal-prinċipju tal-proporzjonalità, meta l-irregolarità tal-offerta tkun wabda minuri, manifesta, ċerikali u bla bsara għall-kompetizzjoni ġusta (ara l-assoġjeta ċivili KPMG v. Il-Ministru għall-Iżvilupp Sostenibbli et decisa mill-Qorti tal-Appell fis-27 ta' Frar, 2017).

- In conclusion, it is submitted with respect that the replacement of a key expert does not fall within the ambit of Regulation 26 and Note 2 (which replicates the same) — that is, the submission of a key expert which does not have the necessary competences cannot be considered to be information or documentation which is (a) incorrect or erroneous, (b) incomplete, or (c) missing — and the offer of SITA was therefore not compliant with the mandatory requirements set out in the Tender Document and ought to be disqualified (even for this reason alone).

Technical Offer Note 3

- Without prejudice to the above in relation to the extent of what is permitted under Note 2, *even if dato ma non concesso* Note 2 is deemed to permit the replacement of a key expert, the Technical Offer was marked as Note 3 which expressly precludes any rectification.
- This was not simply a case of selection criteria which are typically marked as Note 2.
- The Key Experts formed a fundamental part of the technical offer (and, in fact, are part of the scoring in the BPQR) and the award of the contract, with 30 marks awarded for the same.
- No amendments to the Technical Offer could be made. This has been confirmed in several cases of the Board and the Court of Appeal.
- In this case, a key expert was changed during the evaluation process.
- It is submitted that the evaluation committee had no option but to disqualify the offer of SITA.

c) ***Fifth Ground of Appeal – Contracting Authority failed to disclose all information requested by SITA***

- In its Fifth Ground of Appeal, SITA claims it submitted certain requests for information which was necessary for it to exercise a rapid and effective remedy, but not all information requested was provided.
- SITA claims that the Contracting Authority did not disclose the information requested in the 11th, 12th, and 14th information requests, as set out in para. 69 of the SITA Objection.

- With respect to information requests 11 and 12, PTL submits that these are not required in order for SITA to exercise its remedy at this stage, simply because its remedy at this stage is limited to the events which occurred post-submission of bids.
- The Board and the Court of Appeal have consistently held that if a tenderer has an issue with the way in which the procurement procedure (up until the Deadline for Submission of tenders) is being undertaken (including issues with the Tender Document), then they must exercise their right to file a remedy before closing in accordance with Regulation 262.
- The 11th and 12th requests for information are only relevant to the period prior to the deadline for submission of tenders.
- Reference in this reply shall be made to only a couple of the recent decisions and judgments on this point:

5.6.1 Case 1578 – TM 026/2020 - Tender for the Provision of Services of an Insurance Broker for Transport Malta (TM)

This case was decided on 8th July 2021. The Board held as follows:

"Appellant cannot now, once his offer was rejected, object claiming the tender document was flawed and prevented bidders from making appropriate offers."

[emphasis added]

5.6.2 Court of Appeal (Superior Jurisdiction), Application Number 95/21/1: *Truevo Payments Limited (C62721) v. 1. Direttur tal-Kuntratti; 2. Ministeru għall-Finanzi u x-Xogħol u 3. Credorax Bank Limited (C46342)*

This case was decided by the Court of Appeal (Superior Jurisdiction) on 30th June 2021, declaring the objection filed by Credorax Ltd before the Board null and without effect, as its grievances all related to matters which had to be raised through a remedy before closing. The Court held as follows:

*"7. Mhux l-istess jista' jingħad fil-kuntest tal-aggravju l-iehor tas-soċjetà issa appellanti, dak marbut mal-inammissibilità tal-azzjoni in vista tar-rimedju ikkontemplat fir-Regolament 262 aktar qabel indikat. Huwa ċar li l-ilmenti tas-soċjetà Credorax Ltd huma diretti lejn il-proċedura użata u ma humiex marbuta mas-sustanza tal-offerta. **Din is-soċjetà qed tilmenta mill-użu tal-proċedura tal-ghoti tal-kuntratti b'negozjati, fuq il-mod kif ġie infassal il-process ta' din il-proċedura u li ma kienx hemm l-approvazzjoni tad-Direttur tal-Kuntratti għall-użu ta' din il-proċedura.***

Dawn it-tlett aggravi li għal bażi tagħhom il-kumpanija appellata Credorax Ltd ppreżentat l-appell tagħha jirrigwardja materji li kienu jeżistu sa mill-bidu nett tal-procedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taht ir-Regolament 262. Dawn l-ilmenti kellhom jitressqu qabel id-data tal-għeluq tas-sejba għall-kompetizzjoni u mbux, bħal fil-każ ta' llum, wara dik id-data, u sabansitra wara d-deċiżjoni dwar l-għoti tal-kuntratt.

8. Saret referenza għas-sentenza tal-Qorti tal-Ġustizzja tal-Unjoni Ewropea tat-12 ta' Frar, 2004, fil-każ fl-ismijiet Grossman Air Service, Bedarfsluftfahrtunternehmen GmbH & Co. KG v. Republik Österreich (C-230/02, CJEU) fejn fost il-konklużjonijiet milhuqa jingħad is-segwenti:¹ *Articles 1(3) and 2(1)(b) of Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts, as amended by Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts, must be interpreted as not precluding a person from being regarded, **once a public contract has been awarded**, as having lost his right of access to the review procedures provided for by the Directive if he did not participate in the award procedure for that contract on the ground that he was not in a position to supply all the services for which bids were invited, because there were allegedly discriminatory specifications in the documents relating to the invitation to tender, but **he did not seek review of those specifications before the contract was awarded.***

(Sottolinear ta' din il-Qorti).

9. Jidher ċar mill-premiss li darba li, anke f'dan il-każ, il-kuntratt gie rakkomandat u s-socjetà Credorax Ltd naqset li tfittex ir-rimedju opportun skond il-liġi qabel l-għeluq tat-terminu għall-preżentata tal-offerta, ma tistax aktar tappella biex tressaq l-aqgravji tagħha."

- It is therefore submitted that the refusal to disclose such information is justified and that SITA are precluded from raising any issues with the procedure adopted by the Contracting Authority at this stage, unless such issues relate to the period after the Deadline for Submission of tenders.
 - Finally, with respect to the 14th request for information, PTL has no comments on this save that it is normally extracts of evaluation reports which are provided and not extracts of minutes of meetings of the evaluation committee.
- d) ***Sixth Ground of Appeal – The Recommended Bidder does not have the technical and professional ability required to carry out this Project***

- PTL is not privy to the submissions of NetU Consultants Limited (the "**Recommended Bidder**") in relation to the experience submitted in relation to the requirements of Article 5(8)(c).
- PTL therefore reserves the right to make submissions on this following receipt of information requested.
- PTL, however, has serious doubts whether the Recommended Bidder can undertake the project forming the subject-matter of the Tender Procedure, both in terms of experience and in terms of the requirements relating to the solution (as set out in the PTL Objection).

e) ***Seventh Ground of Appeal – The Recommended Bidder’s financial offer appears to be abnormally low***

- PTL agrees with SITA that the offer submitted by the Recommended Bidder appears to be abnormally low — its offer is almost half the estimated contract value.
- The Contracting Authority had a positive obligation in terms of law to investigate such offer.
- The Directive, in Recital 103, states:

"Tenders that appear abnormally low in relation to the works, supplies or services might be based on technically, economically or legally unsound assumptions or practices. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed result from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions." [emphasis added]

- Abnormally low tenders are regulated in terms of Article 69 of the Directive. This article has been transposed into the PPR - in terms of regulation 243, there exists a positive obligation on a contracting authority to require tenderers to explain their tenders if they appear to be abnormally low. Neither the Directive nor the PPR define "*abnormally low*."
- Identifying, investigating, and (if necessary) rejecting abnormally low tenders is a means of ensuring a level playing field and adhering to the principle of equal treatment above-mentioned.
- A contracting authority must evaluate whether the offer is economically sustainable and can be performed in accordance with the tender requirements and the applicable legal obligations, or whether the offer is abnormally low. This will require an assessment as to whether the tenderer misunderstood the requirements set out in the relevant tender document, whether it has underestimated the risks associated with the contract, whether

it has considered all social, labour and environmental laws, whether it is benefiting from any illegal state aid, or whether it is a commercial strategy of the tenderer.

- European Commission's "Guidance on the participation of third-country tenderers and goods in the EU procurement market" (2019/C 271/02) and Brief 35, Public Procurement, September 2016 – Abnormally Low Tenders, published by SIGMA, Creating Change Together (a joint initiative of the OECD and the EU, principally financed by the EU) refers to several ways of seeking to establish whether a tender appears abnormally low, including:
 - (a) An assessment of the price of the tender and the object of the contract.
 - (b) An assessment of the difference between the price of the tender and the average price of all tenders.
 - (c) An assessment of the difference between the price of the tender and the contracting authority's own estimated value of the procurement;
 - (d) A valid method can also be to refer to the difference between the lowest and second lowest tenders;
 - (e) A combination of all or some of the above-mentioned methods is applied.
- The tenderer whose offer appears to be abnormally low must, upon request, provide all the evidence necessary to provide a sufficient explanation. This may include detailed information accompanied by appropriate documentation on the production process, facilities, social conditions, certificates, environmental standards, etc.
- The reasons provided to justify the viability of the tender must comply with the terms of the initial tender. In this regard, a contracting authority must not limit itself to requesting declarations that the tenderer intends to comply with those obligations.
- In the investigation process, the contracting authority may ask additional questions, especially to assess whether the information provided is authentic. The tenderer may also be asked to provide further details on questions and aspects which the contracting authority has not identified in its initial request but which have emerged as a result of the assessment of the information provided.
- The Court of Justice of the European Union (the "CJEU") has considered the matter of abnormally low tenders in several of its decisions, the following being just a couple:

Cases C-285/99 and C-286/99, Impresa Lombardini SpA

In this case, the CJEU held:

*"It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is **under a duty**, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the inter partes nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with **unless all the steps thus described have been successively accomplished.**" [emphasis added]*

Case T392/15, European Dynamics Luxembourg and Others v European Union Agency for Railways

The CJEU held that, whilst the concept of 'abnormally low tender' is not defined, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue.

The CJEU confirmed that the first step is determining whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low, such as where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price.

- The Court of Appeal of Malta (the "Court") has recently considered the matter in *Appeal No. 126/2021/1 and No. 127/2021/1, X Clean Limited (C-69875) v. Active Ageing and Community, Department of Contracts; and Diban Services*. In this case, the Court overturned the decision of the Board and concluded that:

"It is more logical to compare the price offered by the tenderer with the contracting authority's estimate, rather than the price of the highest offer, since the former is based on market research conducted by the contracting authority."

This decision of the Court departed from the Board's previous position, expressed in a number of its decisions in the past, that the Board should not question the matter of price.

We note the Court's position has been reflected in more recent decisions of the Board, such as that in Case 1540 - MF112/2020 – Procurement of Card Services, where the Board considered the abnormally-low argument presented before it and, on the basis of the facts presented to it, concluded that the evaluation committee's assessment (with respect to the pricing of an offer that was prima facie abnormally low) amounted to "no

more than mere assumptions or guess work," thus upholding the appellant's grievance on this point.

- The Court has also this year dealt with this matter in the case instituted by Star Fuels Limited (Application number 450/2023/1, Star Fuels Limited (C-92493) v. WasteServ Malta Limited (C-30560) and Ph. Borg Limited (C-56435), 22nd January 2024) The Court held as follows, amongst other things:

"Il-kriterju jekk prezz huwiex baxx b'mod mhux normali ma huwiex biss kif dak il-prezz iqabbel mal-prezz stmat mill-awtorità kontraenti jew ma' offerri oħra validi, għalkemm dan jista' jkun indikazzjoni. Kriterju ieħor huwa kif il-prezz offert iqabbel ma' kemm il-prodott jew is-servizz jiswa lill-oblatur. Prezz li jkun hekk baxx li l-oblatur jagħmel telf flok qligħ huwa indikazzjoni li l-prezz huwa baxx b'mod mhux normali. Dan ma jfissirx li għandu bilfors jitwarrab, għax jista' jkun hemm fatturi oħra – fosthom dawk imsemmija fir-reg. 243 – li jiggustifikaw il-prezz fiċ-ċirkostanzi partikolari tal-każ li jkun, iżda dan tista' tgħidu biss wara li tqis l-ispjegazzjoni li l-awtorità kontraenti għandha teziġi hekk jekk tara li l-prezz jidher baxx wisq."

And

"Ghidna illi kriterju rilevanti għal dan il-għan jista' jkun li tqabbel il-prezz ma' dak ta' offerri oħra validi u, partikolarment, mal-prezz stmat mill-awtorità kontraenti billi dan, għalkemm biss indikattiv, huwa bāzat fuq riċerka dwar il-kondizzjonijiet tas-suq u għandu għalhekk jitqies realistiku; kriterju ieħor hu li tqabbel il-prezz offert ma' kemm jiswa l-prodott għall-oblatur biex tara jekk il-prezz huwiex ekonomikament fattibbli, jekk iħallix telf flok qligħ."

- The estimated contract value for this Tender Procedure was €11,000,000 excluding VAT.
- The Tender Document provides that this was based on comprehensive research, including appropriate financial analysis. [emphasis added]
- Three (3) offers were submitted for this Tender Procedure. One of the offers, that of SITA, is not relevant for the purposes of this assessment since it was not a valid offer — in this respect, we refer to the Star Fuels case where the Court held that any comparison should be between prices of valid offers.
- PTL's offer was €10,896,945.94 — therefore, close to what the Contracting Authority's comprehensive market research indicated as market value.
- The Recommended Bidder's offer, on the other hand, was for €6,310,500.00 excluding VAT.

- Applying some of the methods for assessing if an offer appears to be abnormally low (as set out in the Commission Guidance, Sigma Guidance and Court judgments referred to above), the Recommended Bidder's offer is clearly materially abnormally low.
- Firstly, the Recommended Bidder's offer is:
 - (a) €4,689,500.00 less than, and
 - (b) equivalent to 57% of, the estimated contract value.
- Secondly, comparing the Recommended Bidder's offer to the other valid offers (only one valid offer, that of PTL), the 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 Bidder's offer on the one hand, and the estimated contract value and value of other valid offers on the other hand — are 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).
- PTL submits that the tender requirements are significant and the services forming the subject-matter of the Tender Procedure are complex and costly. Indeed, it is difficult to understand how any bidder, including SITA, could provide the services at a price which is circa €5,000,000 less than the estimated contract value and well below the market price.
- The Contracting Authority should have investigated any compliant tenders which were submitted for a price which is so significantly lower than the estimated contract value to ensure that all the requirements set out in the Tender Document — including without limitation the requirement that the solution supports differential morphing attack detection (NIST FATE Morph, Tier 3), which requires extensive effort on the part of the manufacturer to obtain such a high certification of high-quality morphs — would be provided and to understand whether there is any justification for such a low price.
- Indeed, by way of example, neither SITA nor the Recommended Bidder appear in 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

under Tier 3 for differential morphing attack detection (a copy of which, downloaded from https://pages.nist.gov/frvt/reports/morph/frvt_morph_report.pdf)

- 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 Bidder'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 tenderer.
- The risk of such a situation, apart from a breach of other tenderers' right of equal treatment, is that a tenderer offering such a low price is 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, putting at risk national security.
- As is best highlighted in the Court's decision in the X Clean Limited case, it is in the Board's remit and duty to carry out such examination, in order to ensure that the Principles of transparency, fairness, and equal treatment are preserved, and so that it may ascertain best value for taxpayers' money and (in this case) no detriment to national security.
- In conclusion, without prejudice to the fact that the offer should have been disqualified as non-compliant for the reasons outlined in the SITA Objection, the PTL Objection and this reasoned reply, the Recommended Bidder's offer is, when assessed in line with a number of methods set out in the relevant guidance notes and Court judgments, clearly abnormally low and ought to have been investigated.
- Of course, the same would apply to SITA's offer had it been deemed compliant (however, as explained above, this offer was not compliant).

f) ***Eighth Ground of Appeal – The negotiated procedure was conducted in an irregular manner***

- PTL is not privy to information relating to this ground of appeal and therefore reserves the right to make submissions on this at a later stage.
- That said, any irregularities would need to be material enough to justify a re-evaluation, in accordance with the principle of proportionality.

The Board also noted the Contract Authority's Reasoned Letter of Reply filed on 23rd of August 2024 and its verbal submission during the hearings held on the 28th of March 2025 (first hearing) and of the 28th of May 2025 (second hearing) in that,

a) ***First Grievance: that the Respondent Contracting Authority altered the tender conditions by requesting the Appellant to submit MCSA Certification vis-à-vis Key Experts 8***

- Put succinctly, the whole argument of the Appellant here is that because Section 5(C)(i) requested that the technical offer include the "Key Experts Form, the Statement of Availability Form and CVs", and not specifically the MCSA Certification, then the Contracting Authority's request for the MCSA Certification alters the technical conditions.
- To begin with, there is a specific technical requirement that the two Key Experts 8 "Be in possession of MCSA or equivalent certification" under the evaluation grid (page 12), and under Section 3 – Specifications/Terms of Reference (page 34 of the Tender Document). To argue that having MCSA certification is, therefore, clearly incorrect.
- Secondly, the Appellant makes the absurd argument that if the Tender Document only required having possession of the MCSA Certification but not also to submit the same, then the Tender Evaluation Committee does not have the power, *a fortiori* the obligation, to verify that a bidder is in possession of MCSA Certification. Such interpretation is not only illogical but also contrary to the spirit of the law.
- As stated already, the condition to be in possession of MCSA Certification is provided in the BPQR evaluation grid. According to Section 6.1 of the Tender Document the BPQR score is the award criterion. Reg. 239(6) of the PPRs expressly provides:

"Award criteria shall not have the effect of conferring an unrestricted freedom of choice on the contracting authority. They shall ensure the possibility of effective competition and shall be accompanied by specifications that allow the information provided by the tenderers to be effectively verified in order to assess how well the tenders meet the award criteria. In case of doubt, contracting authorities shall verify effectively the accuracy of the information and proof provided by the tenderers."

- If the Appellant confirmed that its Key Experts 8 are in possession of the MCSA Certification, then the Contracting Authority not only could but had the obligation to verify this.
- It follows that the first grievance is unfounded.

b) ***Second Grievance: that the Appellant's nominated Key Experts 8 satisfy the tender condition of MCSA Certification***

- For one of the Appellant's nominated Key Experts 8, the Contracting Authority could not verify from the offer submitted that the MCSA Certification was in place. It therefore gave the opportunity to the Appellant to remedy this through a rectification request. In reply to this request, the Appellant, instead of providing MCSA Certification, submitted a Cisco Certified Network Associate (CCNA) certificate which is not the equivalent.
- Having already given the Appellant the opportunity to rectify, the Tender Evaluation Committee could not simply request a fresh rectification without infringing the tender terms in breach of the principle of self-limitation. In its judgment in the case **NQUAYMT v. Aġenzija għal Infrastruttura Malta et (Court of Appeal, no. 35/2022, 22 June 2022)** the Court of Appeal considered that:

"Jekk oblatur ikun ingħata opportunita' ta' rettifika imma xorta wahda jibqa' amministrativly non-compliant, il-bord ta' evalwazzjoni ma jistax isalva dik l-offerta billi joqgħod jġri wara dak l-oblatur sakemm dan, forsi, jirregola l-pożizzjoni tiegħu. F'dan il-każ, il-konsorzju appellat ingħata kull cans jissottometti ruhu għat-talbiet tal-awtorita' kontracenti, u imputat sibi jekk baqa' jitraskura dak li kellu jagħmel. L-eccess fil-manjamentita' u fl-flitt sabiex jigu salvati offerti akkost ta' kollox mhux espressjoni ta' proporzjonalita' imma huwa sproporzjon kontra min kien "compliant" mill-bidu nett. Din il-Qorti mhix l-ewwel darba li t-tirribadixxi li kull oblatur irid, sa mill-bidu nett mal-offerta tiegħu, isegwi rigorozament dak li trid issejha għall-offerti u m'għandux jippretendi li jigi mitlub "jirrange" l-offerta biex ikun kompatibbli ma' dak mitlub." (para. 5)."

- In terms of the Key Experts Form, "Key Experts whose qualifications do not meet the minimum requirements in terms of equivalency, or the equivalency of which is dubious or cannot be determined, shall be rejected". It follows that the Tender Evaluation Committee had no other option than to reject the Appellant's offer.
 - The second grievance is, therefore, also unfounded.
- c) ***Third grievance: that the Respondent Contracting Authority altered the tender conditions by requesting the Appellant to submit DBMS Certification vis-à-vis Key Experts 9***
- All the same submissions made in response to the first grievance also apply here.
 - With regard to Key Expert 9, there is a specific technical requirement that he/she "Holds a Certification in the DBMS being proposed in the solution." under the evaluation grid (page 13), and under Section 3 — Specifications/Terms of Reference (page 34 of the Tender Document).
 - For the same reasons, then, the third grievance is also unfounded.

d) ***Fourth grievance: that the Appellant's nominated Key Experts 9 satisfy the tender condition of DBMS Certification***

- All the same submissions made in response to the second grievance also apply here.
- For the same reasons, then, the fourth grievance is also unfounded.

e) ***Fifth grievance: that the Respondent Contracting Authority failed to disclose all the information requested by the Appellant***

- By means of this grievance, the Appellant contends that the Contracting Authority should disclose to it:

(a) The correspondence exchanged between the Contracting Authority and the Department of Contracts setting forth the duly substantiated reasons for the use of the negotiated procedure without prior publication;

(b) The approval of the Department of Contracts for the Contracting Authority to use the negotiated procedure without prior publication;

(c) Extracts from the minutes of the meetings of the TEC which concern the evaluation of SITA's bid.

- All this information constitutes the internal deliberations of Government bodies in issuing the final decision. As such, that information is exempt from disclosure under Art. 36 of the Freedom of Information Act (Chapter 496 of the Laws of Malta).
- Apart from this, in its judgment in *Antea Polska* (Case 54/21, 17 November 2022, EU:C:2022:888, para. 103), the ECJ is clear that the point of disclosure to aggrieved bidders in the specific context of public procurement is restricted to:

"enable any person having or having had an interest in obtaining a particular contract and who has been or risks being harmed by an alleged infringement to challenge effectively and rapidly decisions taken by contracting authorities."

- There has to be some utility to the Appellant in challenging the decision to reject its bid in order for its request for information to be justified.
- In the case of the information regarding the reasons for using the negotiated procedure without prior publication, the Appellant of this decision to use this procurement process has known since the publication of the Tender Document. The reasons for this decision are of no use to the Appellant. The Appellant knows of the decision to use the negotiated procedure without prior publication and, should it have been of the view that there were no grounds to use this process, it could have lodged an appeal before this Board in terms

of Reg. 262 of the PPRs, even without having access to the internal working documents of Government.

- Worse still, any complaint on the choice of the procurement procedure is inadmissible at this stage and, so, the information requested is even more futile at this stage.

- The ECJ has, in its judgment in the *Universale-Bau* case (**Case C-470/99, 12 December 2002, EU:C:2002:746, para. 74**), considered that the very objective of procurement remedies is to allow for timely appeals which correct any infringement as they occur:

"In that regard, it is appropriate to recall that, as is apparent from the first and second recitals in its preamble, Directive 89/665 is intended to strengthen the existing mechanisms, both at national and Community levels, to ensure the effective application of the directives relating to public procurement, in particular at a stage when infringements can still be corrected."

- It follows then, from the ECJ's judgment in the **Universale-Bau** case (para. 75), that tenderers cannot be allowed to bring untimely claims with respect to alleged infringement, which, if proven true, could have been corrected at an earlier stage of the procurement procedure:

"The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke, at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements."

- The Court of Appeal has also adopted this line of thought. For example, in its judgment **Truevo Payments Limited v. Id-Direttartal-Kuntratti (appeal no. 95/21/1, 30 June 2021, para. 7)**, that where a ground of appeal existed in an earlier remedy, it should have been pursued at that stage and cannot be raised in an appeal after the award decision:

"Dawn it-tliet aggravi li abbażi tagħhom il-kumpanija appellata Credorax Ltd ppreżentat l-appell tagħha jirrigwardja materji li kienu jeżistu sa mill-bidu nett tal-proċedura in kwistjoni, u għal dawn l-ilmenti kienu jeżistu rimedji taħt ir-Regolament 262. Dawn l-ilmenti kellhom jittressqu qabel id-data tal-għeluq ta' sejba għall-kompetizzjoni u mhux, bhal fil-każ tal-lum, wara dik id-data, u saħansitra wara d-deċiżjoni dwar l-għoti tal-kuntratt."

- Turning now to the request to have the meeting minutes of the Tender Evaluation Committee, even this information is of no use to the Appellant in the context of the current appeal. The decision to reject the Appellant's bid and the reasons therefore have been made known to it. What binds the Contracting Authority is its final communicated decision and not what it may have intended by it. It follows that the right of appeal of any

aggrieved bidder is a right to challenge the final decision itself and not the workings that led up to it.

- In this spirit, the ECJ has already made it clear in the **Ispas case (Case C-298/16 Ispas, EU:C:2017:843, para. 35-36)** (relating to defence in tax inspections) that a party's right to appeal or to defend oneself in litigation does not mean that it has a right to access whatever information it wants:

"Indeed, according to settled case-law of the Court, the general principle of EU law of respect for the rights of the defence is not an unfettered prerogative but may be restricted, provided that the restrictions in fact correspond to objectives of public interest pursued by the measure in question... such restrictions, enshrined in national law, may, in particular, be designed to protect requirements of confidentiality or professional secrecy, which are liable to be infringed by access to certain information and certain documents."

- The Advocate General's Opinion in the Ispas case (EU:C:2017:650, para. 116 and 121) also considered that:

"First, access to file as such, understood as the complete set of documents and information in possession of the administrative authorities, should be clearly distinguished from the right to have access to the documents upon which the final administrative decision is based"; and

"Thus, there is no right to see the complete file, but rather to have access to the key information or documents that form the basis for the administrative decision."

- In the context of tender procedures of the EU institutions and bodies, the ECJ has also confirmed in its judgment in the **Evropaiti Dynamiki v. Commission case (Case C-561/10P, EU:C:2011:598, para. 25 EU:C:2017:650, para. 116)** that *"it does not follow... that, upon written request from an unsuccessful tenderer, the contracting authority is under an obligation to provide it with a full copy of the evaluation report."*
- For all these reasons, the fifth grievance is unfounded.

f) ***Sixth grievance: that the Recommended Bidder does not have the technical and professional ability required to carry out this project***

- The Appellant contends that the experience of the Recommended Bidder is not sufficient to comply with the Technical and Professional Ability criterion. The Contracting Authority has reviewed, in strict compliance with the principle of self-limitation, the documentation submitted by the Recommended Bidder in this respect and determined, contrary to the Appellant's view, that the experience submitted by the Recommended Bidder satisfies this criterion.

- It should be recalled 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. In the judgment of *Cherubino Limited v. Id-Direttur (Generali) tal-Kuntratt et* (appeal no. 426/2014, 6 February 2015, page 8), the Court of Appeal stated that:

"Għal darba oħra din il-qorti tosserva li fiq materja ta' apprezzament tekniku bħala regola generali u sakemm ma jintwerewx raġunijiet gravi u konvinċenti ma tid-disturbax apprezzament magħmul minn bord tekniku" [that is, the evaluation board].

- In the judgment of *SaniClean Joint Venture v. St Vincent de Paul Long Term Care Facility et* (appeal no. 97/2020, 20 July 2020, page 19) the Court of Appeal reiterated that:

"Il-Qorti tara fi, kollox ma' kollox, l-*evalwazzjoni* li għamel il-kumitat tal-għażla kienet raġonevoli u l-Bord ma kellux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat."

- Once again, in the judgment of *Executive Security Services Ltd v. Agenzija Servizz Gov et* (appeal no. 205/2021/1, 7 March 2022, para. 5) the Court of Appeal reiterated this principle:

"Qabel xejn tajjeb li minn issa issir referenza għall-prinċipju kardinali materjali simili li fejn l-*evalwazzjoni* li jkun għamel kumitat tal-għażla kienet raġonevoli, allura bord jew tribunal tal-abbar istanza m'għandux jissostitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat."

- It follows that the assessment that this Board must make with respect to this grievance should be strictly limited to assessing whether the evaluation of the Recommended Bidder's submitted experience by the Tender Evaluation Committee was reasonable. The Board should not substitute its own views for that of the Tender Evaluation Committee.
- For these reasons, and as shall be further evidenced throughout these proceedings, this grievance is also unfounded.

g) ***Seventh Grievance: that the bid of the Recommended Bidder is abnormally low***

- By means of its seventh grievance, the Appellant contends that the Recommended Bidder's financial offer appears to be abnormally low since it is lower than the estimated procurement value.
- 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.

- But that a bid may appear 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 (app. no. 450/2023/1, 22 January 2024, para. 15)**, the Court of Appeal considered that whether the performance of the contract at the tendered price would return a profit is a key factor to analyze whether a bid is abnormally low:

"kriterju iehor hu li tqabbel il-prezz offrut ma' kemm jiswa l-prodott għall-oblatur biex tara jekk il-prezz inkwistjoni ekonomikament fattibbli, jekk ihallix telf flok qligħ."

- 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.*"
- It must also be stated that the Appellant submitted an even lower financial bid than that of the Recommended Bidder.
- For all these reasons, the seventh grievance must be rejected.

h) ***Eighth Grievance: a number of alleged irregularities in the procurement procedure***

- The Respondent Contracting Authority states at the outset that it is rebutting all claims by the Appellant that the procurement procedure was in any way irregular.
- Firstly, there were no duplicate bids submitted. The duplication of bids which appears on the e-pps results from the need of the Technical Evaluation Committee to return to certain aspects of the evaluation, namely, to issue clarification requests. This is an ordinary

occurrence, especially where the General Contracts Committee makes recommendations to the Technical Evaluation Committee to revise any part of its evaluation.

- Secondly, the Technical Evaluation Committee was made up of the same five members all throughout the procurement processes, to the contrary of the Appellant's allegations.
- Thirdly, the Contracting Authority rejects that the Technical Evaluation Committee's evaluation report is in any way inadequate as suggested by the Appellant.
- Fourthly, the Contracting Authority reiterates the reasons stated in the Letter of Rejection.
- Fifthly, the financial part of the Appellant's bid was not evaluated given that its offer is technically non-compliant.
- For these reasons, and as shall be further evidenced throughout these proceedings, this grievance is also unfounded.

i) ***Ninth 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***

- 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 if the Appellant has paid the deposit incorrectly, 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.

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.

At the outset, the Board notes that during the final submissions, the Appellant formally withdrew the sixth and seventh grounds of appeal, concerning the recommended bidder's technical experience and its allegedly abnormally low offer, respectively. The Board also notes that the fifth ground concerning disclosure and the ninth ground concerning the deposit were considered by the Appellant to have been largely superseded by events during the proceedings.

The Board will therefore consider the Appellant's remaining grievances.

First and Third Grounds of Appeal: The Contracting Authority Altered the Tender Conditions Ex Post Facto

- The Board finds these grievances to be well-founded based on the documentary evidence produced and witnesses testimony. The tender dossier under Section 5(C) explicitly stated only three documentary requirements for key experts: the Key Expert Form, Statement of Availability, and CV. This was further confirmed in the clarification issued on 22 April 2024. The subsequent request by the TEC for MCSA and DBMS certificates constituted an improper imposition of additional requirements not specified in the original tender conditions.
- The Board notes Mr. Sandro Calleja's telling admission under cross-examination that the requirement to submit certificates "*is not in this or any other tender that exists. It is normal practice that we operate in that way.*" This clearly demonstrates that the TEC applied an unwritten standard rather than adhering to the published tender requirements, thereby violating the fundamental principle of self-limitation.
- Furthermore, the rejection letter's failure to identify which of the two nominated Key Experts 8 was deemed non-compliant demonstrates a serious procedural flaw that deprived the Appellant of its right to an effective remedy. The Board considers this lack of specificity to be inconsistent with the transparency requirements of public procurement law.
- The Board therefore upholds the Appellant's first and third grounds of appeal.

Second and Fourth Grounds of Appeal: The Nominated Key Experts Satisfied the Tender Requirements

- Without prejudice to the above finding, the Board also determines that the Appellant's nominated key experts satisfied the tender requirements as originally specified. The testimony of Mr. Keith Cutajar, the only technical expert to provide evidence in these proceedings, demonstrated through detailed technical analysis that both nominated experts possessed qualifications and experience equivalent to or exceeding the stated requirements.
- For Key Expert 8 (Mr. Jonathan Brincat), the Board opines that his possession of certifications, while different in nomenclature, address the same technical competencies required. The Board finds significant that Mr. Brincat testified under oath that all his qualifications required examinations which he passed. His CCNA certification, while from a different vendor (Cisco rather than Microsoft), demonstrates competency in network administration and security.
- For Key Expert 9 (Dr. Russell Camilleri), the Board observes that he significantly exceeded the academic requirements, holding a PhD (EQF Level 8) versus the required EQF Level 5. His Oracle Database 11G certification demonstrates competency in database management systems, and the Board notes that SQL (Structured Query Language) is an international standard that applies across different database platforms.
- The Board finds that the TEC's rigid interpretation of certification requirements, particularly when the tender explicitly allowed for "*equivalent*" qualifications, was unreasonable and inconsistent with the principle of proportionality. The Board notes Mr. Sandro Calleja's admission that the rejection letter's reference to "*a new resource being proposed*" for Key Expert 9 was "*incorrect*," further undermining the credibility of the evaluation process.
- The Board therefore upholds the Appellant's Second and fourth grounds of appeal.

Eighth Ground of Appeal (Procedural Irregularities): The Negotiated Procedure Was Conducted in an Irregular Manner

The Board finds this grievance to be substantially justified by compelling evidence of serious procedural irregularities as follows:

- Inadequate Assessment of Abnormally Low Offer
- External Pressure and Compromise of Evaluation Independence
- Selective Application of Clarification Procedures
- Irregular Evaluation Practices and Breach of Confidentiality
- Ex Post Facto Approval and Procedural Violations

Inadequate Assessment of Abnormally Low Offer

- Regulation 243 of the Public Procurement Regulations transposes Article 69 of Directive 2014/24/EU and requires that when a tender appears abnormally low, the contracting authority must (i) identify suspect tenders, (ii) request an explanation, and (iii) assess the merits of the explanation.
- In this case, the timeline demonstrates a significant procedural flaw. NetU's clarification response was received on 1 August 2024 at 18:37, yet the award recommendation was issued by 9:00 am the following morning. Testimony from Ms. Graziella Formosa (TEC Secretary) confirmed there were no minutes, emails, or Microsoft Teams meetings between these dates. This lack of any record of deliberation or documented assessment indicates that the committee did not convene or substantively review NetU's explanation.
- Further, the second evaluation report submitted to the GCC was identical to the first and contained no analysis of NetU's response.
- Mr. Antonello Grech (TEC Chair) also admitted that the TEC did not verify NetU's claims about partnerships with manufacturers or technical capabilities.
- Taken together, the Board opines the above facts show that the required assessment of the abnormally low offer did not take place in line with Regulation 243.

External Pressure and Compromise of Evaluation Independence

- Mr. Grech's (chair of the evaluation committee) admitted that he conducted informal discussions about bidders with counterparts in Cyprus and Greece during the evaluation period.
- The Board notes the testimony of Mr. Adrian Dalli, Director General of Contracts, who confirmed that "*the evaluation committee one should stick with the respective committee and the respective expert appointed*" and that evaluation committees "*are responsible for the evaluation of the process*".
- The Department of Contracts guidelines clearly establish that evaluation committees should maintain strict confidentiality and avoid any external communications that could compromise the integrity of the evaluation process.

Selective Application of Clarification Procedures

- The Board notes with concern the selective manner in which clarification requests were issued by the TEC. The evidence shows that the GCC recommended on 19 July 2024 that "*a technical rectification is sought*" from SITA regarding Key Expert 10. However, Mr. Grech testified that the TEC chose not to seek this clarification from SITA because SITA was already disqualified on other grounds.

- This selective application of clarification procedures demonstrates an inconsistent approach that undermines the principle of equal treatment mandated by Article 39 of the Public Procurement Regulations. The TEC's decision to issue clarifications to some bidders while withholding them from others based on their preliminary assessment violates the transparency requirements of public procurement law.

Ex Post Facto Approval and Procedural Violations

- The evidence shows that the GCC approval was received at 10:07 am on 2 August, after the award recommendation had been issued at 9:00 am the same day, constituting ex post facto approval that violates proper procedural sequence and the requirement for prior authorization before making award decisions.

The Board therefore upholds the Appellant's Eight ground of appeal.

The Board,

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

- a) Uphold the Appellant's grounds 1 to 4 of the appeal;
- b) Uphold the Appellant's eight ground of the appeal;
- c) Directs the re-evaluation of the bids in this negotiated procedure by a newly composed, independent evaluation committee with appropriate technical expertise.
- d) Directs that the deposit paid by Appellant to be reimbursed in full.

Mr Kenneth Swain
Chairman

Dr Ing. Damien Gatt
Member

Dr Ana Thomas
Member