

PUBLIC CONTRACTS APPEALS BOARD

Case No. 165 / Case No. 166

CT/2392/2008 Advert No CT/A.015/2009

Service Tender for the Provision of ICT Training Programmes on behalf of MCAST

This call for tenders with an estimated contracted value of €4,205,629 was published in the Government Gazette on 12.05.2009. The closing date for this call for offers was 25.06.2009.

Four (4) different tenderers submitted their offers.

On 11.09.2009 *Messrs Future Focus Ltd* and *St Martin's Education Services Ltd*, separately, filed an objection against the decision arrived at by the Department of Contracts wherein it was claimed that the tenders submitted by the said appellants did not satisfy the tender conditions with regard to accessibility because they were not compliant with the 'Access For All' [Design Guidelines]. As a result, the said offers were disqualified from the tendering process.

The Public Contracts Appeals Board (PCAB) made up of Mr Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr Edwin Muscat, respectively, acting as members convened a public hearing on 18.09.2009 to discuss this objection.

Present for the hearing were:

Future Focus Ltd

Dr Peter Fenech LL.D. Legal Representative
Mr John Galea
Ms Rosanne Galea
Mr Raymond Grillo (House of Representatives)

St Martin's Education Services Ltd (a.k.a St Martin's Institute of Information Technology)

Dr Louis Cassar Pullicino LL.D. Legal Representative
Mr Charles Theuma
AIC Hector Zammit
AIC Christian Spiteri
Mr Emanuel Deguara (Apex Ltd)

Computer Domain Ltd.

Dr Edward Gatt LL.D Legal Representative
Mr Nick Callus

Malta College of Arts, Science and Technology (MCAST)

Dr Peter Caruana Galizia LL.D. Legal Representative

Evaluation Board

Ms Charlotte Attard	Chairperson
Mr Mario Attard	Secretary
Mr Dennis Attard	Evaluator
Mr Raymond Azzopardi	Evaluator
Mr Oscar Borg	Evaluator

Department of Contracts

Mr Francis Attard	Director General Contracts
Mr Bernard Bartolo	Asst Director EU Related Procurement

National Commission Persons with Disability (KNPD)

Mr Joseph M Camilleri	Chairperson
Mr Alfred Bezzina	Executive Director
Architect Joseph Spiteri	

After the Chairman's brief introduction, the appellants were invited to explain the motives of their objections.

Dr Peter Fenech, on behalf of Future Focus Ltd, explained that his client was disqualified from this tendering process due to an erroneous interpretation of the term 'accessibility' in the light of what was admissible by law and in terms of what was laid down in the tender specifications. Dr Fenech then quoted from document marked Clarification 1 dated 15th May 2009 issued by the Department of Contracts:

"Bidders must ensure that steps are taken to prevent any discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation. In particular, buildings have to be accessible to all, including wheel chair users.

During the technical adjudication process the adjudication board shall request the Kummissjoni Nazzjonali Persuni b'Dizabilita' (KNPD) to audit and certify or otherwise that the buildings where the service will be provided is accessible. Bidders whose buildings fail KNPD certification shall be disqualified."

The appellants' lawyer further stated that the said clarification was issued also in terms of the *Equal Opportunities Act* which dealt with, among other things, 'accessibility'.

At this point he quoted from letter dated 4th September 2009 concerning the reasons for his client's disqualification referring to a particular sentence which stated that ... *"All three buildings in your offer did not conform with the Access for All [Design Guidelines]."*

Dr Fenech stated that this was the crux of the matter because that was not what was requested in the tender specifications and that it was not even what was required by law, as regards to 'accessibility'. Dr Fenech maintained that there were different interpretations of 'accessibility' and cited the case 'KNPD vs. Michele Peresso Ltd' where the Court of Appeal decided that dealing with accessibility did not mean dealing with equality.

Dr Fenech remarked that the yardstick used in this tender to assess accessibility was not laid down in the tender specifications or in the apposite legislation.

The appellants' legal advisor mentioned the issue of 'conflict of interest' and reported that, if necessary, he would present witnesses in this regard.

Dr Louis Cassar Pullicino, on behalf of St Martin's Education Services Ltd, the other appellant Company in this joint public hearing, remarked that his client's complaint concerned the non-observance of the principles laid down in the Public Procurement Regulations, namely the principles of 'transparency' and 'equal treatment of all operators'. He maintained that *Clarification 1* referred to earlier on indicated that the adjudication board not only developed a consultation relationship with KNPD with regard to accessibility but the KNPD became part and parcel of the adjudicating process such that in the event that the KNPD did not issue its certification to a bidder, that bidder had to be disqualified as was the case with his client. As a result, claimed

Dr Cassar Pullicino, the KNPD assumed a very important, pivotal role in the adjudicating process of this tender.

Dr Cassar Pullicino stated that prior to this tendering process his client had engaged an architect who had been recommended by KNPD, Mr Hector Zammit, to assist him in rendering his premises in conformity with accessibility. He remarked that a situation developed in that, on one hand, a KNPD recommended architect (Mr Zammit), but acting independently from the KNPD, was carrying out an exercise to render his client's premises accessible to disabled persons – where good progress had been registered – and, on the other hand, the architect detailed by KNPD to inspect his client's premises, namely Mr Joseph Spiteri, decided that his client's premises were not accessible, which decision led to the rejection of his client's offer. Dr Cassar Pullicino expressed doubt as to whether the brief given by KNPD to the architect charged with the certification of his client's premises included any reference to the ongoing independent exercise undertaken by his client with regard to rendering his premises accessible. Dr Cassar Pullicino contended that it was not acceptable that his client had been misguided in this manner.

Dr Cassar Pullicino considered the certification issued on behalf of KNPD by architect Joseph Spiteri which led to the disqualification of his client's tender as premature because he claimed that an exercise was in hand simultaneously whereby representations were being made before the *Reasonableness Board* within the KNPD with the aim of establishing whether the premises belonging to his client were acceptable from the accessibility point of view.

Another point raised by Dr Cassar Pullicino concerned the applicability of the *Access for All* [Design Guidelines]. Dr Cassar Pullicino questioned whether the KNPD guidelines were applicable to this tendering process and, if so, what weight did these guidelines carry in the whole tendering process. He also questioned whether these guidelines were applicable to premises meant for teaching purposes when this kind of building was not on the list of premises/activities mentioned in the guidelines themselves. Dr Cassar Pullicino claimed that certain equipment installed by his client was acceptable to the Malta Standards Authority and conformed to European standards and he further claimed that the premises offered by the successful bidder, Computer Domain Ltd, did not entirely conform with the guidelines used to assess his client's premises and hence he alleged that not all bidders received the same treatment.

Dr Peter Caruana Galizia, on behalf of MCAST, explained that whereas the two appellants were claiming that their premises were compliant with regard to accessibility in effect they were not. He added that only two premises were found to comply, i.e. those of the successful tenderer, Computer Domain Ltd, and those of a tenderer who had been disqualified on other grounds. Dr Caruana Galizia remarked that the adjudicating board had no discretion in this matter as the tender dossier specified that the premises had to be audited and certified by the KNPD and those who failed to obtain that certification would be disqualified. Dr Caruana Galizia said that the KNPD entrusted architect Spiteri to report on the question of accessibility but, ultimately, it was the KNPD that issued and communicated the certification to the adjudication board. He disagreed with the claim that the KNPD became part of the adjudicating board because he regarded the accessibility certificate like any other

requirement as was, for example, the bid bond or academic qualifications. Dr Caruana Galizia declared that the adjudication board conducted its evaluation in a transparent manner. He added that MCAST would probably have preferred that all tenderers were compliant because of the number of students involved however one could not overlook the fact that the accessibility certificate was a mandatory requirement.

At this stage Dr Cassar Pullicino remarked that the works that had been indicated to his client by architect Zammt had been carried out by June 2009. Dr Caruana Galizia remarked that the adjudication board required the certification from the KNPD and not from the architect engaged by the tenderer. Dr Cassar Pullicino intervened to maintain that, according to Clarification 1 cited earlier on, the adjudication board had included the KNPD as part of the adjudication process.

Ms Charlotte Attard, chairperson of the adjudication board, stated that, in terms of the tender conditions, the board had to request the KNPD in writing to audit and certify the buildings in question with regard to accessibility. She added that the certificates they got from the KNPD included comments on the premises reported upon.

The PCAB remarked that it was the role of the adjudication board to evaluate the KNPD's submissions because ultimately it was the adjudication board that had to decide and recommend. In other words, the PCAB felt that there had to be some sort of counter checking otherwise the whole adjudication process would result to be based on the judgement of just one person and there would be no scope for an adjudication board to exist.

Ms Attard replied that the adjudication board did not have the expertise to assess accessibility issues and reiterated that the tender dossier laid down that those who failed to obtain the KNPD certification were to be disqualified. Dr Caruana Galizia added that all the premises were certified by the same body and, practically, by the same architect.

Mr Joseph Spiteri, an architect attached to the KNPD entrusted with reporting on buildings with regard to accessibility issues, gave evidence under oath. Amongst the points raised during his evidence, the following issues were discussed or drawn to the attention of those present, namely:

- The KNPD had engaged Mr Spiteri to report on a number of premises with regard to accessibility with the main focus being on whether the entrance to the building, toilets and common areas were in conformity with the 'Access for All' [Design Guidelines].
- Mr Spiteri's brief was to use the criteria laid down in the 'Access for All' [Design Guidelines] issued in 2000 and revised in 2005.
- Mr Spiteri read out his reports outlining the reasons why he deemed the said premises not to be accessible, viz:
 - Future Focus Ltd had three different premises. Mr Spiteri initially claimed that he had inspected the premises located at 8 Magazines Street Floriana

on the 24th March 2009 and reached the conclusion that those premises were not accessible as laid down in the 'Access for All' guidelines. Also, Architect Spiteri stated that, a month later, he had asked if any alterations had been effected following his March 24th site visit and having been informed by the principals that none had been carried out he confirmed his previous report. Replying to Dr Fenech's remark that he did not visit these premises after having been given this assignment, architect Spiteri replied that that was so because no alterations had been effected since his previous audit. In reply to Dr Fenech's remark that the photos that, on behalf of his clients, he had submitted with his letter of objection demonstrated that these premises were rendered accessible with the installation of a wheelchair lift, architect Spiteri stated that he was aware that these premises were accessible by a temporary ramp and by a wheelchair lift, yet, he continued, the criteria laid down in the guidelines indicated a passenger lift, stair lift or vertical platform but did not mention the equipment referred to by Dr Fenech because that equipment could not be used, independently, by a disabled person because, in the circumstances, the latter would have to be assisted by another person to press the buttons. Dr Fenech intervened and conceded this but maintained that the premises were still accessible to disabled persons even if some assistance was required.

- Also, according to Mr Spiteri, the premises at IELTS in Sliema had the lift and the sanitary facilities not in conformity with the 'Access for All' guidelines.
- Mr Spiteri also stated that:
 - to access the Solana Hotel extension in Mellieha one had to go up five steps
 - the lifts leading to the San Frangisk Street entrance and to the main hotel entrance did not meet the dimensions set out in the guidelines
 - the toilet cubicle was in shell form but could potentially accommodate an accessible toilet and that certain works on the classrooms were still underway

The Chairman PCAB observed that the way the tender had been issued, it could, hypothetically, result that, say, 400 students could be left stranded because the premises were not accessible to, say, 10 disabled persons.

Dr Caruana Galizia maintained all the way that the tender dossier was very clear that the tender which did not qualify for KNPD certification had to be discarded.

Architect Spiteri remarked that the *Equal Opportunities Act* stated that one could not be discriminated against and explained that the guidelines themselves referred to 'Access for All', that is, that everyone could make use of the premises.

Regarding the St Martin's Institute of Information Technology's premises located at Schembri Street in Hamrun, architect Spiteri remarked that:

- a. whereas in the MEPA permit there was a ramp leading to the premises, when he paid the site visit he found a stair platform in place which a disabled person could use independently but that it did not have handrails on both sides, its dimension did not conform to the guidelines (1050mm long and 760mm wide as against 1050mm and 1250mm respectively) and it was installed on the outside of the building exposed to the elements and prone to frequent breakdowns/damages;
- b. the toilets, along with the library, considered as common facilities, were not accessible.

Architect Spiteri explained that certain equipment was meant for domestic and private use but, in this case, the equipment was required for public use and therefore additional standards had to be respected

Architect Spiteri confirmed that the KNPD had assigned him to ensure whether the premises were in line with the guidelines and that it was not his role to disqualify anyone from the tendering process. He also explained that the KNPD guidelines applied to all public places, including school facilities, and the guidelines mention certain buildings, such as public beaches, industrial buildings and hotels, because these premises had specific characteristics.

At this point the Chairman PCAB remarked that he was not questioning the relevance of the concept of accessibility but rather in what manner and to what extent one was implementing accessibility measures.

When cross-examined, architect Spiteri stated that he was not detailed to conduct the inspections on the premises of Computer Domain Ltd.

Architect Spiteri said that his brief did not include any reference to the consultancy work carried out by Architect Hector Zammit at St Martin's Institute of Information Technology's premises in Mosta but confirmed that he was made aware of this by Mr Theuma, the principal of the Institute.

To the question put forward by Dr Fenech as to whether the three premises presented by Future Focus Ltd were accessible or not, architect Spiteri answered that they were not according to the 'Access for All' guidelines, which guidelines indicated minimum requirements. Whilst confirming that he was one of the team that compiled these guidelines for the KNPD, yet he declined that he had ever had any connection with the entities bidding for this tender.

Architect Spiteri remarked that although the Solana Hotel, as such, had a certificate of accessibility, the premises he was detailed to audit was the Solana Hotel Extension which had its entrance on Dun Frangisk Street inaccessible because one had to go up five steps, then another step to enter the first room and even the lift did not conform to the guidelines. He added that he was aware that there was access from the garage but the lift was not compliant and the toilet indicated to him was still in shell form. He

also remarked that the Solana Hotel was built on two sides of the main street at Mellicha centre and the two other toilets that had been mentioned by Dr Fenech were situated on the other side of the road and therefore one had to use the lifts which were non compliant.

Architect Spiteri agreed that MEPA had approved the plans and not the actual works carried out and that one no longer required the MEPA compliance certificate to have water and electricity services installed.

Architect Spiteri declared that he carried out his audits according to the guidelines in the knowledge that these guidelines would allow any disabled person to use premises independently, i.e. unaided by third persons.

Dr Fenech then mentioned European Directives EN 108/2004, 95/63/EC; 89/336/EC; and 2006/42/EC which all referred to platform lifts and stair-lifts and argued that any such products had to bear a particular mark to be marketed in Europe and asked architect Spiteri if he was aware that the lift installed by his client was of that type. Mr Anthony Pavia, PCAB Member, remarked that such a standard was probably required to manufacture and to sell the product in Europe but it did not necessarily satisfy accessibility criteria.

Architect Spiteri remarked that standard MSA ENA140 which covered safety of lifts and stair-lifts and adopted by the Malta Standards Authority in April provided that stair-lifts and standing platforms were not suitable for use in public situations.

In response to Dr Cassar Pullicino's remark that the certification was granted by the KNPD and not by the different architects it detailed to carry out these audits, architect Spiteri stated that that was the reason why they used the guidelines so that all architects would use the same yardstick when carrying out such audits.

Mr Alfred Bezzina, Executive Director of the KNPD, gave his evidence under oath. He explained that the KNPD received a list of premises from MCAST to be certified for accessibility. Mr Bezzina stated that, for the sake of transparency, the architects of KNPD had to use a common set of guidelines, which guidelines were drawn up in 2000 and revised in 2005. He added that they did not revisit those premises which had already been issued with an accessibility certificate, as was the case with the premises of Computer Domain Ltd which had been certified after 2005 by architect Hector Zammit. Mr Bezzina said that the other premises were inspected by Architect Joseph Spiteri.

Dr Fenech presented European Standard for platform lifts EN 81-41 which legislation he claimed indicated minimum standards far less stringent than those used by architect Spiteri. Architect Spiteri remarked that those were standards and not legislation and added that that same standard indicated that those platform lifts were not intended for public use.

Dr Cassar Pullicino referred to a report drawn up in 2009 by Architect Spiteri with regard to proposed tenders concerning the use and dimensions of lifts in public buildings and quoted from para. 4.7:

“The ‘Access for All’ design guidelines KNPD 2005 provide no guidance as to where stairlifts may or may not form part of an accessible entrance route.”

In the light of that, Dr Cassar Pullicino asked whether that meant that the ‘Access for All’ guidelines did not apply to the use of stair-lifts. Architect Spiteri replied that another name for stair-lift was platform and that, therefore, he had guided himself by the dimensions applicable to platforms.

Dr Fenech objected to the submission of the report on premises at Magazines Street Floriana because architect Spiteri had admitted that he did not visit those premises after he had been handed his brief by KNPD. Dr Caruana Galizia remarked that architect Spiteri had inspected these premises the month before and that he was informed that no alterations had been effected since then.

Mr Bezzina further explained that, on the basis of reasonableness, the KNPD had applied certain criteria which were made public, whereby the entrance, the common areas and at least up to 25% of classrooms had to be accessible which meant that the KNPD was not insisting that the premises had to be 100% accessible.

Furthermore, Mr Bezzina claimed that, prior to the issue of this tender, and independently from it, the KNPD had carried out an exercise whereby criteria were established as to what constituted ‘reasonable’ accessibility – as indicated in the appropriate legislation - with regard to schools offering computer lessons.

Ms Attard confirmed that the tender covered a period of three years and that it was adjudicated according to the criteria set out in the tender dossier, no more and no less. She added that tenderers were asked to indicate how many students could be accommodated on their premises but that was not an adjudication criterion.

Mr Pavia, a PCAB member, noted that it could have been the case that with the application of the ‘reasonableness’ criteria a school could accommodate 25% of the students at ground level and, as a consequence, the issue that the lift leading to the other floors was not compliant would not arise. Architect Spiteri confirmed that he was aware of ‘reasonableness’ criteria, including the 25% classroom space accessibility.

At this point Dr Fenech intervened to ask architect Spiteri whether he was aware that 32% of the premises at IELS in Sliema were at ground floor and hence compliant, architect Spiteri replied that when he visited this site the ground floor looked like a common area which he was informed was going to be divided by a partition and acknowledged that the ground floor and the toilet were accessible.

Mr Bezzina intervened to say that MCAST had informed KNPD that it had to certify the entire building and not solely the ground floor and floors 1 and 2. Mr Bezzina remarked that with the application of the ‘reasonableness’ clause of 25% classroom compliance, albeit it would still be regarded as discriminatory against a disabled person to make use of the ground floor only – thus not being granted choice and equal opportunity – yet, that would still be considered *reasonably accessible*. Mr Bezzina reiterated that, in terms of ‘reasonableness’, besides the entrance to the building, the toilets and the common areas, e.g. the canteen or the library, had to be likewise

accessible. Mr Bezzina explained that the *Reasonableness Board* had the role of advising the KNPD on the issue of 'reasonable accessibility' on a case by case basis and that it was up to the client, the owner of the premises, to request that his/her case be considered by the *Reasonableness Board* because it was not possible to have each and every case considered by the *Reasonableness Board*. At that stage Dr Cassar Pullicino remarked that it would appear that his client's case was still pending before that board during adjudication.

Dr Caruana Galizia reiterated that the tender dossier was drawn up in such a manner that the adjudication board had no discretion but to request the accessibility certifications from the KNPD and to act on them.

To a questions put forward by Dr Cassar Pullicino, Mr Bezzina confirmed that the brief given to architect Spiteri was to assess the premises in relation to the 'Access for All' guidelines and taking into account the 25% minimum classroom accessibility criterion and that, to his recollection, the certifications issued were based on those considerations and that the KNPD qualified its certifications. Mr Bezzina also confirmed that, at the time of issue of the certificates to these clients, the 'reasonableness test' was still ongoing and he further confirmed that an agreement had been reached whereby the premises of St Martin's were certified as 'reasonably accessible' as required by law. Mr Bezzina remarked that in this regard the KNPD had also taken into account the national interest issue which had been raised earlier on by the Chairman PCAB. It was also established that the state that premises of St Martin's Institute of Information Technology were in at the time that the 'reasonable test' was carried out was the same as at the time architect Spiteri carried out his audit on the same premises.

To a question put by the PCAB Mr. Bezzina replied that, while the reasonableness board was also conditioned by the accessibility guidelines, it was also allowed a degree of discretion.

Ms Attard pointed out that this development occurred after the closing date of the tender.

Architect Hector Zammit, under oath, declared that he had carried out the audit on the premises of Computer Domain Ltd at Constitution Street Mosta but could not recall that he audited the premises at Curate Schembri Street in Mosta.

Architect Zammit explained that he was engaged by Mr Charles Theuma, principal of St Martin's Education Services Ltd, to advise him on rendering his premises accessible. He recalled that he had given the following advice:

- (i) with regard to the entrance he noted that, due to the physical constraints of these premises, it was not possible to have a ramp with the required gradient and, hence, he resorted to the installation of a platform lift or a stair-lift;
- (ii) with regard to the toilet he admitted that, in relation to the guidelines, it was longer but narrower and that one did not compensate for the other. However, he was made aware that it was a temporary measure as an extension was planned at the back of the building that would, eventually, cater for adequate

sanitary facilities. Architect Zammit remarked that, technically, once the pedestal was removed, the temporary toilet could be used by a disabled person.

Architect Spiteri remarked that the toilet was in its present form on a permanent basis because its stone/concrete structure could not be altered and that, in his opinion, this toilet did not qualify as 'accessible' because it was narrow and tapering in form such that it offered no room for lateral transfer. Architect Spiteri added that he was aware that there was an application before MEPA for an extension to that building but he had to certify the premises as they actually were at that point in time.

Mr Bezzina explained that the main premises of Computer Domain Ltd had been certified as accessible but the smaller premises did not qualify for certification. Mr Bezzina added that the KNPD had entered into a five year agreement with Computer Domain Ltd subject to certain works being carried out during that period. Mr Bezzina was informed that there was an application before MEPA for these works but he did not actually see the application.

The Chairman PCAB remarked that it appeared that, with regard to St Martin's Institute of Information Technology case, the KNPD did not take into account that there was an application before MEPA for the extension of the building that would eventually do away with the use of the temporary toilet, whereas, as regards Computer Domain Ltd the KNPD did take into consideration the MEPA application filed by the said Company with regard to rendering one of its premises accessible.

Mr Bezzina intervened to explain that Computer Domain Ltd had two schools close to one another, namely one had large premises – which the proprietor, Mr Nick Callus, said it could accommodate up to 500 students - which surpassed the 25% classroom accessibility requirement and the other school was smaller, with Mr Callus, in this instance, claiming that it could accommodate between 60 and 80 students. However, it was agreed that this school is not accessible to disabled persons.

Mr Bezzina continued that the KNPD considered it reasonable to reach an agreement with Computer Domain Ltd as, in that case, one had the option of placing a disabled person in the larger school which was accessible and which was situated in the vicinity of the smaller one and taking into account the commitment undertaken by the client to eventually render the smaller premises accessible. Mr Bezzina added that the same line of reasoning was applied in the agreement reached with St Martin's.

In his intervention, Mr Callus, acting on behalf of Computer Domain Limited, confirmed the agreement mentioned by Mr Bezzina and added that the same agreement laid down various conditions, particularly, that

- a. on the smaller premises he had to hold the same training held on the larger premises
- and
- b. eventually, the Company had to render the smaller premises accessible

He concluded that, to date, the smaller premises had not been used for ICT courses and that use of it would be resorted to only if he had to accommodate more than 500 students.

When asked about these types of agreements, Mr Bezzina remarked that it was not the role of the KNPD but it was up to the clients to inform MCAST of the agreements they entered into with KNPD on accessibility issues.

Dr Fenech stated that, with regard to the IELS building, his client had indicated that 32% of the classes were going to be at ground level and asked Mr Bezzina to confirm whether that met the 'reasonableness' criteria. Mr Bezzina remarked that, apart from the 25% minimum classroom accessibility one had also to consider that the common areas and the sanitary facilities were equally accessible.

The PCAB observed that architect Spiteri indicated that the toilet at St Martin's Institute of Information Technology was absolutely inaccessible whereas architect Zammit indicated that a disabled person could make use of it. Mr Bezzina intervened in regard to the apparent disagreement between architects Spiteri and Zammit as to the sanitary facilities offered at St Martin's Institute of Information Technology. The KNPD's Executive Director expressed the view that both architects agreed that the toilet was not accessible according to the 'Access for All' guidelines with the difference that architect Zammit declared that it was acceptable on the basis that it was only a temporary measure.

Architect Zammit confirmed that he used to render his services to the KNPD together with architects Joseph Spiteri and Valerio Schembri respectively. He added that in November 2008 Mr Charles Theuma, acting on behalf of St Martin's Institute of Information Technology, had contacted him, on the recommendation of the KNPD, albeit on a strictly personal basis, to advise him on 'accessibility' issues. He added that, in giving his advice, he could not overlook the KNPD guidelines but he applied them with a measure of flexibility, because he held the view that, practically, no building was fully accessible or entirely inaccessible and, as a consequence, one had to settle for somewhere in between.

Architect Zammit cited an example where, according to the guidelines, the main entrance had to be 900 mm. However, it could be the case that if it were 870mm a wheelchair could still access these premises.

The PCAB commented that it seems that, in such cases, it is never black or white but always a shade of grey and that is the reason why the KNPD had to resort to setting up a *Board of Reasonableness* to decide such cases.

Architect Zammit stated that when he used to be engaged by the KNPD to audit buildings he had to base his assessment on the guidelines in line with the brief given by the KNPD whereas when he was engaged on a personal basis to give advice to a client he had the latitude to exercise his own professional judgment in determining whether a place was 'accessible' or not.

With regard to St Martin's Institute of Information Technology, architect Zammit considered that the right balance had been found with the installation of a stair-lift

since a ramp that conformed to the guidelines was physically impossible which stair-lift was 1050 mm x 770 mm leaving one metre for use as stairs.

Architect Zammit contended that the guidelines did not rule out the installation of a stair-lift on the outside of a building.

He confirmed that, in his private capacity, he had also advised Computer Domain Ltd, in which case he had recommended that the ramp shared with a shop nearby be left in place, even if it did not conform, and that a stair-lift had to be installed. Architect Zammit noted that section 2.8.3 of the guidelines described the stair-lift but indicated no dimensions whereas section 2.8.19 indicated the dimensions of platform-lifts and expressed the opinion that the platform-lift dimensions were being applied to the stair-lift when the latter was a smaller piece of equipment. Architect Zammit conceded that the first preference was a ramp but considered a stair-lift as an acceptable alternative.

At this stage the PCAB, to ensure that the statement was crystal clear, requested Mr. Bezzina to confirm what he had already stated, i.e. that after the case had been examined by the KNPD's *Reasonableness Board*, there existed an agreement between the KNPD and St Martin's Institute of Information Technology whereby the Institute was declared to be reasonably accessible for the purpose of giving computer lessons. Mr. Bezzina duly confirmed his statement.

At this stage Dr Fenech and Dr Cassar Pullicino requested to bring forth further witnesses. However, after considering the stated purpose behind the calling of these witnesses, the PCAB ruled that witnesses were required to provide value added to what had already been presented and the PCAB considered that, at that stage, the technical and other aspects of the case had already been adequately covered.

At this stage Dr Fenech referred the PCAB to a set of photos which he submitted with his letter of objection to demonstrate that his client's premises were in fact accessible.

Mr Joseph Camilleri, Chairman of the KNPD, remarked that the KNPD considered issues of discrimination as laid down in legislation in the light of three particular aspects, namely that a

1. disabled person was given choice
2. disabled person's independence was upheld and
3. disabled person's dignity was respected

Mr Camilleri added that the KNPD did not accept inclined platform-lifts that were installed externally in relatively new buildings because they were exposed to the elements with the consequence that they often broke down or were unsafe in inclement weather and those installed inside the building were used as a last resort, for example, in the case of historical buildings.

Mr Camilleri said that the KNPD preferred a fixed ramp because that provided both equality and independence.

Mr John Grima, an interested party in Future Focus Ltd's tender submission, stated that one aspect that had not been exhaustively mentioned was that at the Solana Hotel Extension one could access the building from the car park by taking the lift from the car park itself.

Mr Callus intervened to remark that, as a rule, tenders financed out of EU funds made provision with regard to accessibility and that tenderers who did not obtain that certification had to be eliminated. He added that in this case one had to ascertain also that the Solana Hotel extension and the IELTS school of English had the appropriate MEPA certificate and licence from the Department of Education to use their premises for ICT training. The Chairman PCAB observed that the appellants were disqualified on grounds of accessibility only. Mr Callus complained that, even following a specific request to the Contracts Department, he was not made aware of the reasons behind the disqualification of the appellants' offers. The PCAB explained to Mr Callus that the practice was that only disqualified tenderers were given the respective reason/s for qualification.

Dr Fenech explained that the tender specifications did not mention the KNPD guidelines but stated "*including general environment and accessibility for persons with disability.*" He added that that was explained further in Clarification 1 where it was specifically stated that "*buildings have to be accessible to all including wheelchair users.*" Dr Fenech stressed that, in addition to those provisions, there was the *Equal Opportunities Act* which referred to 'accessibility'. He then referred once again to the Court decision of the 28th September 2007 (Ref: 413/2001), Michele Peresso vs the KNPD, wherein it was declared that access to a building from a side entrance instead of the main entrance constituted access in line with the provisions of the *Equal Opportunities Act*. Dr Fenech submitted that:

- (i) his client's premises at the Solana Hotel extension provided access from a side door, provided adequate sanitary and lift facilities and that, as a hotel, it had already been subjected to the accessibility audit;
- (ii) with regard to the IELTS building in Sliema it had been clarified to MCAST, by way of letter dated 10th August 2009, that 32% of the area was accessible to persons with disability which letter he claimed was reflected in MCAST minutes dated 11th August 2009 which indicated that his client's reply was satisfactory; and
- (iii) the premises at 8 Magazines Street Floriana had a removable ramp, which still provided access, in addition to EU standard equipment that provided further accessibility

Dr Fenech stressed that, as a consequence, all three premises presented by his client were accessible. He pointed out that in one instance the architect engaged by the KNPD did not visit the premises but based his report on verbal information in the sense that the premises still were as he had inspected them some time previously. Dr Fenech considered it unacceptable that the architect concerned drew up his report without having visited the site after he had been given his brief by the KNPD. He continued that the *Equal Opportunities Act* referred to 'accessibility' and to 'reasonable' but did not refer to any guidelines and so the guidelines should not be

considered as if they were cast in stone. Dr Fenech quoted from the Public Contracts Regulations (Legal Notice 177 of 2005) section 45 (b):

“the technical specifications shall afford equal access for tenderers and not have the effect of creating unjustified obstacles to the opening of public procurement to competition.”

Dr Fenech argued that one had to be careful with the application of the guidelines because it could be the case that premises would be deemed not ‘accessible’ in terms of the guidelines, whilst, at the same time, these same premises would be considered ‘accessible’ in terms of the law and in terms of what was requested by MCAST.

On his part, in concluding, Dr Cassar Pullicino stressed the importance of transparency and consistency in the tendering process. He argued that from the evidence produced it emerged that the KNPD acted inconsistently when fulfilling the task assigned to it by the adjudication board in the sense that architect Spiteri had testified that his brief was to assess according to the ‘Access for All’ guidelines but, on the other hand, Mr Bezzina stated that the brief given to architect Spiteri included the concept of ‘reasonableness’.

Dr Cassar Pullicino pointed out the difference between the two processes, i.e. strict adherence to the guidelines vs. the ‘reasonableness test’.

He remarked that, on one hand, the KNPD was undertaking an exercise on how to render premises accessible within the concept of ‘reasonableness’ and, concurrently, the KNPD was carrying out, on behalf of MCAST, the ‘accessibility certification’ of premises insisting on strict adherence to its guidelines.

Dr Cassar Pullicino lamented that a tenderer should have had the comfort of knowing on what grounds/criteria his offer was going to be adjudicated, even with regard to ‘accessibility’, and the assurance that the same method would be consistently applied to all tenderers.

Dr Cassar Pullicino remarked that it so happened that, on one hand, architect Spiteri rigidly applied the guidelines with the consequence that he disqualified his client’s buildings on the grounds of ‘accessibility’ while, on the other hand, the ‘reasonableness test’ conducted by the KNPD led to the same premises in the same state being declared as ‘reasonably accessible’ as per agreement dated 16th September 2009.

Dr Cassar Pullicino contended that, in this case, the adjudication board divested itself of its discretion to examine the advice given by the KNPD with regard to ‘accessibility’ and, by doing so, it, effectively, delegated the analysis of the issue of ‘accessibility’ exclusively to the KNPD. He argued that, as a result, the KNPD had become part of the adjudication board, limited to the ‘accessibility’ issue and, therefore, one had to examine if the KNPD had acted transparently and consistently in its capacity of adjudicator.

Dr Cassar Pullicino contended that Clarification 1 mentioned ‘accessibility’ and no reference was made to any ‘guidelines’ or ‘reasonableness tests’ and tenderers were

kept in the dark as to the criteria that were going to be used to adjudicate their offers with regard to ‘accessibility’. Dr Cassar Pullicino stated that ‘guidelines’, as the term suggested, were meant to provide a sort of guide to evaluators and they were not meant to be applied to the letter. He concluded that the results that emerged from the audits based on the guidelines were both unreasonable and incorrect.

Dr Caruana Galizia remarked that, in accordance with the tender document, the adjudication board had to request the KNPD to audit and certify the premises presented in the offers submitted and that the adjudication board had to disqualify bidder/s whose buildings failed to obtain the KNPD certification. He stressed that the adjudication board had no discretion on the ‘accessibility’ issue. Dr Caruana Galizia considered the ‘accessibility certification’ as one of the various requirements set out in the tender dossier, such as, the bid bond or teachers’ qualifications or the police conduct certificate in which cases the adjudication board would not go into the merits of how, for example, the police issued the conduct certificates. He argued that the adjudication board had no control over the KNPD as to the architects it engaged to carry out these audits or on the criteria it used. Dr Caruana Galizia stated that, following the KNPD certification, only one school turned out to be compliant and called upon the PCAB not to disturb the discretion of the KNPD and of the adjudication board because those requirements emerged from the tender document.

At this stage the public hearing was brought to a close and the PCAB proceed with the deliberation before reaching its decision.

This Board,

- having noted that both the appellants, in terms of their ‘letters of complaint’ dated 11.09.2009 and also through their verbal submissions presented during the public hearing held on the 18.09.2009, had objected to the decision taken by the General Contracts Committee;
- having also heard the reasons for such appeals relating to the fact that it was claimed that the said appellants did not satisfy the tender conditions with regard to accessibility because they were not compliant with the ‘Access For All’ [Design Guidelines], resulting in their disqualification from the tendering process;
- having heard Future Focus Ltd’s legal representative state *inter alia* that:
 - (a) it was disqualified from this tendering process due to an erroneous interpretation of the term ‘accessibility’ in the light of what was admissible by law, including the *Equal Opportunities Act*, and in terms of what was laid down in the tender specifications;
 - (b) it was erroneously being claimed that all three buildings in their offer did not conform with the ‘Access for All’ [Design Guidelines]

- (c) there are different interpretations of ‘accessibility’ citing the case ‘Michele Peresso vs. the KNPD’ - Court decision of the 28th September 2007 (Ref: 413/2001) - where the Court of Appeal decided that dealing with accessibility did not mean dealing with equality declaring that access to a building from a side entrance instead of the main entrance constituted access in line with the provisions of the *Equal Opportunities Act*;
 - (d) the yardstick used in this tender to assess accessibility was not laid down in the tender specifications or in the apposite legislation explaining that the tender specifications did not mention the KNPD guidelines but stated “*including general environment and accessibility for persons with disability*” whilst in Clarification 1 it was specifically stated that “*buildings have to be accessible to all including wheelchair users.*”;
 - (e) one had to be careful with the application of the guidelines because it could be the case that premises would be deemed not ‘accessible’ in terms of the guidelines, whilst, at the same time, these same premises would be considered ‘accessible’ in terms of the law and in terms of what was requested by MCAST;
 - (f) 32% of the premises at IELS in Sliema were at ground floor and hence compliant as reflected in MCAST minutes dated 11th August 2009 which had considered the clarification received from Future Focus Ltd as satisfactory;
 - (g) his client’s premises at the Solana Hotel extension provided access from a side door, provided adequate sanitary and lift facilities and that, as a hotel, it had already been subjected to the accessibility audit;
 - (h) it is to be considered highly unacceptable that an architect engaged by the KNPD did not visit his client’s premises but based his report on verbal information in the sense that the premises still were as he had inspected them some time previously
- having heard St Martin’s Education Services Ltd’s (also referred to as St Martin’s Institute of Information Technology) legal representative state *inter alia* that:
 - (a) that, in his opinion, a tenderer should have had the comfort of knowing on what grounds/criteria his offer was going to be adjudicated, even with regard to ‘accessibility’, and the assurance that the same method would be consistently applied to all tenderers;

- (b) 'guidelines', as the term suggested, were meant to provide a sort of guide to evaluators and they were not meant to be applied to the letter;
- (c) the adjudication board not only developed a consultation relationship with KNPD with regard to accessibility but the KNPD became part and parcel of the adjudicating process such that in the event that the KNPD did not issue its certification to a bidder, that bidder had to be disqualified as was the case with his client;
- (d) prior to this tendering process his client had engaged an architect who had been recommended by KNPD, Mr Hector Zammit, to assist the institute in rendering the premises in conformity with 'accessibility' legal provisions, claiming that the works that had been indicated to his client by architect Zammit had been carried out by June 2009;
- (e) a situation developed in that, on one hand, a KNPD recommended architect (Mr Zammit), but acting independently from the KNPD, was carrying out an exercise to render his client's premises accessible to disabled persons – where good progress had been registered – and, on the other hand, the architect detailed by KNPD to inspect his client's premises, namely Mr Joseph Spiteri, decided that his client's premises were not accessible, which decision led to the rejection of his client's offer;
- (f) the certification issued on behalf of KNPD by architect Joseph Spiteri which led to the disqualification of St Martin's Institute of Information Technology's tender has to be considered premature in view of the fact that whilst representations were being made before the *Reasonableness Board* within the KNPD with the aim of establishing whether the premises belonging to his client were acceptable from an accessibility point of view yet, concurrently, architect Spiteri was drafting a negative recommendation resulting in the appellant Company being disqualified from being further considered;
- (g) that from the evidence produced it emerged that the KNPD acted inconsistently when fulfilling the task assigned to it by the adjudication board in the sense that architect Spiteri had testified that his brief was to assess according to the 'Access for All' guidelines but, on the other hand, Mr Bezzina stated that the brief given to architect Spiteri included the concept of 'reasonableness';
- (h) it so happened that, on one hand, architect Spiteri rigidly applied the guidelines with the consequence that he disqualified his client's buildings on the grounds of 'accessibility' while, on the

other hand, the ‘reasonableness test’ conducted by the KNPD led to the same premises in the same state being declared as ‘reasonably accessible’ as per agreement dated 16th September 2009;

- (i) the applicability of the *Access for All* [Design Guidelines] was, in this particular instance, questionable in view of the fact that the appellant Company was claiming that certain equipment installed by his client was acceptable to the Malta Standards Authority and conformed to European standards;
 - (j) it would appear that his client’s case was still pending before the *Reasonableness Board* during adjudication
- having heard MCAST’s legal representative state *inter alia* that:
 - (a) whereas the two appellants were claiming that their premises were compliant with regard to accessibility in effect they were not;
 - (b) the adjudicating board had no discretion in this matter as the tender dossier specified that the premises had to be audited and certified by the KNPD and those who failed to obtain that certification would be disqualified;
 - (c) whilst the KNPD entrusted architect Spiteri to report on the question of accessibility yet, ultimately, it was the KNPD that issued and communicated the certification to the adjudication board;
 - (d) he disagreed with the claim that the KNPD became part of the adjudicating board because he regarded the ‘accessibility certificate’ like any other requirement as was, for example, the bid bond or academic qualifications;
 - (e) the adjudication board required the certification from the KNPD and not from the architect engaged by the tenderer;
 - (f) all the premises were certified by the same body and, practically, by the same architect
 - having heard Ms Charlotte Attard, chairperson of the adjudication board state *inter alia* that:
 - (a) in terms of the tender conditions, the board had to request the KNPD in writing to audit and certify the buildings in question with regard to accessibility;
 - (b) the adjudication board did not have the expertise to assess accessibility issues and reiterated that the tender dossier laid

down that those who failed to obtain the KNPD certification were to be disqualified;

- (c) the tender covered a period of three years and that it was adjudicated according to the criteria set out in the tender dossier, no more and no less;
 - (d) tenderers were asked to indicate how many students could be accommodated on their premises but that was not an adjudication criterion;
 - (e) the reaching of an agreement whereby the premises of St Martin's Institute of Information Technology were certified as 'reasonably accessible' as required by law occurred after the closing date of the tender
- having heard architect Joseph Spiteri, an architect attached to the KNPD entrusted with reporting on buildings with regard to accessibility issues, state *inter alia* that:
 - (a) the KNPD had engaged him to report on a number of premises with regard to accessibility with the main focus being on whether the entrance to the building, toilets and common areas were in conformity with the 'Access for All' [Design Guidelines] which guidelines would allow any disabled person to use premises independently, i.e. unaided by third persons;
 - (b) the brief given to him by the KNPD was to use the criteria laid down in the 'Access for All' [Design Guidelines] issued in 2000 and revised in 2005;
 - (c) the reasons why he deemed both the appellant Companies' premises not to be accessible;
 - (d) the *Equal Opportunities Act* stated that one could not be discriminated against and explained that the guidelines themselves referred to 'Access for All', that is, that everyone could make use of the premises;
 - (e) certain equipment was meant for domestic and private use but, in this case, the equipment was required for public use and therefore additional standards had to be respected;
 - (f) it was not his role to disqualify anyone from the tendering process and that, whilst confirming that he was one of the team that compiled these guidelines for the KNPD, yet he declined that he had ever had any connection with the entities bidding for this tender;

- (g) whilst he had inspected the premises located at 8 Magazines Street Floriana on the 24th March 2009 reaching the conclusion that those premises were not accessible as laid down in the ‘Access for All’ guidelines, yet, during the hearing it transpired that, a month later, he had asked if any alterations had been effected following his March 24th site visit and having been informed by the principals that none had been carried out he confirmed his previous report;
 - (h) he was aware of ‘reasonableness’ criteria, including the 25% classroom space accessibility;
 - (i) when he visited the IELS in Sliema site the ground floor looked like a common area which he was informed was going to be divided by a partition and acknowledged that the ground floor and the toilet were accessible
- having heard Mr Alfred Bezzina, Executive Director of the KNPD, state *inter alia* that:
 - (a) the KNPD did not revisit those premises which had already been issued with an accessibility certificate, as was the case with the premises of Computer Domain Ltd which had been certified after 2005;
 - (b) the other premises were inspected by Architect Joseph Spiteri;
 - (c) the brief given to architect Spiteri was to assess the premises in relation to the ‘Access for All’ guidelines and taking into account the 25% minimum classroom accessibility criterion and that, to his recollection, the certifications issued were based on those considerations and that the KNPD qualified its certifications
 - (d) on the basis of reasonableness, the KNPD had applied certain criteria which were made public, whereby the entrance, the common areas and at least up to 25% of classrooms had to be accessible which meant that the KNPD was not insisting that the premises had to be 100% accessible and that with the application of the ‘reasonableness’ clause of 25% classroom compliance, albeit it would still be regarded as discriminatory against a disabled person to make use of the ground floor only – thus not being granted choice and equal opportunity – yet, that would still be considered *reasonably accessible*;
 - (e) the *Reasonableness Board* had the role of advising the KNPD on the issue of ‘reasonable accessibility’ on a case by case basis and that it was up to the client, the owner of the premises, to request that his/her case be considered by the *Reasonableness Board*

- (f) prior to the issue of this tender, and independently from it, the KNPD had carried out an exercise whereby criteria were established as to what constituted 'reasonable' accessibility – as indicated in the appropriate legislation - with regard to schools offering computer lessons;
- (g) MCAST had informed KNPD that it had to certify the entire building and not solely the ground floor and floors 1 and 2;
- (h) the KNPD had entered into a five year agreement with Computer Domain Ltd subject to certain works being carried out on designated premises in Mosta during that period;
- (i) following the PCAB's remark that it appeared that, with regard to St Martin's Institute of Information Technology case, the KNPD did not take into account that there was an application before MEPA for the extension of the building that would eventually do away with the use of the temporary toilet, whereas, as regards Computer Domain Ltd the KNPD did take into consideration the MEPA application filed by the said Company with regard to rendering one of its premises accessible, Mr Bezzina said that, albeit the situation was different, yet, he could confirm that an agreement had been reached whereby the premises of St Martin's Institute of Information Technology were certified as 'reasonably accessible' as required by law;
- (j) the KNPD considered it reasonable to reach an agreement with Computer Domain Ltd as, in that case, one had the option of placing a disabled person in the larger school which was accessible and which was situated in the vicinity of the smaller one, taking into account the commitment undertaken by the client to eventually render the smaller premises accessible, adding that the same line of reasoning was applied in the agreement reached with St Martin's Institute of Information Technology;
- (k) with regards to the other appellants' claim, namely Future Focus Ltd, that, with regard to the IELS building it had indicated that 32% of the classes were going to be at ground level, he argued that for any premises to meet the 'reasonableness' criteria apart from the 25% minimum classroom accessibility one had also to consider that the common areas and the sanitary facilities were equally accessible;
- (l) with regard to the apparent disagreement between architects Spiteri and Zammit as to the sanitary facilities offered at St Martin's Institute of Information Technology, he expressed the view that both architects agreed that the toilet was not accessible according to the 'Access for All' guidelines with the difference

that architect Zammit declared that it was acceptable on the basis that it was only a temporary measure

- having heard Architect Hector Zammit, state *inter alia* that:
 - (a) he had carried out the audit on the premises of Computer Domain Ltd at Constitution Street Mosta but could not recall that he audited the premises at Kurat Schembri Street in Mosta;
 - (b) in November 2008, Mr Charles Theuma, acting on behalf of St Martin's Institute of Information Technology, had contacted him, on the recommendation of the KNPD, albeit on a strictly personal basis, to advise him on rendering his premises accessible and had duly submitted his recommendations;
 - (c) when giving advice on similar issues, whilst not overlooking the KNPD guidelines, yet, he tends to apply them with a measure of flexibility, because he holds the view that, practically, no building is fully accessible or entirely inaccessible and, as a consequence, one has to settle for somewhere in between;
 - (d) in his private capacity, he had also advised Computer Domain Ltd, in which case he had recommended that the ramp shared with a shop nearby be left in place, even if it did not conform, and that a stair-lift had to be installed

- having heard Mr Nick Callus, state *inter alia* that:
 - (a) Computer Domain Ltd had two schools close to one another, namely one had large premises which Mr Callus claimed to be in a position to accommodate up to 500 students with the other school being smaller claimed to be able to accommodate between 60 and 80 students;
 - (b) he agreed that the smaller school is not accessible to disabled persons;
 - (c) to date, the smaller premises had not been used for ICT courses and that use of it would be resorted to only if he had to accommodate more than 500 students;
 - (d) as a rule, tenders financed out of EU funds made provision with regard to accessibility and that tenderers who did not obtain that certification had to be eliminated

- having heard Mr Joseph Camilleri, Chairman of the KNPD, state *inter alia* that the KNPD considers issues of discrimination as laid down in legislation in the light of three particular aspects, namely that a
 - disabled person was given choice

- disabled person's independence was upheld and
- disabled person's dignity was respected

reached the following conclusions, namely:

1. The PCAB finds that the tender specifications did not clearly lay out the methodology for assessment (a rigid vis-à-vis a reasonable stand within pre-defined parameters), as claimed by the representatives of the appellant Companies, a context which has remained uncontested throughout the hearing. It is clear that the subjective element was very much evident considering the different metric levels suggested or availed of by the KNPD itself or its designated representatives (the architects) ranging from highly rigid (Architect Spiteri), reasonable (the KNPD via the *Reasonableness Board*) to pragmatic (Architect Zammit);
2. The approach taken by the adjudication panel to refrain from questioning any interpretation given by the technical person/s engaged, rendered the presence of the members within the adjudication board a mere formality. The PCAB cannot support a scenario wherein a single person ends up deciding on his own during an entire adjudication process, and this for many a valid reason where no counterchecks are made possible. The PCAB argues that similar scenarios are dangerous and likely to vitiate the 'transparency' concept that one would normally advocate in public procurement;
3. The PCAB opines that the fact that two architects entrusted, at one time or another, either separately, as well as, concurrently, by the KNPD to ensure that disabled people are given a choice, have their independence guaranteed and their dignity respected, cannot but be considered equally professionally held in high esteem. Both of the said architects have admitted that they cannot overlook the 'Access for All' guidelines whilst conducting their professional duties and advising on apposite subject matter/s. Yet, it is quite evident that, as it normally happens, professional people coming from the same line of academic fold, tend to embrace different opinions albeit guided by the same principles. It is undoubtedly a fact that the said architects viewpoint as to the way one should interpret 'guidelines' is different with one taking the stringent position, whilst the other assuming a more liberal and pragmatic approach. At this stage the PCAB questions as to which of the two best supports the *raison d'être* of the competent authority, namely, the KNPD? It seems that the latter is more in line with the reasoning and 'modus operandi' that the same KNPD advocates and actively operates so much so that, during the hearing, it was clearly stated by Mr Bezzina that the KNPD was not insisting that the premises had to be 100% accessible and that with the application of the 'reasonableness' clause of 25% classroom compliance, albeit it would still be regarded as discriminatory against a disabled person to make use of the ground floor only – thus not being granted choice and equal opportunity – yet, that would still be considered *reasonably accessible*. This line of thought already seems to have been put into practice by the KNPD on a couple of occasions, namely, (a) in reaching a five year agreement with Computer Domain Ltd and (b) in reaching a separate agreement with St Martin's Institute of Information Technology;
4. The PCAB feels that it is evidently clear that the premises offered by both Computer Domain Ltd and St Martin's Institute of Information Technology have satisfied the 'reasonableness' criteria as regards 'accessibility'. As a

consequence, the PCAB feels that once there is no contention to this issue and that the interested party to this, namely the KNPDP, is satisfied, then the PCAB sees no reason to challenge the favourable stand taken by the KNPDP relating to both parties;

5. The PCAB feels that as regards the objection made by Future Focus Ltd there still exists the likelihood that the assessment has not been adequately conducted. The PCAB is not convinced that the rigid stand taken by architect Spiteri truly reflects the 'reasonable' stand adopted by the KNPDP's *Reasonableness Board*, especially when one considers that the said appellant Company, Future Focus Ltd, has still not been examined by the *Reasonableness Board*. As a result, the PCAB retains it opportune that, for the sake of level playing, the premises in question of Future Focus Ltd be re-examined by the *Reasonableness Board* within three working days from the publication of this sentence. It is imperative that, following such examination, the findings should be, formally, forwarded to MCAST and the DG Contracts within two days from the time the *Reasonableness Board* reaches its own conclusions within the three day time frame referred to earlier. The PCAB is satisfied that following the review by the KNPDP's *Reasonableness Board* the whole adjudication process will have been performed correctly.

As a consequence of (1) to (5) above:

- a. in the case (Ref. Case No. 165) of the appeal lodged by Messrs *Future Focus Ltd* the PCAB decides that the KNPDP's *Reasonableness Board* has to re-examine – following the methodology referred to in the PCAB conclusions No.5 above - all the premises included in the appellant Company's original submission;
- b. in the case (Ref. Case No. 166) of the appeal lodged by Messrs *St Martin's Education Services Ltd* the PCAB finds in favour of the appellant Company

In view of the above and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by the appellants should

- in the case (Ref. Case No. 165) of the appeal lodged by Messrs *Future Focus Ltd* be momentarily retained by recipient until the formal publication of the *Reasonableness Board's* re-examination and consequent findings. Should such findings be in favour of appellant Company the deposit shall be reimbursed to the said appellant Company;
- In the case (Ref. Case No. 166) of the appeal lodged by Messrs *St Martin's Education Services Ltd* should be reimbursed.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

28 September 2009