PUBLIC CONTRACTS REVIEW BOARD

Appeal Reference Number	**2260**
Tender Reference Number	**CPSU5245/26**
Tender Name	**"Tender for the Supply of Disposable Temperature Probe Covers"**

The Public Contracts Review Board (hereinafter the 'Board' or the 'PCRB') convened a public hearing on the 15th July 2026 to hear the appeal as filed by the appellant Drugsales Limited (hereinafter the 'Appellant') on the 15th June 2026, and after taking cognisance of:

The tender document for the 'Tender for the Supply of Disposable Temperature Probe Covers' (hereinafter referred to as the "Tender Document");

The minutes of the proceedings dated 15th July 2026 which are being reproduced hereunder:

> *"**Case 2260 – 681 – Objection – CPSU5245/26 – Tender for the Supply of Disposable Temperature Probe Covers.***
>
> *The Tender was issued on the 20th February 2026, and the closing date was 17th March 2026.*
>
> *The estimated value of the tender, excluding VAT, was €137,922.36*
>
> *On 15th June 2026, Drugsales Ltd., lodged an appeal against Central Procurement and Supplies Unit (CPSU) the Contracting Authority under Regulation 270 of the Public Procurement Regulations.*
>
> *On the 15th July 2026, the Public Contracts Review Board (PCRB), composed of Dr Ana Thomas as Chairperson, Mr Keith Victor Grech and Mr Lawrence Ancilleri as members, convened a public hearing to consider the appeal.*
>
> *A deposit of €690.00 was paid. There were five bids.*
>
> *The attendance for this public hearing was as follows:*
>
> ***Appellant – Drugsales Ltd***
>
> *Dr Douglas Aquilina – Legal Representative*
> *Ms Giulia Attard Montalto – Company Director*
> *Mr Alex Fenech – Company Representative*
> *Mr Reuben Demanuele – Company Representative*
>
> ***Contracting Authority – Central Procurement and Supplies Unit (CPSU)***
>
> *Dr Alexia Farrugia Zrinzo – Legal Representative*
> *Dr Leon Camilleri – Legal Representative*

Ms Angel Paul – Chairperson
Ms Bernice Gauci – Secretary
Ms Cathleen Carabott – Evaluator
Mr Emanuel Zammit – Evaluator
Ms Ruth Pace – Evaluator

Recommended Bidder – Europharma Ltd

Mr Michael Peresso – Company Representative
Mr Adrian Azzopardi – General Manager

Observer CPSU

Mr S. Jayadev
Mr Ajaidas

Opening Statements
The Chairperson welcomed the parties present and formally opened Case Number 2260 in the records of the PCRB. The Chairperson identified the Appellant as Drugsales Ltd, the Contracting Authority as Central Procurement and Supplies Unit (CPSU), and the Recommended Bidder, Europharma Ltd.

The Chairperson invited the legal representative for the Appellant to make the initial submissions.

Initial Submissions

The Chairperson was informed that the appellant had requested a witness to testify about tender drafting. At this stage, the Board stated that it was informed that the tender evaluators could answer these questions. The appellant requested that the proceedings be heard in English, and there were no objections. The Board acceded to the request.

Initial Submissions by Dr Douglas Aquilina (for the Appellant)

Dr Aquilina noted that they were discussing temperature probes for a particular product, namely the Welch Allyn thermometers. The Contracting Authority already owns this product. These have a cover that has to be changed for every patient. Tender specification 2.3 allowed for equivalent products, besides the original, provided they had the same performance.

In this case, an after-market product was submitted, and the appellant was enquiring whether, since the product was not original, the recommended bidder had provided proof that it achieved the required performance and was equivalent.

Dr Thomas asked why they were doubting that there was no proof.

Dr Aquilina said that the Contracting Authority showed the awarded product; however, there was no study or proof in the online literature that it provided identical performance. This should be a very accurate thermometer, where the readings are important for medical reasons.

The appellant filed the appeal and requested proof, but none was provided. They supply the original product.

Initial Submissions by Dr Leon Camilleri (for the Contracting Authority)

Dr Leon Camilleri noted that they were dealing with plastic covers that cover the thermometer probe used for temperature testing. They were dealing with performance equivalence. The Evaluators tested the products and were satisfied. Samples were provided and tested. The objector submitted that ten samples were not sufficient to determine performance equivalence.

If they had a query regarding the quantity, they should have raised it at an earlier stage. The tender document does not specify the quantity of samples required in order to determine compliance.

The Evaluation Committee confirmed that the product of the recommended bidder satisfied all the tender specifications, and there was no reason for the decision to be overturned.

The Chairperson asked what was required at bid stage, apart from the samples.

Dr Leon Camilleri said that the usual literature list was requested.

Dr Aquilina replied that Clause 5.6 of the General Rules requested the literature list.

Witness

Ms Ruth Pace (ID no. 195675M), summoned by Dr Douglas Aquilina.

Ms Ruth Pace was a Practice Nurse in Infection Prevention and Control for the Oncology Centre. She was an evaluator and had evaluated the samples together with her colleague. The temperature probes are covered with a plastic sheey, as the probes are inserted into the patient's mouth. The cover is used once and then discarded.

Dr Douglas Aquilina said that the tender requested a specific product, item code WA-05031-110. This was the product currently being used, namely the Welch Allyn Electronic Thermometer.

The witness stated that the product tested was equivalent, with a cover that fitted the thermometer being used.

Dr Aquilina asked what proof had been provided at bid stage.

The witness said that they determined the equivalence after testing and observing that the readings were equivalent.

Dr Aquilina clarified that the bidder had not submitted any literature with the tender document.

Dr Thomas asked the witness whether she was aware of the documents submitted.

Ms Pace said that the probe covers were similar to the data provided through the bids. They were intended to prevent cross-contamination of bugs. She explained how they used the samples. They tested the samples on ten different patients by using the current thermometer and then using the sample cover a few seconds later on the same patients.

The temperatures recorded were either identical or differed by 0.2 degrees. This minor variation was accepted based on their clinical data and experience. They recorded all the temperatures and later discussed the results with the team. They showed evidence that a maximum temperature difference of 0.2 degrees was not clinically significant and proceeded to award the cheapest bid.

Ms Pace had been carrying out this work for the last twelve years.

They had reviewed the literature that had been provided, which was still available on the portal.
Dr Aquilina had specifically requested it.

The Chairperson noted that she had the full procurement file. The appellant was arguing that the preferred bidder had not provided evidence of equivalence but had instead proved it through the sampling.

Dr Aquilina noted that it was the nurses who had checked it for him. He assumed that there was nothing in the file. This was the legal argument. The factual argument was that Dr Aquilina did not have the file and was assuming that there was no proof in it.

The Chairperson stated that the witness had testified that they reviewed the literature, tested the sample, and established compliance. Dr Thomas confirmed that she had the bids.

The witness said that the CPSU requested ten samples from the cheapest bidder after the submission of the tender.

Cross-Examination by Dr Leon Camilleri

Dr Camilleri confirmed with the witness that the bidder had answered "Yes" to confirm compliance with all the specifications.

Witness Ruth Pace (ID no.195675M) was called again this time by Dr Leon Camilleri with the same oath taken previously.

The witness clarified that a maximum difference of 0.2 degrees in temperature might occur even when using the same probe cover. Different readings may be obtained from the same patient when tested twice with the same probe only seconds apart.

The witness had a one-page note containing the instructions for use of the product.

Dr Thomas kept a copy, although she already had one in the procurement file.

Dr Aquilina said that it contained the specifications of the thermometer, where it stated that the readings might be inaccurate if another cover was used.

Dr Camilleri asked the witness to elaborate on the "Methodology of Testing."

Ms Pace read the document:

"Methodology for testing disposable temperature probe covers samples on the 24th of April 2026.

Each of the 10 patients were informed that temperature was going to be taken twice to test a sample, not because there was a clinical concern.

All thermometers were calibrated and were functioning correctly for clinical decision making.

Due to clinical reasons, all patients were in isolation rooms, and all had designated thermometers.

Sample cover readings were compared to the current cover reading from the same thermometer.

Corresponding temperature readings from current and sample covers were taken within seconds of each other.

Readings were registered accordingly: Current covers 1a - 10a
Sample covers 1b-10b respectively.

Patients were numbered 1 — 10 for the current cover and the corresponding sample cover respectively.

Step 1: temperature was taken buccally (as per standard practice) with the current cover and temperature reading was recorded.

Step 2: temperature was taken buccally, with the sample cover using the same thermometer from the same patient and recorded.

Data set: Patient 1 had reading 1a (current cover) and 1b (sample cover).

Patient 2 had reading 2a (current cover) and 2b (sample cover), etc.

Patient 10 had reading 10a (current cover) and 10b (sample cover).

Patients were informed about their temperature status accordingly; no information about the sample testing was given to patient."

Comparative results were then discussed with the adjudication board".

Ms Pace conducted the testing, together with a colleague from work.

Cross-examination by Dr Douglas Aquilina

Dr Aquilina asked why they tested only 10 samples when the contract was for 4.18 million probe covers.

The witness said that the CPSU determined the quantity. They conducted clinical testing on patients, not in a laboratory.

Witness:

Mr Emanuel Zammit (ID No. 0476090M), summoned by Mr Leon Camilleri.

Mr Emanuel Zammit was a Charge Nurse in the Haematology Ward at SAMOC for the last three years, with ten years' experience in the Intensive Care Unit. He was the colleague who worked with Ms Pace on the sampling.

The Chairperson minuted:

"The witness exhibited Document EZ, which was the Methodology Document mentioned by Ms Pace".

Dr Camilleri asked whether there was any other information, besides the testing, to determine compliance.

The witness said that the information from the bidder stated that the product was compatible with the Welch Allyn, and they requested samples. He could not remember whether this information was in the literature or in the Technical Offer Form.

Cross-examination by Dr Douglas Aquilina

Dr Aquilina understood that the bid showed proof of identical performance, and that they had to verify it through the samples.

The Chairperson noted that the witness had not said that. He had said that there was conformity as to compatibility, based on what he saw in writing and what was verified through the sampling.

Dr Aquilina repeated the question and told the witness that they established performance through the testing.

The witness answered, "Yes."

Final Submissions

Final Submissions by Dr Douglas Aquilina (for the Appellant)

Dr Aquilina said that he had not seen the bid, but that it all referred to compatibility with the original product. This did not mean that it provided the same performance as requested. Specification 2.3 states:

"Equivalent probe covers should have identical performance as the original product".

Not just that the cover fits. It was not up to the CPSU to verify compliance when the bidder had not provided the proof themselves. The bidder should take responsibility for their product.

The General Conditions were very clear on this, and Clause 5.6 states, "Where in the tender document, a standard brand or label is quoted", and they were ready to accept an equivalent to the original. "However, it will be the responsibility of the respective bidder, at tendering stage, to prove that the brands they quoted are equivalent to the standard requested by the Contracting Authority". He needed evidence to show identical performance.

There is no manual specifying what proof should be provided. Dr Aquilina considered that the proof had to be scientific, since the procurement concerned

medical products. The bidder stated that the product was compatible, which is not the same as equivalent performance. The bidder's offer failed because it lacked proof. The submission of samples was not required with the bid; it was at the Contracting Authority's discretion. He quoted the following from page 5:

"Samples as per Form marked 'Sample List' may be requested during the adjudication stage to supplement the technical offer submitted. If requested, the Samples must be submitted within ten (10) working days".

This did not prove compliance with the bid. Article 16.3 of the General Rules, regarding technical compliance, states, "wherever applicable in the tender documents and in Regulation 12(1)B, tenderers may be requested to submit samples, so that the Evaluation Committee will collaborate the technical compliance of the offer submitted".

That proof had to be considered. The CPSU was taking responsibility instead of the bidder.

Final Submissions by Dr Leon Camilleri (for the Contracting Authority)

Dr Camilleri referred the Board to the Technical Specifications. He referred to Specification 2.1 and quoted:

"Must fit Welch Allyn Electronic Thermometer (item code WA-05031-110 or equivalent)".

This states that it "must fit" and, if it fits, it is compatible. This specification was fulfilled.
Specification 2.2 requested a female luer and this was fulfilled.

He then referred to Specification 2.3 and quoted:

"Equivalent probe covers should and have identical performance as the original product".

His submission on this specification was that the best way for the Evaluation Committee to determine and confirm performance equivalence was by testing the sample. The bidder had confirmed in the Technical Offer Form that the product had identical performance.

Dr Aquilina stated that sample testing was there to corroborate the Technical Offer, and Dr Camilleri replied that "so is literature", as provided in the General Rules Governing Tenders.

Both samples and literature are used to corroborate the Technical Offer. The Evaluation Committee referred to both but, in Dr Camilleri's opinion, opted for

the best possible way to confirm identical performance, namely by testing conducted by nurses with extensive experience.

He compared the results and confirmed that this specification was fulfilled. The decision should therefore be confirmed.

Replica by Dr Douglas Aquilina

Dr Aquilina referred to the General Rules, Clause 5.6, and stated that it was the responsibility of the bidder, not the CPSU, to provide proof at the tendering stage. Proof had to be submitted at the tendering stage. The CPSU was checking where something was missing and filling the gaps, and this could place the CPSU in a dangerous position. The law states that the bidder must have proof at the tendering stage.

Replica by Dr Leon Camilleri

Dr Camilleri said that Dr Aquilina was making his submissions as though the evaluators should simply refer to the documents and not conduct any sample testing. This was not the ideal scenario. The specification stated that it must fit the Welch Allyn Thermometer, and this had been proven. Specification 2.3 concerned performance, and performance could only be confirmed through performance testing.

Conclusion of the Hearing

The Chairperson, Dr Ana Thomas, thanked all parties present and formally concluded the hearing. The Board would communicate its decision in due course."

The written pleadings as filed by Drugsales Limited on the 15th June 2026, together with proof of payment of a deposit in the amount of €690.00, wherein it held as follows:

"Dear Sirs/Madams,

We write on behalf of Drugsales Limited (C-1780) of Ferreri Buildings, Idward Street, Ta' Qali National Park, Attard with reference the tender in subject.

By means a letter dated 5 June 2026, the contracting authority stated that the procurement was recommended for award to Europharma Ltd, being the cheapest priced offer satisfying the administrative and technical criteria.

We hereby submit this appeal against the award decision issued in relation to Tender CPSU5245/26. Our company is the supplier of the original Welch Allyn Electronic Thermometer probe cover referenced in the tender specifications, namely item code WA05031-110.

The Contracting Authority specified under Section 3 — Specifications that:

> *"Equivalent probe covers should have identical performance as the original product." (Specification 2.3)*

Compliance with the requirement of identical performance as the original product constituted a mandatory technical requirement and not merely a desirable characteristic.

Ground 1 — Lack of Demonstrable Evidence of Identical Performance, and Obligation of the Bidder to Provide such evidence at Tendering Stage

Information provided by the contracting authority shows product awarded is Suzhou ACE Biomedical A-ST-PC-25. The manufacturer's published literature describes the product as compatible with Welch Allyn SureTemp thermometers and refers to features such as universal fit, prevention of cross-contamination, one-handed operation and latex-free construction.

However, literature available in public domain does not provide evidence demonstrating:

- *identical performance to the original Welch Allyn probe cover;*
- *comparative clinical validation;*
- *comparative accuracy testing;*
- *equivalence studies*
- *performance data demonstrating that temperature measurements obtained through the offered probe cover are identical to those obtained using the original product.*

Compatibility and physical fit cannot automatically be equated with identical performance. The tender expressly required identical performance, which is a significantly higher standard than compatibility. Identical performance in this context could relate, amongst others, to characteristics such as –

- *Rate of transfer of heat*
- *Thermal conductivity*
- *Thermal mass of the probe cover itself*
- *Interaction or effect on the calibration and accuracy of the temperature probe itself*
- *Variation between samples in the above parameters.*

In terms of the General Conditions Governing Tenders (as well as according to jurisprudence and established principles of procurement):

> *5.6 Where in the tender document a standard, brand or label is quoted, it is to be understood that the Contracting Authority will accept equivalent standards, brands or labels. However, it will be the responsibility of the respective bidders at tendering stage. to prove that the standards, brands or labels they quoted are equivalent to the standards, brands or labels requested by the Contracting Authority*

Given that the bidder submitted a bid with an allegedly "equivalent" probe to the original, it was incumbent on the said bidder to provide concrete evidence that the "equivalent" probe offers an ***identical*** *performance to the original product, as requested in the same tender specifications.*

The ***bidder therefore had the obligation to bring sufficient and reliable scientific evidence to show that the "equivalent" product effectively gives identical performance to the original product, and this in a consistent manner and in the several conditions and various patients for which the probe is used.***

A simple declaration by the bidder or 'ticking of the box' is not sufficient proof of equivalence.

Failing production of such evidence of identical performance by the bidder at tendering stage, the offer had to the rejected by the contracting authority.

Ground 2 – Insufficient Sample Evaluation to Establish Identical Performance

Without prejudice to the above, the tender documentation provided that samples may be requested during evaluation and specified that only ten (10) samples would be requested.

The estimated quantity under the contract is approximately 4.18 million probe covers over the contract period.

The Appellant respectfully submits that an equivalent based on ten samples cannot reasonably establish that a product intended for supply in quantities exceeding four million units possesses "identical performance" to the original product across all manufactured batches and in all conditions. Especially in consideration of all the relevant performance characteristics involved in ensuring that the thermometers and probes continue to provide validated, accurate and repeatable readings.

In particular, evaluation of ten samples may demonstrate:

- *physical fit;*
- *ease of use;*
- *compatibility with the thermometer;*
- *packaging characteristics*

However, such evaluation cannot by itself scientifically demonstrate:

- *identical thermal transmission characteristics;*
- *identical measurement accuracy;*
- *identical repeatability;*
- *identical performance consistency across mass production batches;*
- *absence of clinically significant variation.*

Unless the contracting authority carried out documented comparative performance testing against the original Welch Allyn probe cover, the Appellant submits that there was no objective basis upon which compliance with Specifications 2.3 could be conclusively established.

Furthermore, it is to be noted that the requesting of and testing of any samples by the contracting authority does not and cannot in any way remedy a deficiency by the bidder to submit its own proof of equivalence and identical performance.

It is the bidder who has the obligation and responsibility to provide such evidence of equivalence, which evidence must be provided in all cases upon submission of the bid.

A request for samples by the contracting authority is merely an additional check that may be done by the contracting authority is merely an additional check that may be done by the contracting authority, which can not in any do away with or substitute the obligation of the bidder to provide proof of equivalence.

Ground 3 – Breach of Transparency and Equal Treatment Principles

Article 18 of Directive 2014/24/EU requires contracting authorities to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner.

Regulation 18 of the Public Procurement Regulations (S.L. 601.03), transposing Directive 2014/24/EU into Maltese law, incorporates the same fundamental principles.

Where a mandatory specification requires "identical performance", all tenderers must be assessed against the same objective and verifiable standard.

If compliance with the requirement was accepted without documented evidence establishing identical performance, this would constitute unequal treatment and a manifest error in the technical evaluation process.

Ground 4 — Clinical Importance of Accurate Temperature Measurement

Temperature monitoring is a clinically significant diagnostic parameter. Particular concern arises in vulnerable patient populations, including:

- *neonates;*
- *immunocompromised patients;*
- *oncology patients;*
- *intensive care patients;*
- *elderly patients.*

Even small measurement variations may influence clinical decision-making, escalation pathways, infection screening protocols and treatment interventions.

For this reason, the tender did not merely require compatibility but expressly required "identical performance as the original product".

The Appellant submits that the Evaluation Committee was required to possess objective and documented evidence demonstrating that the awarded product satisfies this mandatory requirement before determining technical compliance. Typically such evaluations are carried out by independent, suitably qualified and certified laboratories, and not by a simple in use evaluation on 10 samples.

Ground 5 — Manufacturer's Instructions for Use Explicitly Warn Against Use of NoOEM Probe Covers

The Appellant further submits that the original manufacturer of the Welch Allyn SureTemp thermometer expressly warns users regarding the use of non-original probe covers.
Page 10 of the Welch Allyn Instructions for Use (IFU) states:

"WARNING: Use only Hillrom probe covers. The use of other manufacturer's probe covers or no probe cover may produce temperature measurement errors and/or inaccuracy."

This warning was issued by the original manufacturer of the thermometer and reflects the manufacturer's assessment that probe cover design, material composition, thickness, thermal transfer characteristics and dimensional tolerances may influence temperature measurement performance.

The warning is particularly relevant in the present procurement because the tender specification did not merely require physical compatibility but specifically required that:

"Equivalent probe covers should have identical performance as the original product."

The existence of the manufacturer's warning demonstrates that identical performance cannot be presumed solely because a probe cover physically fits the thermometer.

Rather, the warning confirms that the use of third-party probe covers may result in measurement errors or inaccuracies unless equivalence has been objectively established through appropriate validation and testing.

In these circumstances, the Appellant respectfully submits that the Evaluation Committee should have possessed robust and documented evidence demonstrating that the awarded third-party probe cover achieves identical performance to the original Hillrom/Welch Allyn probe cover notwithstanding the manufacturer's explicit warning.

Absent such evidence, the conclusion that the awarded product complies with Specification 2.3 appears unsupported and contrary to the precautionary approach required for medical devices used in patient diagnosis and monitoring.

The concern is particularly significant in vulnerable patient populations, including neonates, oncology patients, immunocompromised patients, intensive care patients and elderly patients, where even small temperature measurement deviations may affect clinical assessment, escalation pathways and treatment decisions.

Request for Relief

The Appellant respectfully requests that the Public Contracts Review Board:

1. *Obtain and review the complete technical evaluation report and all documents relied upon by the Evaluation Committee in concluding that the awarded product demonstrated "identical performance" to the original Welch Allyn probe cover.*

2. *Verify whether any independent lab comparative performance validation, laboratory testing, clinical testing, equivalence study or manufacturer certification was submitted and evaluated*

3. *Determine whether the bidder submitted sufficient objective evidence to prove equivalent "identical performance" in compliance with Specification 2.3.*

4. *Annul the award decision and declare non-compliance of the offer submitted by Europharma Ltd, should it be determined that compliance with the mandatory requirement of identical performance was not objectively demonstrated, and*

5. *Should the award by annulled, give such orders in the circumstances including to order that the tender process is re-opened and re-evaluated, including such orders to ensure evaluation of the other bids offering non original Welch Allyn are all checked for identical performance criterion as described above.*

6. *Refund appeal money paid.*

The Appellant reserves the right to submit further observations following disclosure of the evaluation documentation relied upon the Contracting Authority. Saving any other objections at the opportune stage, and reserving all rights and remedies at law. With costs."

The written reply as filed by the Central Procurement and Supplies Unit on the 25th June 2026 (hereinafter the 'Contracting Authority') wherein it held as follows:

*"**Objection 681 – CPSU5245/26 – Tender for the Supply of Disposable Temperature Probe Covers** "*

*Reply of the **Central Procurement and Supplies Unit (CPSU)** on behalf of the Department of Health as the Contracting Authority to the reasoned application lodged by **Drugsales Limited (the Objector).***

A call for tenders for the Supply of Disposable Temperature Probe Covers was issued by CPSU on the 20th February 2026.

A number of bids were submitted and following an evaluation process the tender was recommended for award to Europharma Ltd (the recommended bidder).

The objector's offer was not recommended for award since there was a cheaper compliant offer.

The Objector filed an objection based on 5 grounds of appeal.

CPSU humbly disagrees with the grievances raised and is hereby presenting its reply.

Submissions

On the First Grievance: Lack of Demonstrable Evidence of Identical Performance and Obligations

1. *In its first Grievance the objector states that the literature of the recommended product which is available in the public domain does not state that the offered product has identical performance to the original Welch Allyn probe cover, does not provide a comparative clinical validation, comparative accuracy testing and equivalence study or any other performance data.*

2. *CPSU respectfully submit that the above are not the requisites of the tender. The tender clearly pointed out limited and clear specifications which are the below:*

1.0	*Functional specifictions:*	
1.1	*To prevent cross contamination*	*N/A*
2.0	*Technical Specifications:*	
2.1	*Must fit Welch Allyn Electronic Thermometer (item code WA-05031-110 or equivalent)*	*N/A*
2.2	*Female Luer*	*N/A*
2.3	*Equivalent probe covers should an have identical performance as the original product*	*N/A*

3. *The bidder had to prove, that the product offer prevents cross contamination, fits the Welch Allyn Electronic Thermometer, is a female luer, and if the product is not of the Welch Allyn brand, should provide identical performance to probe covers of the Welch Allyn brand.*

4. *The above were all satisfied by the recommended bidder and thus there was no reason to reject the offer.*

5. *The product was tested by the evaluation committee and when compared to products of the Welch Allyn brand it was concluded that these give identical performance.*

6. *This was confirmed by the literature and also by sample testing which is an integral part of the evaluation process.*

7. *For these reasons this grievance ought to be rejected in full*

On the Second Ground of Appeal – Insufficient Sample testing to establish identical performance

8. *The Objector argues that testing of 10 samples is not sufficient to test equivalent performance.*

9. *The Contracting Authority submits that sample testing is within its discretion and its professionals test the samples in a way they deem appropriate for the particular product which will be purchased. The absence of an established sample testing criteria, gives the contracting authority this discretion to test the samples in the manner it deems most appropriate in the context of their use and functionality.*

10. *The General Rules Governing Tenders provide in clause 16.3 that:*

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

11. *This method of sample testing used, that is comparing of results, is in the opinion of CPSU a very reasonable way of testing.*

12. *CPSU also submits that if the objector is of the opinion that there should have been a detailed sample testing protocol, this opinion should have been there from the beginning i.e. from when the tender was published and not from when its offer was rejected!;*

13. *The Objector was well aware from the outset that only 10 samples would be requested;*

14. *This objection for lack of sample testing protocol or the argument that 10 samples are not enough, should have been brought up during the applicable time frame for the filing of an action in terms of regulation 262 of the Public Procurement Regulations before the closing time for the submission of offers. Once this time frame lapsed there is a juris et de juris presumption that the specifications as published have been accepted and thus whoever submits an offer should observe such specifications.*

15. *The objector also had ample time to ask for clarifications on sample testing as per procurement procedure however chose not to do so.*

16. *This has been also the position taken by our Court of Appeal. In fact in the decision of the 10th of January 2023 in the names All Clean Services Limited v. Ministeru ghall-Edukazzjoni et, the Court states that:*

    7. Din il-Qorti taqbel ma' dak li osserva l-Bord li kull min kien interessat, jekk ma kienx jaqbel ma' xi kundizzjoni fis-sejha, skont ir-Regolamenti applikabbli, seta' aġixxa, bilmezzi li jagħtuh l-istess Regolamenti, biex jipprova jimpunja dik jew dawk ilkundizzjonijiet. Mhux lečitu li l-oblatur ihalli l-proċess għaddej, u wara,jekk jitlef il-kuntratt, jallega li kundizzjoni fis-sejha ma kellhiex tkun hemm għax "kompletament irrilevanti".

    8. Hu veru li I-kundizzjonijiet tax-xogħol tal-ħaddiema huma regolati b'liġijiet oħra, u hemm regolamenti li jagħtu poter lill-awtorità kompetenti tissindika fuq dawk ilkondizzjonijiet, però, dan kien ikun argument li kellu jitressaq fl-istadju preparatorju għall-proċess tal-għażla tal-oblatur preferut.Jekk ir-rekwiżit ta' ftehim kollettiv huwa parti mill-kundizzjonijiet li kellhom jiġu sodisfatti minn kull oblatur, is-soċjetà appellanti kellha taderixxi ruħha ma' dak rikjest. Din il-Qorti osservat diversi drabi li dak rikjest fid-dokumenti tas-sejha għall-offerti jridu jiġu kollha sodisfatti.
    (Added emphasis)

17. *Similarly, in the decision of the Court of Appeal in the names* ***Vassallo Builders Ltd v. Wasteserv Malta Ltd*** *et decided on the 6th of May 2025 it was stated that:*

> ***... jekk VBL dehrilha li r-rekwiżit inkwistjoni kien illegali, hija setghet tattakka dak il-kriterju fl-istadju ta' qabell-għeluq tas-sottomissjoni tal-offerti, u dan bilmod kif imsemmi f'Regolament 262 Regolamenti dwar I-Akkwist Pubbliku.*** *La hija naqset milli taghmel hekk, u s-sejha ghall-offerti kienet tobbligaha tressaq kopja tal-Final or Provisional Acceptance Certificate or equivalent, mela allura, VBL kienet marbuta li tressaq tali dokumentazzjoni ma kinitx mehtirga minhabba s-setghat tal-kumitat tal-evalwazzjoni li jwettaq ilverifiki kollha mehtiega, jew inkella ghaliex dak il-kumitat seta jsib linformazzjoni minn fuq l-internet. (Added emphasis)*

18. *For the reason as will be further substantatited during the sitting, this first fround of objection should be rejected.*

<u>On the Third Grievance of Appeal – Breach of Tranparency and Equeal Treatment Principles</u>

19. *The objector in this ground of objection argues that if compliance to identical performance was determined having documentary evidence, this would be a breach of transparency and equal treatment of bidders.*

20. *This grievance apart from being factually and legally incorrect, is also hypothetical.*

21. *The specifications were simple and clear and the recommended bidder submitted both literature and samples for the evaluation committee to do the evaluation.*

22. *The evaluation committee performs the evaluation on the basis of the technical offer form submitted, the literature submitted and the testing of samples. As long as the recommended bidder fulfils all the minimum requirements of the tender, its offer would be compliant.*

23. *The objector cannot expect that more onerous literature is submitted other than that fulfilling the minimum tender requirements.*

24. *The evaluation committee submits that the evaluation process was done in full adherence to the general principles of public procurement including equal treatment of bidders, transparency and self-limitation.*

25. *For these reasons, CPSU submit that this third ground of appeal should also be rejected.*

<u>On the Fourt Ground of Appeal - Clinical importance of Accurate temperature Measurements</u>

26. *The Objector emphasizes on the importance of accurate temperature measurement.*

27. *The evaluation committee is aware of the importance of this and confirms that adequate testing was done.*

28. *For this reason this second grievance ought to be rejected as well*

On the fifth Grievance: Manufacturer Instructions for use explicitly warn against use of non-OEM probe covers.

29. *The objector submits that the manufacturer of the Welch Allyn Electronic Thermometer warns against the use of original Welch Allyn probe covers.*

30. *CPSU submits that this grievance cannot be raised at this stage of the evaluation process since it is a grievance which of its nature could have been raised in terms of regulation 262 of the Public Procurement Regulations. CPSU refers to paragraphs 16 and 17 of this reply which shall apply to this grievance as well.*

31. *Without prejudice to the above, CPSU respectfully submits, that no manufacturer will tell you to buy consumables from his competitors.*

32. *CPSU is duty bound by the principles of fair and open competition to consider equivalent products on the market to ensure fair competition.*

33. *For these reasons this fifth grievance ought to be rejected in full as well.*

CPSU hereby reserve its right to present further evidence and submissions both written and orally to further substantiate their reply in relation to the said objection throughout the hearings.

In view of the above, the objection lodged by the objector ought to be rejected in full, whilst the decision of the Evaluation Committee confirmed, and the relevant deposit forfeited.

The opening and closing submissions of the Appellant and the Contracting Authority as delivered by their legal representatives;

Considers;

This Board notes that the Appellant has split its grievances under five (5) distinct headings which shall be tackled as follows.

A. First Ground of Appeal

The Appellant in its first ground of appeal argues that the Preferred Bidder's product is non-compliant as it lacked evidence of identical performance and obligations based on publicly available technical literature. The Contracting Authority argues that the Tender Document required any economic operator to prove that the product offer prevents cross contamination, fits the Welch Allyn Electronic Thermometer, is a female luer, and if the product is not of the Welch Allyn brand, it should provide identical performance to probe covers of the Welch Allyn brand.

This Board, having seen the relevant technical specifications as reproduced hereunder, likewise concludes that the product offers must necessarily fit the current probes supplied (or equivalent probes), must be a female luer, and in the event that the probe cover offered is from a third party and is not the Welch Allyn probe cover, identical performance is expected.

2.0	**Technical specifications:**
2.1	Must fit Welch Allyn Electronic Thermometer (item code WA-05031-110 or equivalent)
2.2	Female luer
2.3	Equivalent probe covers should an have identical performance as the original product

The evaluators in this case, all experienced individuals, testified that the product of the Preferred Bidder was tested through a sampling exercise, the readings taken were satisfactory in their entirety, therefore corroborating identical performance. Given the fact that the product complied with all technical specifications, the Evaluation Committee awarded the bid to the cheapest compliant, in this case the Preferred Bidder.

This Board agrees with the Contracting Authority in that factually, the product chosen needed to fit the current thermometer utilised with the present item code or an equivalent, and further that in the event that the probe covers are not the Welch Allyn covers, their performance must be identical to the original product. In this case, it clearly emerges that the product offered by the Preferred Bidder did in fact satisfy the technical specifications, and not only did the Preferred Bidder confirm this in its Technical Offer Form but the Contracting Authority went a step further, asked for and obtained samples and went through a meticulous sampling exercise to ensure that the equivalent probes in question do in fact satisfy identical performance. So long as the Preferred Bidder's product fulfilled all the technical criteria and was deemed to be technically compliant, the Contracting Authority's decision cannot be said to be incorrect in the circumstances. It appears that the Appellant's first grievance is based on several assumptions due to what results from publicly available documentation and also from what does not result from publicly available information, in fact, the Appellant sought further information about the product offered throughout this appeal itself.

Given the fact that the product offered by the Preferred Bidder fulfils the entirety of the technical specifications requested in the Tender Document, as corroborated by the sampling exercise carried on by experienced individuals working in the field, this Board finds that the Contracting Authority was not incorrect in determining the award to the cheapest compliant, in this case the Preferred Bidder.

Therefore, the Appellant's first ground of appeal is being rejected as unfounded.

B. Second and Fifth Grounds of Appeal

Within the second ground of appeal, the Appellant argues that the stipulated sample evaluation is insufficient to establish identical performance, and that ten samples are far too little vis-a-vis the amount of 4.18 million probe covers to be used throughout the contract period. The Contracting Authority defends its position by arguing that the mode and manner of the sampling is left to the discretion of the Contracting Authority, whilst any qualms relating to the amount of samples which may be collected should have been raised at the appropriate moment i.e. by filing an appeal under Regulation 262 of the Public Procurement Regulations.

Within the fifth ground of appeal, the Appellant argues that the instructions for use issued by the manufacturer of the Welch Allyn Electronic Thermometer warns against the use of non-OEM probe covers and argues that this warning demonstrates that identical performance cannot be presumed solely because a probe cover fits the thermometer. The Appellant further argues that the warning confirms that the use of third party covers may translate into measurement errors or inaccuracies. Hereagain, the Contracting Authority argues that such a grievance cannot be raised at this time, and should have been addressed in a remedy filed under Regulation 262 of the Public Procurement Regulations.

This Board considers that both grievances raise issue with tender requirements proper rather than the Tender Evaluation Committee's assessment vis-a-vis the tender requirements. Here, this Board must agree with the Contracting Authority's submissions that any qualms with the tender requirements as drafted and as published should have been raised at a prior stage. This Board and the competent Court of Appeal in its Superior Jurisdiction have been consistent in this respect. Once an economic operator submits its bid and participates in the tender process, that economic operator has not only accepted the Tender Document and its contents as is, but is also precluded from seeking to condemn the tender specifications post-award during an appeal under Regulation 270 of the Public Procurement Regulations. It results to this Board that although the Appellant had every opportunity to do so, it did not raise issue regarding the potential procurement of third party covers, neither did it complain of the quantity of samples being too little. Therefore, so long as the Appellant submitted its bid and participated in this procurement process, it accepted the entirety of the tender specifications as drafted and as published accordingly. On this point, this Board refers to paragraphs 19 through to 22 of the judgment delivered on the 10th March, 2026 by the Court of Appeal (Superior Jurisdiction) in the names '**Camilleri Paris Mode Limited vs. Dipartiment tal-Kuntratti et**'.

Therefore, the Appellant's grievances in this respect are being rejected.

C. Third Ground of Appeal

The Appellant in its third ground of appeal alleges that the Contracting Authority has breached transparency and equal treatment principles. The Appellant states that if compliance was accepted without documented evidence establishing identical performance, this would constitute unequal treatment and a manifest error in the technical evaluation process. On the other hand the Contracting Authority argues that this ground of appeal is factually and legally incorrect, whilst maintaining that the Preferred Bidder demonstrated compliance with tender requirements.

This Board, having reviewed the entire procurement file, and heard the testimony of the evaluators as summoned by the Appellant, finds that there exists no indication however slight that the Contracting Authority breached the principles of transparency and equal treatment.

Therefore, the Appellant's third grievance is also being rejected.

D. Fourth Ground of Appeal

In the Appellant's fourth ground of appeal, it emphasises the clinical importance of temperature monitoring whilst the Contracting Authority also recognised its importance and submitted that adequate testing was carried out.

There is not much to be considered on this point, other than the fact that it clearly emerged that the Contracting Authority did give temperature monitoring the importance it deserved. In fact, Ms Pace testified and explained to this Board the precise and meticulous manner in which the samples were tested by herself and another colleague in a clinical setting. This Board finds nothing untoward in this approach.

Therefore, the Appellant's fourth grievance is also being rejected.

DECIDE

The Board, in view of the foregoing and on the basis of the considerations as outlined above, declares and decides to reject the appeal filed by Drugsales Limited (C-1780).

The Board further decides not to re-imburse the deposit paid by Drugsales Limited (C-1780).

Dr Ana Thomas	**Mr Keith Victor Grech**	**Mr Lawrence Ancilleri**
Chairperson	**Member**	**Member**

Wednesday 26th August, 2026.