PUBLIC CONTRACTS APPEALS BOARD

Case 91

CT 2089/2005; Advert Notice CT 318/2005 - Improvement of the Sant'Antnin Waste Treatment Plant and Material Recycling Facility - Lot 1

This call for tenders was published in the Maltese Government Gazette and the EU Official Journal on 28 October, 2005 and was issued by the Contracts Department following a request received from WasteServ Malta Ltd.

The closing date for this call for offers was 31 January 2006 and the global estimated value of the contract was Lm 2,500,000. Three (3) different tenderers submitted their offers.

Following notification by the Department of Contracts wherein it was stated that the joint venture Strabag AG/ BTA GmbH & Co. KG / Polidano Bros. Ltd. had been recommended for the award of the tender (Lm3,149,824.07), Messrs Haase Anlagenbau AG / Vassallo Builders Group Ltd., the appellants, filed an objection on 21 August 2006.

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 20.09.2006 to discuss this objection.

Present for the Hearing were:

Haase Anlagenbau AG/ Vassallo Builders Group Ltd

Mr Nazzareno Vassallo	
Mr Jonathan Buttigieg	
Dr Aldo Vella	Legal Representative
Mr Pio Vassallo	

Strabag AG/ BTA GmbH & Co. KG / Polidano Bros. Ltd.

Mr Charles Polidano	
Mr Boris E Farrugia	
Dr Michael Sciriha	Legal Representative
Dr Jesmond Manicaro	Legal Representative

WasteServ Malta Ltd

Dr Stefan Frendo	Legal Representative
Dr Antoine Cremona	Legal Representative

Evaluation Committee

Mr Joseph Degiorgio	Chairman (Witness)
Ing Stephen Dimech	Secretary
Ing Aurelio Attard	Evaluator (Witness)
Mr Marco Abela	Evaluator
Ing. Mario Agius	Evaluator

Department of Contracts

Mr Edwin Zarb	Director General, Contracts Department

After the Chairman's brief introduction Haase Anlagenbau AG/ Vassallo (hereinafter referred to as 'Haase/Vassallo') were invited to explain the motive which led to their objection.

At the beginning of the hearing, three preliminary points were raised: two by Haase/Vassallo's legal representative and another one by one of Strabag AG/BTA/Polidano's (hereinafter referred to as 'Strabag/BTA/Polidano') legal representative.

Dr Aldo Vella, Haase/Vassallo's legal representative, claimed that in WasteServ Malta Ltd's (hereinafter referred to as 'Wasteserv') reply dated 13 September 2006 it was stated that 'In the first place, the recommended bidder following the analysis carried out by the Evaluation Committee is not Strabag AG, but a joint Venture composed of Strabag AG/BTA / Polidano Group.' He questioned whether it was regular for the Joint Venture to be composed of three members considering the fact that in the minutes of the site visit held on 22 November 2005 at Sant' Antnin Waste Treatment Plant, M'Scala it was declared that 'a civil works contractor can join forces only for Lot 1 provided that the Joint Venture/Consortium is composed from not more than 2 members.'

Dr Michael Sciriha, Strabag/BTA/Polidano's legal representative responded by stating that both the regulations and the tender dossier did not exclude a consortium which is composed of three instead of two members. Furthermore, he maintained that the question 'Can a civil works contractor form a Joint Venture for Lot 1 only, i.e. is there a possibility to join forces for Lot 1?' was applicable to those tenderers who had submitted an offer for Lot 1 only and not for those who tendered for all four lots.

Dr Antoine Cremona and Dr Stefan Frendo, WasteServ's legal representatives, said that this was a clarification for those who submitted an offer for Lot 1 only and confirmed that Strabag/BTA/Polidano had tendered for all four lots. Also, reference was made to the *Addendum* to the Tender issued by Department of Contracts wherein it was stated that 'Sole Tenderers may submit their offers for one, more than one or all Lots. A Joint Venture/Consortium/Group may either submit an offer for Lot 1 only, otherwise an offer for all four lots must be submitted.'

Dr Jesmond Manicaro, the other legal representative assisting the recommended tenderer, argued that this meant that a tenderer who opted for one partner would have automatically excluded himself from bidding for Lots 2, 3 and 4.

Dr Vella said that their reasoned letter of objection was presented on 29th August 2006 whilst WasteServ's reply was submitted on 13th September 2006. Although he did not know the date when their submission was published, he doubted whether WasteServ's submission was regular because according to the Public Contracts Regulations the reasoned reply should have been filed within five working days from the publication of the letter of objection. He contended that if it was established that this reply was submitted late, then it should be removed from the records of these proceedings.

Dr Cremona explained that the procedural limitations imposed by the regulations applied to the tenderers and not to the beneficiaries. He said that in the past the PCAB had permitted the beneficiaries to present reasoned letters of replies even on the day of the hearing.

Dr Michael Sciriha said that tenders were regulated by two legal notices, namely LN 177/2005 – Public Contracts Regulations and LN178/2005 – Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations. He maintained that the arguments brought forward by the appellants in their letter of objection indicated that the appeal

was lodged in terms of LN 178/2005 instead of LN 177/2005. He claimed that the PCAB should not consider their appeal because these regulations did not apply for this tender.

When Dr Sciriha asked Dr Vella to state whether the appeal was based on the Public Contracts Regulations or the Public Procurement Regulations, the reply given was that they had submitted their objection in accordance with the requirements of the tender document.

The PCAB pointed out that in the Director General Contracts's letter dated 15 June 2006 reference was made to LN 177/2005.

At this stage the PCAB decided to proceed with the hearing.

Mr Jonathan Buttigieg, appearing on behalf of the appellants, started by giving background information on the submission and evaluation process of this tender and the reasons that led to the filing of their objections by means of a power-point slideshow presentation.

He explained that the Joint Venture Haase Eneregietechnik AG of Germany and Vassallo Builders Group Limited submitted a complete tender on 31st January 2006.

The financial offers of the tenders were opened on 27 June 2006 and the results for Lot 1 were as follows:

Haase/Vassallo	Lm 2,700,754.32
Horstman/C&F/Bonnici	Lm 3,119,952.24
Strabag/BTA/Polidano	Lm 3,149,824.07

On 11th August 2006 they were notified by the Director General (Contracts) that the Evaluation Committee had recommended that the contract for Lot 1 should be awarded to Strabag AG (the Price was not indicated in the Letter) and that the decision was based on the fact that Strabag /BTA/Polidano had received the highest overall score at 95.23 points, while JV Haase/Vassallo obtained 78.18 points.

On 14th August 2006 JV Haase/Vassallo asked for an explanation of how they achieved their points.

On 16th August 2006, they received a reply from the Director of Contracts which stated:

> 'The following is an extract from the Evaluation Technical Report:
>
> A Strengths & Weaknesses Report summarising the issues identified by the team of technical experts was compiled. Each evaluator assessed the strengths and weaknesses of each offer on an individual basis and gave weighting according to his formed opinion.
>
> In view of the results obtained by adopting the 'Pairwise Competitive Method', the Evaluation Committee affirms that the low scoring obtained by certain tenderers does not signify that they are incapable of meeting the tenders's requirements. This outcome simply means that the proposed technical solution of these tenderers was less preferred (although compliant) to the other contenders, when compared together and in the light of the minimum criteria requested in the tender documents.'

Mr Buttigieg said that on 21st August 2006 they submitted their Notice of Objection accompanied by a bank draft of Lm 25,000 and on 29th August 2006 they submitted their Reasoned Letter of Objection.

The appellant's representative explained that the tender was divided into four distinct Lots and each Lot had a clear definition of the Employer's Requirements. He said that as far as Lot 1 was concerned, the relative Design (copy presented during the hearing), Technical Specification, Drawings and the Bills of Quantities were provided by the Employer while for Lots 2, 3 and 4, bidders were expected to design and build plant and machinery to process waste in accordance with the Employer's Requirements. The key words for these three lots were 'Design and Build'.

Mr Buttigieg said that the Employer's Requirements consisted of a detailed description of the works required for

Lot 1	Civil Works
Lot 2	The Mechanical Treatment Plant
Lot 3	The Biological Plant
Lot 4	The Mechanical Recycling Facility.

In reply to a specific question by the PCAB, the recommended tenderer's representatives claimed that each lot was stand alone and evaluated separately while Mr Buttigieg contended that there was inter-dependence between Lot 1 and Lots 2, 3 and 4 in view of the foundations required for equipment.

Then, on the PCAB's request, Mr Buttigieg highlighted the relevant points of their objection.

Mr Buttigieg claimed that Clause 31.2 of the tender document clearly specified that the ' quality of each technical offer will be evaluated in accordance with the award criteria as detailed in the evaluation grid Volume 1, Section 6 of this tender dossier. No other award criteria will be used.'

He explained that for Lots 2, 3 and 4 tenderers were requested to submit a 'Proposed Technical Solution' and these lots were to be evaluated by using the Pairwise Method. Mr Buttigieg said that tenderers were not required to submit a 'Proposed Technical Solution' for Lot 1 because its design was provided by the Employer. He argued that on the basis of the fact that there were the 'Bills of Quantities' and the 'Proposed Technical Solution' was not mentioned, then Lot 1 should not have been evaluated by using the Pairwise Method. He claimed that according to the Technical Compliance Grid tenders were to be adjudicated by indicating whether the offers were 'Acceptable', 'Not Acceptable' and 'Not Applicable'. He contended that the Evaluation Committee did not need to draw up a Strengths and Weaknesses Report for Lot 1 because once a tender was determined to be acceptable then the contract should have been awarded on the basis of price.

Dr Sciriha responded by making reference to the document which was submitted by the appellants themselves in their offer. At paragraph no 5 of this document which was rubber-stamped by Vassallo Builders Group Ltd and HAASE Anlagenbau AG it was stated that 'As specified in the Minutes of the site visit, all members present were informed that the evaluation grids of Volume 1 Section 6 do not contain any scorings, since the evaluation will be assessed by means of the "Pairwise Comparison Method", an American Method which is scientifically proved. The technical and financial evaluations shall be performed as determined by this method.'

The appellants' representatives confirmed that they were present for the above-mentioned site visit. However, they insisted that the Pairwise Method was not applicable to Lot 1 because there was no technical solution for the evaluators to assess or to decide upon.

Dr Manicaro responded by stating that by using the Pairwise Comparison Method the Evaluation Committee was in a position to choose the most economically advantageous offer. However, Mr Buttigieg pointed out that in actual fact the offer recommended for award was the most expensive and significantly more expensive than the estimated value of tender.

Dr Cremona rebutted the appellants' representative's arguments by stating that the Pairwise Method could be used also for Lot 1 because, under the Three Package Procedure, the nature of Envelope Two was 'technical' in itself. Furthermore, he said that when an offer was considered 'acceptable' in the Technical Compliance Grid meant that it was admissible for the evaluation process.

Dr Cremona emphasised that in the Instructions to Tenderer contained in Volume 1 of the Tender Documents, the Contracting Authority was given the right to modify the yardstick of assessment provided that each tenderer was informed beforehand.

Clause 10 – Modifications to Tender Documents specified that:

> '10.1 The Contracting Authority may amend the tender documents by publishing modifications up to 11 calendar days before the date for submission of Tenders.
>
> 10.2 Each modification published will constitute a part of the Tender Documents and be sent, in writing, to all known Tenderers. The Tenderers must provide written confirmation within 3 days from receipt of the modifications that they have received modifications, sign each page and attach it to the Tender Documents.
>
> 10.3 The Contracting Authority may as necessary and in accordance with Clause 22, extend the deadline for submission of tenders to give Tenderers sufficient time to take modifications into account when preparing their tenders.'

WasteServ's lawyer said that the minutes of the site visit were signed and annexed with the tender and that it was only now that they were contesting the use of the Pairwise Method and claiming that Lot 1 did not have a technical solution. He maintained that the Pairwise Method was not only limited to Envelope 2 – Technical but also to the Envelope 3 – Financial. In fact in the document tabled by Dr Sciriha it was clearly stated that 'The technical and financial evaluations shall be performed as determined by this method.'

Dr Frendo intervened to remark that they were comforted by the fact that the appellants were not alleging that the Evaluation Committee had used different weights and measures in their evaluation when they used the Pairwise Method.

At this stage Mr Aurelio Attard, a member of the Evaluation Committee, took the witness stand and gave his testimony under oath.

On cross-examination by the PCAB, Mr Attard testified that there was technical solution for Lot 1 in the sense that the contractors had to indicate that they had the necessary equipment, experience and technical capacity to carry out the works.

In reply to a specific question as to why it was found necessary to use the Pairwise Method after the issue of the tender, the witness clarified that it was on the advice of the Department of Contracts that it was not included in the tender document. However, subsequently it was decided to use this method because they felt that there should be a method of scoring. He explained that in the Pairwise Method the comparison was carried out in pairs by assigning a score of between 1 and 6 at every stage of evaluation.

When asked by Dr Sciriha to state whether they applied the same criteria for all the contenders in the evaluating process, the reply given by Mr Attard was in the affirmative. He declared that there was level playing field among all bidders.

Replying to a question by Mr Buttigieg, Mr Attard said that tenderers were required to propose a 'Technical Solution' for Lots 2, 3 and 4 because there was an element of design. The 'proposed technical solution' was not required for Lot 1 because the design was ready. However, he maintained that tenderers had to show 'the methods proposed by the tender for carrying out the works in compliance with the Employer's requirements' as specified in the Technical Compliance Grid.

When Dr Vella asked the witness to state whether this meant that his clients had to submit a 'technical proposal' and not a 'technical solution', Mr Attard responded by stating that, although the solution was provided by them, tenderers had to propose how they were going to carry out the works. At this point Dr Vella referred the witness to the contents of a telefax message received from the Department of Contracts on 16 August 2006 which contained an extract from the Evaluation Technical Report wherein it was stated that:

> 'In view of the results obtained by adopting the "Pairwise Comparative Method", the Evaluation Committee affirms that the low scoring obtained by certain tenderers does not signify that they are incapable of meeting the tender's requirements. This outcome simply means that the proposed technical solution of these tenderers was less preferred (although compliant) to the other contenders, when compared together and in the light of the minimum criteria requested in the tender documents.'

Mr Attard pointed out that this particular paragraph was common to all the four reports (one for each lot) and when they copied the text, through an oversight, the word 'solution' was not replaced with 'proposal'.

Then it was the turn of Mr Joseph Degiorgio, Chairman of the Evaluation Committee, to take the witness stand. He signed a written declaration.

On cross-examination by the PCAB, Mr Degiorgio testified that, holistically, there was no discrepancy in the appraisal made by the individual members of the Evaluation Committee and confirmed that the points were given objectively.

When Dr Vella asked the witness to state whether there were extremes in the points given by evaluators, the reply given was in the negative. The PCAB on analyzing the points awarded by the individual evaluators noticed that the variations were reflected on all bidders and therefore it was of the opinion that no one was advantaged or disadvantaged in that aspect.

Mr Buttigieg maintained that they failed to understand how Sub-contracting was considered as a weakness by the Evaluation Committee, considering the fact the total value of works to be sub-

contracted by Haase/Vassallo was only 6% out of the 30% limit allowed by the tender document. Furthermore, he said that this should not have been one of the criteria used in the evaluation process because there was no reference thereto in the Technical Evaluation Grid.

In response to Mr Attard's remark that the appellants did not indicate the identity of their proposed sub-contractors for steelworks and roads, Mr Buttigieg said that they had already approached various companies and obtained their quotations. Also, it was indicated that they had a choice from a number of sub-contractors and named them. He explained that there was no agreement in place with sub-contractors because the contract had not yet been awarded.

With regard to Mr Buttigieg's statement that the criterion 'strengths and weaknesses' was not mentioned in the tender document, Mr Attard clarified that this was not a criterion for evaluation but a report requested by the Department of Contracts as an explanation of the points taken into consideration during the evaluation process. He said that sub-contracting was part of the Method Statement's criterion wherein tenderers had to show how they intended to carry out the works.

Dr Vella intervened to point out that, contrary to the witness's testimony, the fact that in the Technical Evaluation Report it was stated that 'A Strengths & Weaknesses Report summarising the issues identified by the team of technical experts was compiled. Each evaluator assessed the strengths and weaknesses of each offer on an individual basis and gave weighting according to his formed opinion', meant that they first compiled the Strengths and Weaknesses Report and then gave their weighting. However, Mr Degiorgio asserted that the report consisted of observations made by each evaluator after awarding the points while Mr Attard confirmed that they first gave the points and then compiled the report.

Dr Manicaro argued that although the tender document permitted up to 30% of the value of works to be carried out by sub-contractors, those tenderers who did not propose to sub-contract had an advantage over others.

Dr Vella said that another weakness mentioned in the Strengths and Weaknesses Report was that Vassallo, as the local partner within the joint venture was considered to have no 'experience in infrastructural works'. The appellants' legal representative tabled a copy of Form 4.6.5 – Experience of Contractor which was included in their tender submission to prove that his clients had the necessary experience to carry out the required works. Mr Buttigieg said that Vassallo Builders Group Ltd have been involved in the construction industry for the past 60 years.

Mr Attard said that the list of projects indicated by Vassallo Builders Group Ltd involved construction works and not infrastructural works. Mr Buttigieg responded by stating that the construction of major hotels, old people's homes and other projects listed in Form 4.6.5 did not comprise only civil works and building services of the type and nature indicated in Volume 3 Employer's Requirement for Lot 1 Section A2 General Description of the Works but also involved significant infrastructural works. Dr Vella pointed out that no specific reference was made to infrastructural works in this document.

Continuing, Mr Attard explained that during the evaluation process, when they compared the lists submitted by the tenderers, it was concluded that while Vassallo Builders Group Ltd might have had more experience on construction, others had more experience on infrastructure. Here, his attention was drawn by the PCAB to the fact that it would have been more appropriate if they stated 'less experience' rather than 'no experience'.

Dr Manicaro said that Vassallo Builders Group Ltd did not have the necessary experience related to this tender. He pointed out that, albeit in their reasoned letter of objection they might have mentioned projects of a similar nature, the Evaluation Committee could only rely on information submitted with the tender otherwise it would vitiate the evaluation process.

In reply to a specific question by the PCAB, Mr Attard confirmed that they based their evaluation strictly on the information submitted in the tender documents and not on personal experience.

Dr Cremona said that, had the appellants included the projects mentioned in the reasoned letter of objection in Form 4.6.5, the Evaluation Committee's comments would have not been the same.

Dr Vella asked Mr Attard to explain why in the Strengths and Weaknesses Report it was stated that 'Access to equipment resources are limited and will need to be supplemented by sub-contractors' considering the fact that his clients had complied with the requirements of the tender. He emphasised that in Form 4.6.2 it was stipulated that tenderers had to submit a list of equipment proposed and available for the execution of the contract and not the whole fleet of equipment owned by the contractor.

Mr Attard declared that they had no particular problem with the list of equipment submitted by the appellants and confirmed that there was no benchmark. However, he maintained that the Evaluation Committee arrived at that conclusion after assessing their proposal in comparison with others.

Mr Buttigieg claimed that the need of having a *three separate packages* process was to ensure transparency throughout the whole tendering and adjudication process. He claimed that in spite of the fact they were informed that each tenderer had a right to be given their respective technical points prior to the publication of the financial results, when they made a specific written request to the Department of Contracts, they were informed that 'the relative points for both the technical and financial scores will be made available after the final stage of the evaluation process.'

Dr Sciriha claimed that tenderers had no right to know their points during any stage of the process once their tender had not been discarded. Also he maintained that according to the Public Contracts Regulations only those tenderers whose bid had been discarded had a right to contest the decision.

At this point Mr Edwin Zarb, Director General, Contracts Department, was summoned to the witness stand and he gave his testimony under oath.

On cross-examination by Mr Buttigieg, Mr Zarb declared that after the technical evaluation stage, tenderers were only informed about whether their bid had been discarded or not and at this stage no points were given to bidders. He explained that Regulation 82 of the Public Contracts Regulations 2005 clearly specified that, at the technical evaluation stage, tenderers had a right of complaint only if their tender had been discarded. However, he contended that the rights of the affected tenderers were safeguarded because, at the end, all the results of the technical and financial packages were published.

Dr Cremona said that all tenderers have a right to appeal at the award stage.

Mr Buttigieg alleged that the fact that the technical results were not published could have influenced the evaluation of the financial offers. The PCAB insisted that it would not tolerate such allegation if not substantiated. However, the PCAB remarked that the same procedure was adopted for Lot 3, a tender which was awarded to the same appellants.

At this stage the parties concerned agreed with the PCAB's request to submit and exchange their submissions (which had to include only issues raised during the hearing) in English through the Secretary PCAB by Friday, 6 October 2006 (17.00 hrs) and to submit corresponding replies by Friday, 13 October 2006 (17.00 hrs).

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Quo-597 BY HAND

6th October 2006

The Secretary
Contract Appeals Board
Department of Contracts
Notre Dame Ravelin
Floriana

Dear Sir,

CT 318/2005
IMPROVEMENT OF THE SANT'ANTNIN WASTE TREATMENT PLANT AND MATERIAL RECYCLING FACILITY

PUBLIC CONTRACTS APPEALS
FINAL SUBMISSIONS

During the public hearing on 20th September 2006, we presented our submissions to the Public Contracts Appeals Board and the following are additional submissions which further substantiate our appeal.

Regulation 83(2)(f)(i) of the Public Contract Regulations

In terms of Regulation 83(2)(f)(i) of the Public Contract Regulations:

"Within five working days from the publication of the letter of objection, any tenderer who had registered an interest may send a reasoned reply to the letter of objection."

It is clear from a reading of the above that the faculty to submit a reply to our Reasoned Letter of Objection, published on the 29th August 2006, was limited to tenderers who had registered an interest in terms of the said Regulation.

Wasteserv Malta Limited, not being a tenderer but only an interested party, could not have filed a reply to the reasoned letter of objection. In addition, and this without prejudice to the foregoing, the said reply was not filed within the period specified in the said Regulation.

Therefore, it follows that in terms of the mandatory procedure laid down by the Public Contract Regulations the Appeals Board is to strike off from the records of the Appeal the reply submitted by Wasteserv on the 13th September 2006 through the services of Ganado & Associates.

The Evaluation Process

The evidence presented clearly showed that a proposed technical solution was required for Lots 2, 3 and 4 since these three lots were to be Design and Build to satisfy the Employer's Requirements. This was highlighted in the Technical Evaluation Grids of the tender document. No proposed technical solution was required for Lot 1 since this was designed by Bezzina and Cole (the employer's architect) and the tenderer for Lot 1 just had to price the extensively detailed Bills of Quantities.

Ing. Aurelio Attard confirmed that the Proposed Technical Solution was more important for Lots 2, 3 and 4 since these dealt with solutions being solicited by Wasterserv to overcome the current problems of the existing Sant Antnin Plant. When asked to point out where the Proposed Technical Solution of Lot 1 lay, Ing. Attard confirmed that no proposed technical solution existed but rather a *"proposed technical proposal" was* contained in the Tenderer's Method Statement of Lot 1. Ing. Attard explained that this *"proposed technical proposal"* should have explained to the Evaluation Committee how the tenderer intended to carry out the works.

Ing. Attard was asked to comment about the letter from the Department of Contracts (CT 2089/2005 dated 16th August 2006) which contained an extract from the report of the Evaluation Committee that specifically stated "that the proposed technical solution of these tenderers was less preferred (although compliant) to the other contenders...". Ing. Attard stated that although it is written that a proposed technical solution was required for Lot 1, this must have been a mistake of "cut and paste" made by the evaluators, since the same conclusion was reached for the other three lots.

Ing. Attard emphasised that the Pair Wise Method was used to evaluate the Proposed Technical Solutions.

The tender documents clearly show that a comprehensive Design and Build Technical Solution was required for Lots 2, 3 and 4. **However, there was no comprehensive Design and Build Technical Solution in Lot 1.**

This notwithstanding, the Evaluation Committee proceeded to evaluate a proposed technical solution which in the case of Lot 1 did not exist.

The Appeals Board raised an interesting point by questioning whether or not there was any substantial difference in the points awarded to the tenderers by the individual members of the Evaluation Committee. Although the Chairman of the Evaluation Committee stated that there was none, the Appeals Board, on viewing the results, ascertained that indeed the scoring was not consistent.

One would expect that on the basis of an objective evaluation of this type of bid there should not be any significant discrepancy in the appraisal made by the individual members of the Evaluation Committee. Any such discrepancy as may have been noticed by the Board may suggest that the evaluation was carried on the basis of subjective rather than objective criteria. No doubt when such a subjective appraisal is combined with the Pair Wise System the result of the adjudication can hardly be said to be "scientifically proved" (vide minutes of the Site Visit held at the Sant' Antnin Waste Treatment Plant on the 22/11/2005).

The Strengths and Weaknesses Report sheds some light on the criteria which were adopted in the assessment of the respective bids for Lot 1.

The Strengths and Weaknesses Report relative to JV Haase / Vassallo mentions that a key weakness of the Joint Venture was the need to subcontract steel works and road works. It is clear that the categorization of the requirement to subcontract as a weakness is inconsistent with the Tender Document itself. The Tender Document allows sub-contracting up to a maximum limit of 30% of the total value of the tender (Page 3 Clause 3.4 - Instructions to Tenderers).

The total value of the works to be subcontracted by JV Haase / Vassallo is only of 6% of the total Tender value, therefore, well within the 30% limit imposed by the tender documentation.

Once the Tender itself allows for the possibility of sub-contracting part of the works, the Evaluation Committee should not have considered sub-contracting as a weakness especially once the level of sub-contracting was well within the limits allowed for in the Tender. JV Haase / Vassallo could not have anticipated that sub-contracting would have been treated negatively once it was permitted by the Tender document itself.

During the hearing of the Appeal it transpired that in the case of the Recommended Tenderer the works were to be carried out by the partners forming part of the bidding venture and from the evidence submitted by Ing. Attard, it was evident that this factor was considered to be a "Strength" in the case of the Recommended Bidder. It also resulted that the fact that JV Haase / Vassallo was to sub-contract part of the works, though within the allowed limits, was treated by the Evaluation Committee as a weakness. Ing. Attard also confirmed that the fact that JV Haase / Vassallo did not indicate the identity of their proposed subcontractors was considered to be a serious weakness. Here too, the Tender Document contemplates specifically the possibility of not identifying the sub-contractors at the time of submission of the Tender, without mention of any form of penalization (vide Instructions to Tenderers Vol. I, Sec. I, Para. 3.3).

The method of evaluation adopted by the Evaluation Committee is clearly contradicting the Tender Documentation which specifically allows sub-contracting up to 30% of the value of the works and also allows Tenderers not to identify their proposed subcontractors at the time of submission of the bid. Nowhere is it stated in the Tender Documentation that sub-contracting within the approved limits would be still treated negatively nor is it stated that the non-indication of the identity of the sub-contractors would be treated negatively. The Evaluation Committee's subjective choice to penalise JV Haase / Vassallo in this regard clearly contradicts what is specified in the Tender Documentation.

This clear irregularity invalidates the award procedure and of itself is sufficiently serious to warrant the annulment of the award procedure for Lot 1.

Another weakness stated against JV Haase / Vassallo was lack of experience. The exact words used in the Strengths and Weaknesses Report stated "No experience in infrastructural works by Vassallo, the local partner".

Ing. Attard was asked to comment about how the Evaluation Committee could have arrived at such a conclusion when one considers the fact that Vassallo Builders Limited has been engaged in these types of activities for the past 60 years. Ing. Attard stated that the declaration in the Strengths and Weaknesses Report was just "bad English" and it should have said the experience of JV Haase / Vassallo when compared to the other two tenderers of Lot 1 was less preferred. Ing. Attard added that the projects listed by Vassallo Builders in Form 4.6.5, in his opinion, did not involve infrastructural works.

The general description of the works for Lot 1 as set out in volume 3 section A2 may be summarised as comprising:

(1) Dismantling of parts of the existing steel structures and re-erection on the proposed locations on the site. Fixing of new metal composite cladding panels.
(2) The demolition of a limited number of small structures.
(3) Excavation and filling works.
(4) The construction of a number of structures.
(5) The supply and installation of services including related building services, pipework and storm-water culverts.
(6) Carrying out structural alterations to buildings being retained and their refurbishment.
(7) Landscaping works, including coated macadam paved areas, concrete footways and soft landscaping.

With all due respect it is certainly a misconceived idea that the construction of major hotels, old people's homes and other projects of a similar entity as listed by the Joint Venture do not involve infrastructural works of the type and nature listed above. As a matter of fact all of those projects listed by the Joint Venture involved significant infrastructural works which were by far more complex and extensive than those contemplated in Lot 1.

The blatant failure of the Evaluation Committee to recognize this factor casts serious doubts on the expertise of the individual members in the field of building and civil engineering.

Ing. Attard himself stated during the Appeal proceedings that his line of expertise is that of mechanical engineering, which is a totally distinct field from that of civil engineering. One asks whether any of the other members of the Evaluation Committee are sufficiently qualified in the field of civil engineering.

If the reply to this question should be in the negative (and the blatant error outlined above should suggest so) then such a circumstance too should be considered by the Appeals Board as being sufficiently serious to warrant the annulment of the award procedure for Lot 1.

In the same context, another weakness is stated to be "method statement is not very detailed, is lacking in technical level, particularly with respect to the striking of formwork."

This is another area requiring particular expertise in the field of civil engineering. Should it be ascertained that the members of the Evaluation Committee were not sufficiently qualified in this field, then the appraisal made by them should be considered as being flawed. The attribution of such a great degree of importance to the level of detail with respect to the striking of formwork suggests that this is the case. The Method Statement provided by JV Haase / Vassallo clearly detailed the methods to be adopted in each and every stage of the construction process to the satisfaction of any reasonably competent person in the field of civil engineering.

The other two weaknesses determined by the Evaluation Committee with regard to the tender submitted by JV Haase / Vassallo were: that the project programme is not very detailed and lacks resource allocation; and that access to equipment resources are limited and will need to be supplemented by subcontractors.

Contrary to the appraisal made by the Evaluation Committee, the programme submitted by the JV Haase / Vassallo with their tender, contained 190 separate activities for the four lots, comprising all the necessary activities relative to the civil works of Lot 1.

Yet it transpires both from the Strengths and Weaknesses Report as well as from the evidence submitted during the appeal proceedings that the JV Haase /Vassallo were penalized by the Evaluation Committee because allegedly their programme for Lot 1 was not very detailed and lacking in technical level, when in actual fact the programme in so far as it relates to Lot 1 was in conformity with the tender requirements.

Similarly erroneous and contradictory to the Instructions to Tenderers is the assessment made by the Evaluation Committee to the effect that **access *to equipment resources are limited and will need to be supplemented by subcontractors.***

JV Haase/Vassallo presented in form 4.6.2 a list of their equipment resources as required by the technical compliance grid. They did not submit a list of their whole fleet.

As specified in Volume 1 Section 4, the equipment listed was to include only the equipment proposed and available for the execution of the contract, and not the whole fleet of equipment owned by the tenderer.

During the proceedings Ing Attard stated that in the case of the recommended bidder his whole fleet was taken into consideration in the evaluation process.

The criteria adopted by the Evaluation Committee in this regard, as confirmed by Ing. Attard during the proceedings, lead to two considerations.

Ex admissis, during the evaluation process, **the entire fleet** of the recommended bidder was taken into consideration and was deemed by the Evaluation Committee to be a "Strength"; it follows that the list submitted by the JV Haase / Vassallo containing only the necessary equipment for the execution of the contract rather than ***the whole fleet of equipment owned by the Contractor*** was deemed by the same Committee as being a "Weakness". It results therefore that here too the Evaluation Committee adopted criteria which run counter to the Instructions to Tenderers, as a consequence of which the JV Haase /Vassallo were seriously prejudiced.

The access to equipment resources by the JV Haase/Vassallo is not limited at all and is more than sufficient to carry out the works as specified for Lot 1.

The mere fact that some equipment will be *supplemented by subcontractors,* exclusively for the relatively small portion of the works which are to be subcontracted, could not have been regarded as a "Weakness" by the Evaluation Committee.

It is stated earlier in these submissions that the categorization by the Evaluation Committee of the requirement to subcontract as a "Weakness" is inconsistent with the Tender Document itself.

It is submitted that the Evaluation Committee committed the same mistake/irregularity when considering the access to equipment resources.

The JV Haase / Vassallo will be having recourse to equipment *supplemented by subcontractors* exclusively with regard to those works which the Joint Venture will be subcontracting, which subcontract works amount to a mere 6% of the total Tender value.

Having established that the Tender itself allows for the possibility of subcontracting part of the works, the Evaluation Committee, as stated earlier, should not have considered subcontracting as a "Weakness", nor should it have considered as a "Weakness" recourse by the Joint Venture to equipment supplied by the subcontractors for the execution of the subcontracted works.

This is yet another irregularity to the prejudice of the JV Haase / Vassallo which suffices to invalidate the award procedure.

Other Considerations

In Volume 1 Section 1 clause 29.2 it is specifically stated that "the purpose of the evaluation process is to identify the Tenderer most likely to enable the Contracting Authority to achieve its objectives of having a facility that is completed on time, meets the requisite quality criteria and is within the budget available".

The award of the contract to the most expensive tenderer - practically Lm 450,000 more expensive than the JV Haase/Vassallo Bid and significantly more expensive than the budget - certainly cannot be considered to achieve ***the purpose of the evaluation process*** as defined in Volume 1 Section 1 clause 29.2.

Having ascertained the irregularities committed by the Evaluation Committee in the evaluation procedure as submitted above, the Appeals Board should annul the recommendation of the Evaluation Committee to award the contract for Lot 1 to Strabag AG.

The Appeals Board should also come to the conclusion that the tender submitted by the JV Haase / Vassallo fully satisfies the Contract Requirements; contrary to the conclusions reached by the Evaluation Committee, the JV Haase / Vassallo Tender guarantees the execution of the works in conformity with the Contract Requirements under their various aspects, by meeting the requisite quality criteria, by guaranteeing the completion of the works on time and at a price which is Lm 400,000 cheaper than Strabag AG, the Bidder to whom the Evaluation Committee recommended the contract should be awarded.

The JV Haase / Vassallo bid, which resulted to be the cheapest amongst the tenders submitted, clearly satisfies Wasteserv's declared intention that the procurement process is completed by the selection of the most economically advantageous bid which is fit to satisfy the Employer's Requirements.

Yours truly,

JV HAASE / VASSALLO

Avv. Aldo Vella
Director and Legal Advisor

WRITTEN SUBMISSIONS BY JOINT VENTURE STRABAG POLIDANO GROUP

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13th October 2006

The Secretary
Contracts Appeals Board
Department of Contracts
Notre Dame Ravelin
Floriana

Dear Sir,

Re: CT318/2005 – Improvement of the Sant'Antnin Waste Treatment Plant And Material Recycling Facility

In accordance with the Contracts Appeals Board directives of the 20th September please find hereunder Messrs Strabag/Polidano's (hereinafter referred to as the "Recommended Tenderer") the reply to Messrs Hasse/Vassallo (hereinafter referred to as the "Objecting Tenderer") final note of submissions dated 6th October 2006.

Admissibility of Document filed by Wasteserv Malta Limited

The regulation quoted by the Objecting Tenderer in support of his claim that the document filed by Wasteserv Malta Limited on the 13th September 2006 is clearly not applicable to the case in question and therefore such claim is completely unfounded. Regulation 83 of the Public Contracts Regulations [S.L. 174.04] – (hereinafter referred to as the "Regulations") refers to the "*any tenderer who feels aggrieved*" or "*any person having or having had interest*" in obtaining a particular public contract. WasteServ Malta Limited (hereinafter referred to as "WasteServ") is neither a tenderer nor a person interested in obtaining a public contract. Therefore, WasteServ is not bound by the procedural limitations imposed by Regulation 83.

As the Implementing Agency and the ultimate beneficiary of the final contract, however, WasteServ may rely on the provisions of Regulation 84 (11) (a) which are unequivocal. The provisions of the said regulation stipulate in no uncertain terms that:

> *" The Chairman shall have the power to determine the procedure for the hearing of all complaints lodged with the Appeals Board and shall ensure that during the public hearing all interested parties are given the opportunity to make their case"*

The document submitted by Ganado & Associates on behalf of Wasteserv is merely a document outlining the preliminary observations of the Implementing Agency, which Agency is definitely is an interested party in terms of the above-quoted regulation. Though not a person interested in obtaining a particular public contract, WasteServ is definitely an interested party. Thus, contrary to what the Objecting Tenderer is stating in its final submissions, WasteServ is merely availing its right to *"make [its] case"* in accordance with Regulation 84 (11) (a) .

Without prejudice to the foregoing, the widely recognised general principle of Maltese law, *' ubi lex voluit dixit, ubi noluit tacuit'* which means that when the legislator wants to regulate a matter it does so, and when it does not want to regulate a matter it remains silent also needs to be taken into consideration. This simply means that if the legislator intended to preclude an Implementing Agency from making submissions or participating in the appeal proceedings it would have expressly stated so.

Finally it has been an uninterrupted practice adopted in appeal proceedings to allow submissions by implementing agencies and/or ultimate beneficiaries of the final contract.

Further elaboration on this point would be but a futile exercise.

Admissability of the Final Note of Submissions submitted by the Objecting Tenderer

It is humbly submitted that the Appeals Board should not take cognisance of the final note of submissions filed by the Objecting Tenderer on the 6th October 2006 and should order that the said note be removed in its entirety from the records of these proceedings. This submission is based on the fact that what the Objecting Tenderer has attempted to do by means of the said note is, raise grounds of objection not raised in its original Reasoned Letter of Objection dated the 29th August 2006 and this in view of the fact that the claims brought forward during the oral pleadings by the Objecting Tenderer were all defeated in their entirety.

Permitting an objecting tenderer to raise fresh grounds of objection following the submission of the reasoned letter of objection would give vent to abuse by present and future objecting tenderers thus creating a risky precedent. An objecting tenderer is bound by the objections raised in the reasoned letter of objection. The Objecting Tenderer's actions are a clear case of goalpost shifting, and an attempt to prejudice the Recommended Tenderer. Accepting the contents of the Objecting Tenderer's note, whilst as pointed out above, would create a risky precedent would require the reopening of the appeal proceedings with either party having the right to bring fresh evidence in support of its claims.

Nonetheless and without prejudice to the foregoing the Recommended Tenderer shall reply to these submissions *seriatim*. With regard to its submissions in relation to the original Reasoned Letter of Objection dated the 29th August 2006 submitted by the Objecting Tenderer, the Recommended Tenderer shall rely entirely on its oral pleadings of the 20th Sepetember 2006 the recording of which is available to the Appeals Board.

The Evaluation Process

It is completely incorrect to state that no proposed technical solution was required for Lot 1. The Objecting Tenderer in a overtly desperate move to try to regain lost ground have had to resort to deceiving and misleading tactics. The fact that the Tender Document included drawings by Messrs Bezzina & Cole does not mean that Lot 1 did not require a technical solution. Contrary the misstatement put forth by Objecting Tenderer, Ing. Aurelio Attard never stated that Lot 1 did not require a technical solution. The very same words quoted by the Objecting Tenderer "*proposed technical proposal*" show that a technical solution was in fact required and expected of all tenderers. The Objecting Tenderer in fact admits that a Design and Build Technical Solution was required but tries to qualify this by the term "*comprehensive*". This exercise of word play adopted by the Objecting Tenderer verges on the ridiculous and does not merit further attention.

Expertise of the Evaluation Committee

In its note of final submissions, the Objecting Tenderer makes a feeble attempt at casting doubts as to the expertise of the Evaluation Committee. "*He who alleges must prove*" and the Objecting Tenderer should prove any allegations put forth by it instead of trying to venture on a fishing expedition. The Appeals Board in one of its earlier decisions was adamant that it "*would not permit fishing expeditions thus allowing anyone to gain access to documents not related to the formal objections raised*".[CT2063/04]

The Pairwise Comparison Method for Evaluation

At the outset it has to be pointed out in no uncertain terms that the all tenderers knew perfectly well that the pairwise comparison method was going to applied for evaluation purposes. The minutes of the site visit held at Sant' Antnin Waste Treatment Plant on the 22nd November 2005 are indisputable and undeniable in this regard:

> "*Following the last clarification request Ing. A. Attard informed the members present that the evaluation grids do not contain any scorings, since the evaluation will be assessed by means of the "Pairwise Comparison Method", an American Method which is scientifically proved*"

At no point prior to the oral submissions of the 20th September 2006 did the Objecting Tenderer contest the Pairwise Comparison Method, on the contrary, the above-mentioned minutes of the site visit were endorsed by the Objecting Tenderer.

The Objecting Tenderer's allegation that the Evaluation Committee undertook a subjective appraisal is completely unfounded and unsubstantiated. Again, in another deceitful move the Objecting Tenderer resorts to word play. As is clear, the words "*scientifically proved*" referred to in the last preceding quotation refer to the Pairwise Comparison Method, a fact that is recognised by the most renowned academics and scientists alike.

Furthermore it is to be pointed out that the Pairwise Comparison Method was the method adopted by the Evaluation Committee in the evaluation of all bids with regard to all lots. Is one to understand thus that what the Objecting Tenderer is proposing is that all the tender awards be annulled including those where its bid was successful? The Objecting Tenderer attempts at discrediting the Pairwise Comparison Method are of a frivilous and vexatious nature as was clearly visible during the public hearing of the 20th September 2006. The Pairwise Comparison Method ensures that the bid with the highest added value is chosen. The Evaluation Committee's task was to determine the tenderer who "offered the most economically advantageous offer"[1] out of two technically compliant bids. If one had to describe this in terms of "*end*" and "*means*" the Pairwise Comparison Method was the means an "end", the "end" being the tenderer who made the most economically advantageous

[1] Vide Tender Document – Clause 31 titled *Criteria for Award*

offer. What the Evaluation Committee had to establish was which bid would give the necessary serenity and guarantees that the ultimate beneficiary i.e. the Implementing Agency would attain what it had set out to achieve. This brings the Recommended Tenderer to consider the issue of the "most economically advantageous offer".

The Most Economically Advantageous Offer

As pointed out above, in terms of the Tender Document the Evaluation Committee had to choose the most economically advantageous offer. In this regard the Regulations are unequivocal. They stipulate that:

> "*Where the award is made to the most economically advantageous offer, various criteria relating to the contract, including but not limited to price, delivery date, delivery period or period of completion, running costs, cost effectiveness, quality, aesthetic and functional characteristics, technical merit, profitability, after sales service and technical assistance shall be taken into consideration.*"[2]

A cursory glance at the foregoing provision from the Regulations is enough to discredit completely the emphasis made by the Objecting Tenderer on the fact that its was the cheapest offer. The method of choosing the most economically advantageous offer is chosen for many contracts especially for complex works. In such cases it is not appropriate to compare what is available on the basis of price alone. The Objecting Tenderer, however, for reasons known only to it seems to be totally ignoring this fact by repeating *ad nausiam* that its was the cheapest offer without referring to its failure in the other criteria laid down by the Tender Document.

The Evaluation Committee reached its conclusion on the objective grounds and criteria specifically mentioned in the Tender Document[3], which grounds and criteria were equally applicable to all tenderers and were strictly related to the subject of the contract.

[2] Regulation 27 (4)
[3] Vide Tender Document – Technical Compliance Grid – Lot 1

The Objecting Tenderer's lack of Experience in Infrastructural Works

The term *infrastructure* has been used since 1927 to refer collectively to the roads, bridges, rail lines, and similar public works that are required for an industrial economy, or a portion of it, to function. With all due respect, the Recommended Tenderer reiterates that the Objecting Tenderer does not possess the required experience in infrastructural works. So much so, that when giving the general description of the works for Lot 1in its final submissions, the Objecting Tender conveniently failed to include road works when these are part and parcel of the Civil Works for Lot 1.

Furthermore and without prejudice to the foregoing, it is an enshrined principle of Maltese Law that "*quod non est in acti non est in mundi*". Merely for argument's sake let us presume that the Objecting Tenderer possessed the necessary experience. Even if this were the case, the Objecting Tenderer failed to furnish details of similar projects undertaken by it in the past. The Objecting Tenderer was not precluded from submitting such information. It is, however, up to a tenderer to prove that it possess the qualities necessary to satisfy tender requirements. It is not the Evaluation Committee's task to fill in any lacunas in a tenderer's bid. Such an exercise would vitiate the evaluation process. The Committee can only decide on the documentation made available to it. If documentation was not submitted one cannot expect the Evaluation Committee to make assumptions of the sort the Objecting Tenderer expects it to do. In this context the phrase "hindsight is a tenderer's worst enemy" assumes huge significance.

Subcontracting

As pointed out above, since the Evaluation Committee was faced with two compliant bids, it had to go for the bid having the higher added value. Even in the event that the level of subcontracting proposed by the Objecting Tenderer was within the permitted limits, it is only logical that the Evaluation Committee would go for a solution depending solely on the tenderer in

question rather than one depending on a tenderer who needed to subcontract. It is far easier for the Implementing Agency to guarantee compliance with the tender requirements in the case of the particular tenderer rather than in the case of having to exercise controls not only over the contractor but also subcontractors.

The Objecting Tenderer makes reference to Instructions to Tenderers Vol.1, Sec.1 Para. 3.3 in support of their claim that they were not bound to identify their subcontractors. However such an exemption is clearly granted in the case where the subcontractors are not known. As results clearly from the answers submitted by the Objecting Tenderer to the Clarifications requested by the Evaluating Committee, the Objecting Tenderer had clear ideas of the companies they intended to approach for subcontracting purposes. On the contrary the answer given by The Objecting Tenderer [Clarification letter - 16th March 2006] clearly shows an attitude which surely does not contribute to providing the necessary serenity and guarantees sought for by the client:

> "*As we mentioned during Clarification Meeting we as yet do not have any commitments with any subcontractors or suppliers, although it would be our intention to subcontract the roadworks to either Bitmac, Asphaltar, or Polidano. We also intend on subcontracting certain Structural Steel Works to either Motherwell Bridge (Malta) Limited or Steel Structures Limited*."

The Objecting Tenderer to date have not managed to secure an arrangement with a subcontractor. In the event that for some reason or other the Objecting Tenderer does not manage to secure a subcontractor, a situation whereby after being awarded the tender in question, the Objecting Tenderer would not be able to perform the same. This would entail the starting afresh of the tendering process with all the dire consequences this would bring about. On the other hand this is non existent problem for the Recommended Tenderer who does not need to subcontract any of the works.

Furthermore, one cannot but note another change in position. In its reasoned letter of Objection of the 29th August 2006, the Objecting Tenderer stated:

> *" In fact, all tenderers for Lot 1 have to subcontract at least 4.5% of the value because none of them are Structural Steel Fabricators/Erectors. Surely this should not be a criteria which should determine the outcome of such a tender".*

It resulted that the Recommended Tenderer, contrary to what was alleged, does not intend to subcontract these works. It does not follow that because of the fact that the Objecting Tenderer would need to subcontract, it ought to be assumed that other bidders would need to do the same.

Tenderer's Fleet and Access to Resources

The arguments raised in the last preceding section hold just as good to the issue raised by the Objecting Tenderer in regard to the equipment to be used on the project. Ex admissis some of the equipment the Objecting Tenderer intended to use would depend on the subcontracting agreements it could secure with its subcontractors. Therefore by their own admission they submitted a list of equipment which they were not even sure they could secure at the time of submission.

The Objecting Tenderer contend that they only provided a list of the equipment they thought would suffice to carry out the project. It is only logical to presume that one would go for a bid submitted by a tenderer who has the equipment readily available should it be so required rather than go for a bid wherein the tenderer cannot guarantee the availability of the required equipment due to his reliance on subcontractors.

Other Considerations

It is humbly submitted that it is quite apparent that Objecting Tenderer's note of final submissions fails to address the points raised during the oral

pleadings of the 20th September 2006 thus confirming that the objection is void of substance and does not merit to be upheld. Not only did the Objecting Tenderer fail to answer the points raised during the oral pleadings but it was constrained to change the basis of objection which in itself is inadmissible.

In the light of the position taken by the Objecting Tenderer, the Recommended Tenderer cannot but reiterate the points (not mentioned above) raised during the oral pleadings in response to the original objection raised by The Objecting Tenderer in its reasoned letter of Objection of the 29th August 2006.

Publication of Technical Evaluation Results

In yet another unsuccessful attempt to precondition the Appeals Board, the Objecting Tenderer in its letter of the 29th August 2006 tried to create an impression that it was being prejudiced at a very early stage of the proceedings and that the adjudication process was somewhat vitiated and non transparent. It claims that the rejection of their request for the publication of the Technical Evaluation prior to the publication of the Financial Results prejudiced their right of appeal in the process. The answer to its qualms is provided in the Regulations themselves. Given the Objecting Tenderer's bid was not disqualified or disregarded at the technical evaluation stage, the Objecting Tenderer had no right of appeal until the publication of the final result and thus its right of appeal was unharmed. In this regard Regulation 82 (3), (4), (6) and (10) are unequivocal. Reference is made to a Decision by the Public Contracts Appeals Board of the 12 th June 2006 [Case 81 – CT 2525/2005] wherein the Appeals Board dealt with this point in an exhaustive manner. Furthermore in support of its claim, the Objecting Tenderer exhibited a copy of an email transmission in regard to tender WSC/T/51/2004 which in no manner whatsoever proves any of its points and clearly is not applicable

to the these proceedings in that public procurement of entities operating in the water, energy, transport and postal services sector (the Water Services Corporation being one of these entitities) is not governed by the Regulations but by a separate set of rules.

What the the Objecting Tenderer attempted to do was to acquire information about the other tenderers' bids, an action strictly prohibited by the Regulations and the secrecy provisions of the Tender Dossier. No information whatsoever on the contents of bids may be disclosed until final adjudication. The Department of Contracts and in particular the Director of Contracts acted correctly in disclosing only permitted information and only at the permitted stage.

Technical Evaluation

With regard to the issues raised by the Objecting Tenderer in their letter of the 29th August 2006 regarding the Technical Evaluation process, in order to avoid odious repetitions easy reference can be made to the preliminary observations submitted by the Wasteserv on the 13th September 2006 on the issues raised.

Concluding Remarks

It is sufficiently clear that all throughout the tendering process, a level playing field was maintained between all parties involved. The Objecting Tenderer has attempted to disturb this level playing field to the detriment of the Recommended Tenderer. It departed from its original objections and sought to introduce fresh objections at this late stage of the proceedings.

The Recommended Tenderer reiterates that the Objecting Tenderer in its note of final submissions fails to rebut the Recommended Tenderer's objections raised during the oral pleadings and to which the Recommended Tenderer

holds firm. Instead, the Objecting Tenderer choses to change tact. It is a general principle of law and equity that "*Electa una via non dat ricursus ad alteram*". The Objecting Tenderer cannot simply change path upon that it had taken the wrong direction.

In view of the forgoing, the Recommended Tenderer whilst reserving the right to make further submissions, humbly request that the Public Contracts Appeals Board:

1. Reject the Objecting Tenderer's Appeal
2. Declare the Objection filed by the Objecting Tenderer frivolous and vexatious

and

3. Confirm the original recommendation of the Director of Contracts in favour of the Recommended Tenderer

Avv Michael Scerri

Avv Jesmond Manicaro

Avv Franco Galea

WRITTEN SUBMISSIONS BY GANADO & ASSOCIATES ADVOCATES

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12th October 2006

The Secretary
Public Contract Appeals Board
Department of Contracts
Notre Dame Ravelin
Floriana

Dear Sir,

CT 318/2005
IMPROVEMENT OF THE SANT'ANTNIN WASTE TREATMENT PLANT AND MATERIAL RECYCLING FACILITY

Reply to Appellants' final submissions following Public Hearing

We write on behalf of the final beneficiary (implementing agency) of the above-captioned public contract, Messrs. WasteServ Malta Limited (hereinafter referred to as 'Wasteserv') in reply to the final submissions filed by appellants Messrs. Haase/Vassallo Joint Venture (hereinafter referred to as 'HVJV') in terms of the procedural order of the Public Contracts Appeals Board at the oral hearing of the 20th September 2006.

It has to be reiterated that as the final beneficiary of the above-captioned contract of works, Wasteserv is solely and exclusively interested in ensuring that the Director General (Contracts), as the contracting authority, completes this procurement process by selecting the most economically advantageous bid which is fit to satisfy the Employer's Requirements.

Nevertheless, in accordance with the provisions of the Public Contracts Regulations (hereinafter called the 'Regulations') and in accordance with the consolidated practice of the Public Contracts Appeals Board (hereinafter called the 'PCAB') it is hereby addressing issues arising out of the appellants' final submissions dated 6th October 2006 which are in its opinion both factually and legally incorrect.

1. *Locus Standi* of Wasteserv as the beneficiary of the contract

In their final submissions Appellants reiterate two questions which have already been dealt with by the PCAB in the sitting of the 20th September, namely Wasteserv's alleged

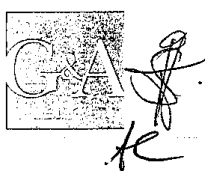
lack of the required interest at law to participate in these proceedings and the alleged late submission of the reply to the reasoned letter of the 13th September 2006.

Wasteserv humbly submits that both these allegations are factually as well as legally incorrect as can be attested by even a mere superficial review of the now vast number of decisions delivered by the PCAB on this issue. This issue has for example been dealt with at length in past decisions (*v.* for instance Case 46 CT2616/2004 *Joint Venture Polidano Group/Gatt Tarmac Ltd. vs. Director General Contracts, AdT and the Ministry for Gozo*) and it is now consolidated practice in similar appellate proceedings that beneficiaries/ implementing agencies have a residual automatic interest in appellate proceedings in order to request the PCAB to uphold the decision of evaluation committees appointed by the Director General (Contracts) as the default contracting authority at law.

The Regulations in fact vest the Director General (Contracts) with the default role as contracting authority in all the public works, supplies and services contracts which exceed in value the applicable thresholds implementing into Maltese law the relevant EU thresholds set in the EC public procurement directives. As such therefore in the vast majority of cases the *ex lege* contracting authority is not the authority, Ministry or department which will benefit from the execution of the contract but the Director General (Contracts). This does not divest the implementing agency however from its interest at law. Indeed its interest is protected by law and has always been protected by the PCAB in view of the fact that in reality the compilation of the tender dossier itself, the members of evaluation committees and the drafting of the employers' requirements often emanate from within that implementing agencies or external consultants appointed by that same agency.

The implementing agency is therefore in the best position to ensure that the contracting authority awards public contracts following procurement processes to the most economically advantageous bidder and therefore to that bidder who can deliver in accordance with the set Employer's requirements and this interest has to be protected by the PCAB.

In addition, with respect to Appellants'allegation that Wasteserv's reply to their reasoned letter of objection was filed late and should be discarded, it should be very clearly pointed out that the law does not even require a beneficiary authority to register an interest. Nor does it naturally impose a deadline for the submission of its replies or limit its participation at any public hearings convened by the PCAB. In the *Polidano/Gatt vs AdT et* case above-mentioned for instance, as well as in a number of other proceedings, the PCAB accepted replies to reasoned letters of objections filed on the day of the sitting (*seduta stante*) by the beneficiary. Participation by the beneficiary at the oral hearing is evidently not limited or in any way curtailed by whether the beneficiary has filed a



written reply to the reasoned letter or not. Wasteserv has solely filed a written reply in order to assist the PCAB, by presenting to it the case for upholding the decision of the contracting authority's evaluation committee in a more coherent way and for ease of reference prior to decision, even if in no way was it obliged to do so in order to be able to defend the decision of the evaluation committee at the oral hearing.

Without prejudice to the above however, it is hereby being submitted that appellants' objection to the filing of Wasteserv's reply to the reasoned letter of objection has already been exhaustively dealt with by the PCAB at the hearing of the 20th September 2006. The PCAB's decision to accept Wasteserv's participation at the hearings and the notification of the reply to the reasoned letter by the secretary of the board to appellants and to the Director General (Contracts) constitutes in fact an interim decision by the PCAB confirming Wasteserv's *locus standi* in these proceedings as the beneficiary of the public works contract CT 318/2005. Such decision is based on the provisions of Regulation 84 (11) (a):

> *"The Chairman* [of the PCAB] *shall have the power to determine the procedure for the hearing of all complaints lodged with the Appeals Board and shall ensure that during the public hearing all interested parties are given the opportunity to make their case."*

2. The Evaluation Process

In their final submissions HVJV argue that *"The evidence presented clearly showed that a proposed technical solution was required for Lots 2, 3 and 4 since these three lots were to be Design and Build to satisfy the Employer's Requirements. This was highlighted in the Technical Evaluation Grids of the tender document. No proposed technical solution was required for Lot 1 since this was designed by Bezzina and Cole (the employer's architect) and the tenderer for Lot 1 just had to price the extensively detailed Bills of Quantities."*

This is simply a restatement of an illogical argument brought by appellants at the oral hearing, which has already been proven to be factually incorrect and based on wrong assumptions.

Wasteserv respectfully submits that the appellants' grievance is based on a false equation between a technical solution and design. Appellants claim that since there was no design 'input' expected from the bidders, then there can be no technical solution in that what was expected of the bidders was the mere compilation of the bills of quantities. This cannot be farther from the truth in projects such as Lot 1, i.e. projects where design is furnished by the Employer's architects (Messrs. Bezzina & Cole in this case).

The fact that the design is provided by the Employer does not necessarily mean that the technical solution is given. In fact design is but one, albeit important, part of the 'technical solution'. A solution given by the bidders and prospective contractors includes other factos, namely the methodology to be employed in the execution of the contact, the phases or milestones to be reached in a given works programme, the equipment and access thereto, the on-site measures operated, the availability of qualified personnel etc. What was furnished by the Employer was simply the design. And, even though admittedly no bidder furnished such a variant solution, for Lot 1 as well there was the possibility of having a variant solution including design in terms of Clause 19 of the Instructions to Tenderers.

To argue that the evaluation committee could not judge a bid on the technical solution in Lot 1 because the design was given and therefore *"there was no technical solution"* is therefore utterly misleading. It is not only design and build contracts which require a technical solution from bidders. Proposed contracts as Lot 1 still require a host of other factors forming part of a proposed technical solution although one of the most important of such factors, i.e. design, is admittedly given by the contracting authority and is therefore identical for all bidders.

In view of the above and with reference to the submissions already made on this point by legal counsel for Wasteserv as well as with particular reference to the evidence given by Ing. Aurelio Attard on this point, Wasteserv therefore humbly submit that the PCAB should confirm the decision reached by the evaluation committee appointed by the Director General (Contracts) when it declared that *"the proposed technical solution of these tenderers* [Haase-Vassallo] *was less preferred (although compliant) to the other contenders."*

3. Alleged lack of objective evaluation

In the second page of their 'final submissions' Appellants argue again that there were 'discrepancies' between the scorings made by the individual members of the Evaluation Committee and that the Chairman of the PCAB has ascertained this fact at the oral hearing. They further argue that the scoring *'was not consistent'* and that evaluation was therefore subjective rather than objective in nature.

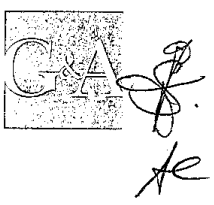
This is a last-ditch effort at trying to discredit the whole process of adjudication adopted in this procurement process by trying to allege in a very vague statement based on completely unproven facts, that the members of the adjudication committee did not have an objective unit of measurement and that therefore the evaluation process was vitiated.

Again Wasteserv categorically rejects this version of the facts and argues that it is completely misleading to represent the adjudication process adopted in this procurement process in such light.

With the adoption of the Pairwise Comparison method, notified to all and agreed to **in writing** by all the participating bidders, the evaluation committee indeed adopted a scientifically proven and statistically independent method of measurement which combines the results achieved by competing bids in order to arrive at the most economically advantageous bid in an objective method.

It has to be stated however, in the clearest of terms, that the evaluation committee **was not bound** to adopt any such statistical method, both in terms of the tender dossier and in terms of the applicable public procurement legislation. In fact there is nothing wrong in principle, in terms of the Regulations and the applicable EC public procurement legislation, for evaluation committees to assess bids on their own and without reference to any statistical method. This entails an element of subjectivity which is NOT prohibited by the law and which is why evaluation committees are made up of 5 or 7 members in the first place. The appellants to the contrary seem to allege that the absence of a purely objective ruler with no subjective influences vitiates the process; something which is both illogical and unrealistic. Indeed the Director General (Contracts) himself confirmed that not all contracts are awarded on the basis of the pairwise or other statistical method of comparison and that in a vast number of other procurement processes, the evaluators arrive at a decision based on average scorings. Subjectivity on its own is not a ground for vitiation of the process! Appellants have to prove wrongdoing or gross negligence by the individual evaluators in order for the PCAB to be in a position to disturb the decision reached by the evaluation committee.

This situation however, for the purposes of the current proceedings is only hypothetical since the evaluation committee **did** in fact adopt an objective ruler by incorporating the Pairwise comparison method in the evaluation process. The fact then that there are differences (which in the words of the Chairman of the PCAB at the hearing were not substantial) in the scoring by the individual evaluators simply attests to the residual degree of subjectivity left in all procurement process and which, contrary to what is being alleged by HVJV, is **not** prohibited by the Regulations, is **not** prohibited by the applicable EC directives, does **not** violate existing practices adopted by the Directorate of Contracts and is **not** a ground for annulment of an adjudication.



4. Tenderer's Limited Access to Equipment

On the issue of the appellants'limited access to equipment, HVJV argue that:

"Similarly erroneous and contradictory to the Instructions to Tenderers is the assessment made by the Evaluation Committee to the effect that access to equipment resources are limited and will need to be supplemented by subcontractors.

JV Haase/Vassallo presented in form 4.6.2 a list of their equipment resources as required by the technical compliance grid. They did not submit a list of their whole fleet.

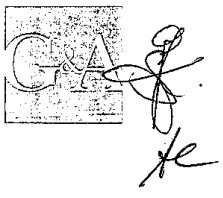
As specified in Volume 1 Section 4, the equipment listed was to include only the equipment proposed and available for the execution of the contract, and not the whole fleet of equipment owned by the tenderer.

During the proceedings Ing Attard stated that in the case of the recommended bidder his whole fleet was taken into consideration in the evaluation process."

This quotation contains an incredible amount of incorrect statements of fact and is based on assertions which have been re-iterated several times by Appellants throughout these proceedings but which have so far (and will certainly remain) unsubstantiated and uncorroborated by other evidence and which Wasteserv will hereby address in order.

Primarily, it is *not* true that Ing. Attard stated that in the case of the recommended bidder his whole fleet was taken into consideration in the evaluation process. Indeed Ing. Attard in cross-examination by legal counsel for appellants in open sitting declared that the evaluation committee took into consideration only the list of equipment provided with the tender documentation by the bidders. Logically Ing. Attard could never know whether the recommended bidder had included in the tender the list of the entire fleet owned. This would presuppose a knowledge by Ing. Attard of the fleet owned by the recommended bidder, something which is evidently not the case.

Secondly, on the very merits of this issue, it transpired in the clearest way from the documentation submitted by HVJV and by statements made in open sitting by representatives of the appellants that as a matter of fact HVJV did not own all the equipment required for the execution **of the works** in accordance with the employer's requirements. They intended to subcontract some of the works **specifically because of the lack of equipment.** In the tender documentation they list a wide selection of potential subcontractors, which incidentally includes a partner in the recommended bidder. It is therefore not a question of the appellants and the recommended bidder both having enough equipment to perform the obligations assumed and the latter having gone 'overboard' by providing more than what was requested. It is in fact a question of comparison between the equipment provided for the execution of works together with



ancillary considerations as possibility of back-ups and subcontracting arrangements within the list provided.

It has to be confirmed again that the access to equipment factor was the factor with less weight in the adjudication. Nevertheless, even for such a minor factor, if a contracting authority does not have the right to prefer a bidder with a more extensive fleet and therefore with the possibility of providing back-up and if a contracting authority is barred from preferring a bidder who does not intend to subcontract outside the venture to another one who intends to subcontract then the whole purpose of a procurement process would be defeated.

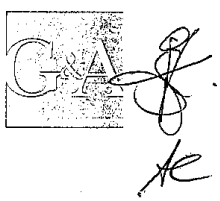
5. Qualifications of the Individual Members of the Evaluation Committee

In a further effort at attempting to discredit the whole adjudication procedure in this procurement process, Appellants are now claiming for the first time that the individual members of the evaluation committee were not qualified in civil engineering and that therefore such a circumstance should be considered by the PCAB as being *'sufficiently serious to warrant the annulment of the award procedure for Lot 1'.*

Wasteserv humbly submits that this claim is both frivolous and vexatious for the following reasons.

Without entering into the merits of the academic and professional background of the individual members forming the evaluation committee, it has to be stated in the first place that even if, and only if, this allegation is found to be true by the PCAB, it is NOT a ground for annulment of a procurement process in terms of both the Public Contracts Regulations and in terms of the applicable EC Directives.

In addition, the evaluation committee was identically constituted in the award of all the four (4) separate lots in this procurement process and conveniently no such claim on the academic or professional qualifications of the members was made with respect to the adjudication of the other lots to the Appellants. However, even more importantly, it has to be stated that the submission of a bid by a bidder creates a contractual relationship with the contracting authority based on the terms of the tender dossier. The tender dossier specifies in detail the award process, the specifications and the evaluation criteria. In addition the site visit and the clarification meetings attended by the Appellants were conducted and chaired by the members of the evaluation committee themselves as can be easily attested by the PCAB upon mere reference to the minutes of these meetings already presented in these proceedings. It is therefore unacceptable for Wasteserv to be confronted with a similar 'grievance' by the Appellants when they were aware **before the date of submission of their bid** of all the mechanics of the evaluation process.



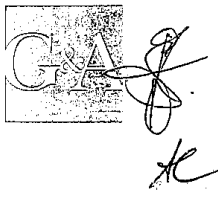
This allegation that the lack of professional or academic qualifications of the members of the evaluation committee is sufficiently serious to warrant the annulment of the award, is then also unacceptable in view of the fact that the contracting authority and the implementing agency have contracted the services of external professional consultants to supplement any possible academic deficiency in technical civil engineering matters. Appellants are well aware that Messrs. Bezzina & Cole and their staff of architects and civil engineers have supported the contracting authority throughout the process, even though they had no active role in the adjudication. Their role was clearly indicated both in the tender dossier and in the clarification meeting and therefore any allegation that the evaluation committee was not professionally competent on issues relating to civil engineering works and ancillary matters is completely baseless as any such deficiency was more than adequately compensated by the external professional consultants.

Finally, even if one were to assume exclusively for argument's sake that there was no such compensation and that the evaluation committee acted 'in complete ignorance' of basic civil engineering tenets, they have evidently failed to show how this fact may have influenced their bid in an unequal manner or worse still how this benefited the recommended bidder. If the evaluation committee was not qualified in such matters, it was so unqualified for all the bidders and in terms of the ***Storebælt Bridge case*** [Case C-243/89] ***Commission* v *Denmark* [1993] ECR I-3353** and the ***Walloon Buses cases*** [Case C-87/94] ***Commission* v *Belgium*** [1996] ECR I-2043 the Appellants have not proven that the successful tenderer benefited from any kind of special treatment. This is essential for any Appellant in order to ask the PCAB to reverse a decision of a contracting authority in awarding a public contract.

6. Procurement budget and the Most Economically Advantageous Tender (MEAT)

Wasteserv finally wishes to address in the strongest of terms the section named **'Other Considerations'** in the Appellants' final submissions. In this section the Appellants raise very serious allegations that *"the award of the contract to the most expensive tenderer – practically Lm 450,000 more expensive than the JV Haase/Vassallo Bid and significantly more expensive than the budget – certainly cannot be considered to achieve the purpose of the evaluation process."*

Presented in this way, this allegation is misleading and equivocal and Wasteserv humbly submits that it serves exclusively the purpose to deviate and sidetrack the PCAB from the analysis of the actual grievances – the evaluation on the merits of HVJV's bid carried out by the evaluation committee – presented by the Appellants. It is in addition also unjust to the spirit in which this evaluation process has been conducted.



The EC Directives and the implementing Legal Notice 177 of 2005 (as amended) which brought in to force the Regulations, allow public authorities and entities listed in the Schedules to the Regulations to adopt as award criteria in pubic services, works and supplies contract only two possible criteria, namely **the cheapest offer** AND the **most economically advantageous tender (MEAT).** This has been clearly reaffirmed by the EU Court of First Instance (CFI) and by the European Court of Justice (ECJ) in various cases, principally in *Case C-19/00 SIAC **Construction v. County Council of the County of Mayo*** [2001] ECR I-7725, *Case C-513/99 **Concordia Bus Finland v. Helsinki*** [2002] ECR I-7213 and *Case C-448/01 **EVN and Wienstrom v. Austria*** [2004] 1 CMLR 22.

It cannot be more evident that in this particular process (Lot 1 of CT 318/2005) the contracting authority adopted the MEAT criterion and NOT the cheapest offer criterion. It is, therefore, with respect very puerile at this late stage to try and discredit or worse still cast doubts on the integrity of the whole process by stating in this way that the contracting authority went above budget and chose an offer which is more expensive than that of the Appellants.

Where contracting authorities in the EU chose the MEAT criterion, they may take into account other factors as well as or even **instead of**[1] price: for example quality, delivery date or product life. Not only was this approach clearly indicated in Article 31.1 of the Instructions to Tenderers:

"31 Criteria for Award

31.1 The Evaluation Committee will select the tenderer who meets the administrative and technical criteria, and has offered the most economically advantageous offer;

31.2 The quality of each technical offer will be evaluated in accordance with the award criteria as detailed in the evaluation grid, Volume 1, Section 6 of the standard dossier. No other award criteria will be used;

31.3 *The most economically advantageous tender is established by weighing technical quality against price on a 60/40 basis respectively."*

but all the tenderers were provided with a precise list of these criteria together with the respective weights to be assigned for each criterion. Indeed with respect to the pricing criterion the Appellants scored more than the recommended bidder with 40 points out of a possible 40.

[1] Sue Arrowsmith *The Law of Public and Utilities Procurement*, [Sweet & Maxwell, 2005], p. 501

The Appellants also allege that the recommended bid was 'significantly more expensive than the budget'. It has to be stated clearly that **All** financial offers received for Lot 1 exceeded the budget. However, Clause no.2 Volume 1 Instructions to Tenderers, *Financing* [Clause 2.1], clearly states that *'Any offers exceeding the under-mentioned budgets ..... may not be taken into consideration.'*

In view of the foregoing, the Evaluation Committee was of the opinion NOT to eliminate all the offers exceeding the budget but to apply the following Financial Evaluation method in order to produce a fair and equitable result:

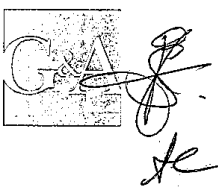
As directed by the Department of Contracts, the following equation was used to determine the financial score:

$$\left(\frac{\text{cheapest offer}}{\text{submitted offer}}\right) * 40$$

It may be stated without disclosing any confidential information that being the closest to the budget does **not result in an automatic adjudication of the tender.** By adding the financial scores to the technical scores in this case since the recommended obtained the highest scores in the technical (weighted at 60/100) that bidder obtained the maximum overall score, hence he ranked first, i.e. before the Appellants' bid.

Evidently this shows strict adherence to the award criterion chosen, the MEAT criterion with the balance established by weighing technical quality against price on a **60/40** basis as indicated in clause 31.3 of the tender document. It is also to be emphasised that during the evaluation stage of the technical offers the financial offers were not disclosed as this was a separate packages tendering process.

In view of the above, Wasteserv as the implementing agency and the final beneficiary of the public contract CT318/2005, therefore again humbly asks the PCAB to confirm the decision of the Evaluation Committee *in toto* and order the Director General (Contracts) to proceed with awarding the contract in question to the recommended bidder with immediate effect, also in view of the tight schedule imposed on Wasteserv in terms of the applicable provisions of the relevant European Union funds which are partially financing the contract for the improvement of the Sant'Antnin Waste Treatment Plant and Material Recycling Facility.



Wasteserv also humbly requests the PCAB to strike-off from the records of these proceedings the final submissions filed by the Appellants HVJV in so far as they do not address issues arising in the oral hearing of the 20th September 2006 and instead address issues which have already been dealt with at the oral hearing including in certain instances by procedural orders and interim decisions of the PCAB.

Wasteserv thus concludes its final submissions to this honourable Board for its esteemed consideration.

Yours truly,

Dr. Stefan Frendo

Dr. Antoine Cremona

This Board,

- having noted that the appellants, in terms of their motivated 'letter of objection' dated 29th August 2006, and also through their verbal submissions presented during the public hearing held on the 20 September 2006 as well as their written submissions dated 6 October 2006, had objected to the decision taken by the General Contracts Committee, through which they noted that the tender submitted by them was not successful;

- having considered all the following issues, namely:

    1. Admissibility of document filed by Wasteserv Malta Limited
    2. The evaluation process
    3. Expertise and qualifications of the Evaluation Committee members
    4. The Pairwise Comparison Method for evaluation
    5. The appellants' lack of experience in infrastructural works
    6. Subcontracting
    7. Tenderer's limited access to equipment
    8. The Most Economically Advantageous Tender (MEAT)

reached the following conclusions regarding:

1. Admissibility of document filed by Wasteserv Malta Limited

The Board agrees with the submission made by Strabag AG / BTA GmbH & Co. KG / Polidano Bros. Ltd., stating that the provisions of Regulation 84 (11) (a) are self-explanatory.

Furthermore, this Board argues that for it not to accept the submissions made by Wasteserv Malta Limited would tantamount to a mockery of the whole exercise considering the fact that, although the final decision was taken by the Contracts Committee, yet, the tender itself was issued by Wasteserv Malta Limited as the contracting party as well as the ultimate beneficiary.

The PCAB notes that, ever since it was constituted, it has always maintained that all those entities involved in the proceedings have always been allowed to make their own submissions and this for the sake of transparency. Unless otherwise specified in the same legislation governing public procurement, this Board has defined its own time frame policies giving enough time to all other parties to state their part in order to ensure total transparency and expedite matters as much as possible, avoiding unnecessary lengthy discussions and possible deferments of sittings. In view of the fact that this formula has, to date, worked to perfection, this Board finds no scope to modify its own 'modus operandi'.

Also, as stated in Ganado & Associates' submissions, by allowing the contracting authority to participate at the hearings and make its own submissions in line with a similar request made by this Board to the tenderers present during the hearing, it is evidently clear that Wasteserv Malta Limited's 'locus standi' in the proceedings had already been positively acknowledged and well defined by this Board.

2. The evaluation process

This Board besides having heard during the hearing that, for the purpose of this tender, the 'proposed technical solution' was not required for Lot 1 because the design was provided, also notes what was stated by Mr Attard, namely that the tenderers had to show 'the methods proposed by the tender for carrying out the works in compliance with the Employer's requirements' as specified in the Technical Compliance Grid.

The PCAB acknowledges that this may have led to a misunderstanding amongst the interested parties. It, however, also notes that the appellants did not feel the need to clarify whether a solution was required or not at the point before submitting their tender and, as a consequence, the reasons brought forward by the same appellants wherein it was argued by the latter that (a) they did not agree that a technical solution was in fact required and (b) that this issue should not be considered for evaluation purposes, could be, 'prima faciae', seen in the light of, possibly, giving the benefit of the doubt to the appellants. However, the PCAB is also fully cognisant of the arguments raised in regard by interested parties and fully concur with the statements made by Ganado & Associates, namely that the "fact that the design is provided by the Employer does not necessarily mean that the technical solution is given" and agree that proposed "contracts as Lot 1 still require a host of other factors forming part of a proposed technical solution although one of the most important of such factors, i.e. design, is admittedly given by the contracting authority and is therefore identical for all bidders".

Furthermore, the PCAB noted the fact that (a) all the contractors had been advised during the clarification meeting held in November 2005 that the Pairwise Method was going to be adopted to evaluate the offers received and (b) this claim was never contradicted by the appellants during the public hearing.

3. Expertise and qualifications of the Evaluation Committee members

This point was not raised in the appellants' reasoned letter of objection and it was definitely not an issue during the public hearing. As a consequence, this Board argues that the issue should clearly not be admitted at this stage. However it would not be amiss to state that the PCAB is satisfied that the adjudication process itself was carried out on a level playing field and has not come across any justification which could in any way discredit the level of expertise or qualification of the members forming the Evaluation Board.

The PCAB notes that the same appellant company had been the tenderer whose offer was selected by the same Evaluation Committee with respect to lot 3.

At this stage, this Board considers pertinent the argument raised in Ganado & Associate's submission wherein it is stated that:

> "in addition the site visit and the clarification meetings attended by the Appellants were conducted and chaired by the members of the evaluation committee themselves as can be easily attested by the PCAB … It is therefore unacceptable for Wasteserv to be confronted with a similar 'grievance' by the Appellants when they were aware before the date of submission of their bid of all the mechanics of the evaluation process."

4. The Pairwise Comparison Method for evaluation

The PCAB agree with Strabag AG / BTA GmbH & Co. KG / Polidano Bros. Ltd's claim that "all tenderers knew perfectly well that the Pairwise Comparison Method was going to applied for evaluation purposes" and that "The minutes of the site visit held at Sant' Antnin Waste Treatment Plant on the 22nd November 2005 are indisputable and undeniable in this regard" so much so that these include the following, viz:

> "Following the last clarification request Ing. A. Attard informed the members present that the evaluation grids do not contain any scorings, since the evaluation will be assessed by means of the "Pairwise Comparison Method", an American Method which is scientifically proved" and that at "no point prior to the oral submissions of the 20th September 2006 did the Objecting Tenderer contest the Pairwise Comparison Method, on the contrary, the above-mentioned minutes of the site visit were endorsed by the Objecting Tenderer."

This Board took note of the appellants' submission in which, inter alia, it was claimed that…

> "The Appeals Board raised an interesting point by questioning whether or not there was any substantial difference in the points awarded to the tenderers by the individual members of the Evaluation Committee. Although the Chairman of the Evaluation Committee stated that there was none, the Appeals Board, on viewing the results, ascertained that indeed the scoring was not consistent."

Yet, this Board also notes that, although it is true that the PCAB observed a certain discrepancy between the points given by various members of the Evaluation Committee, this, in itself, cannot be deemed to invalidate the process.

It is inherent within the system used for adjudication that in view of the fact that the Evaluation Committee is composed of more than one member, the points given by any member in any similar circumstance, would, unavoidably, attach to such points a certain degree of subjectivity, necessarily so because opinions of different persons are bound to vary! The PCAB notes that, it is the accumulation and the averaging of these points that render the exercise an objective one.

It is to be pointed out that the Pairwise Comparison Method was the method adopted by the Evaluation Committee in the evaluation of all bids with regard to all lots. Is one therefore to understand that what the Objecting Tenderer is proposing is for all the tender awards to be annulled … including that where its own bid was successful?

Yet, having said this, this same Board could have looked at this issue in a totally different manner had any accusation or proof been brought forward that one or more members of the Evaluation Board had carried out their duties with some hidden agenda. This is being stated in a scenario where such accusation did neither emerge from the public hearing nor from the written submissions.

5. The appellants' lack of experience in infrastructural works

The PCAB has noted the appellants' claim that during the hearing "Ing. Attard was asked to comment about how the Evaluation Committee could have arrived at such a conclusion when one considers the fact that Vassallo Builders Limited has been engaged in these types of activities for the past 60 years".

This Board also notes Ing. Attard's reply wherein, apart from maintaining that, in the Committee's opinion, the projects listed by Vassallo Builders in Form 4.6.5 did not involve infrastructural works, he also stated that "the declaration in the Strengths and Weaknesses Report was just "bad English" and it should have said the experience of JV Haase / Vassallo when compared to the other two tenderers of Lot 1 was less preferred."

In their submissions, the appellants proceed by stating the following:

> "The general description of the works for Lot 1 as set out in volume 3 section A2 may be summarised as comprising:
>
> - Dismantling of parts of the existing steel structures and re-erection on the proposed locations on the site;
> - Fixing of new metal composite cladding panels;
> - The demolition of a limited number of small structures;
> - Excavation and filling works;
> - The construction of a number of structures;
> - The supply and installation of services including related building services, pipe work and storm-water culverts;
> - Carrying out structural alterations to buildings being retained and their refurbishment;
> - Landscaping works, including coated macadam paved areas, concrete footways and soft landscaping.
>
> With all due respect it is certainly a misconceived idea that the construction of major hotels, old people's homes and other projects of a similar entity as listed by the Joint Venture do not involve infrastructural works of the type and nature listed above. As a matter of fact all of those projects listed by the Joint Venture involved significant infrastructural works which were by far more complex and extensive than those contemplated in Lot 1."

One has to place the above statement within a certain perspective as regards the way the evaluation process is carried out in so far as the Pairwise method is concerned. This is evidently substantiated in an excerpt from a Telefax Message dated 16.08.2006, transmitted by Ms Jacquiline Gili (Department of Contracts) to Mr N Vassallo (Haase / Vassallo JV) in which she states that

> "the Evaluation Committee affirms that the low scoring by certain tenderers does not signify that they are incapable of meeting the tender's requirements. This outcome simply means that the proposed technical solution of these tenderers was less preferred (although compliant) to the other contenders, when compared together and in the light of the minimum criteria requested in the tender documents."

In its deliberation this Board has also taken into consideration the point raised in Messrs Strabag AG / BTA GmbH & Co. KG / Polidano Bros. Ltd's submissions, namely, that without entering into the merits as to whether the appellants possessed the necessary experience or not it, this Board agrees that

> "the Objecting Tenderer failed to furnish details of similar projects undertaken by it in the past. The Objecting Tenderer was not precluded from submitting such information. It is, however, up to a tenderer to prove that it possess the qualities necessary to satisfy tender requirements. It is not the Evaluation Committee's task to fill in any lacunas in a tenderer's bid. Such an exercise would vitiate the evaluation process. The Committee can only decide on the documentation made available to it. If documentation was not submitted one cannot expect the Evaluation Committee to make assumptions of the sort the Objecting Tenderer expects it to do."

6. Subcontracting

The PCAB has also examined the issue wherein the appellants needed to subcontract steel works and road works within a context in which "the total value of the works to be subcontracted by JV Haase / Vassallo is only of 6% of the total Tender value, therefore well within the 30% limit imposed by the tender documentation."

This Board concurs with the appellants' claim, taken in isolation, namely, that 6% is relatively low for the same factor to be regarded as a 'weakness' especially when one considers that this falls "well within the 30% limit imposed by the tender documentation".

Yet, the PCAB's major concern is that any Evaluation Committee would have encountered some degree of difficulty in analysing a similar statement such as the following made by the appellants in their bid, viz:

> "As we mentioned during Clarification Meeting we as yet do not have any commitments with any subcontractors or suppliers, although it would be our intention to subcontract the roadworks to either Bitmac, Asphaltar, or Polidano. We also intend on subcontracting certain Structural Steel Works to either Motherwell Bridge (Malta) Limited or Steel Structures Limited."

Once again, the appellants have been unable to provide the Committee with concrete supporting evidence as to what they actually had in mind.

This Board has to note that had there been any formal arrangement between the appellants and the eventual subcontractors then this would have been manifested in the bid; the lack of such mention gives rise to vagueness … hence, in this instance the term 'weakness' may be justified. Needless to say that considering this perceived 'weakness' a corresponding reflection in the scoring becomes inevitable!

The PCAB notes that clarity of scope is pivotal in the submission of bids as there is a limit to what clarification processes can clarify or what level of arbitrary decisions an evaluator should make. This Board acknowledges that subjectivity is a two-edged sword. Indeed, subjective considerations become more difficult when bidders either assume or simply refrain from providing pertinent information which could be evaluated. The Pairwise method of evaluation acknowledges this and at the end it is reflected in the scores given by the evaluators during the process.

7. Tenderer's limited access to equipment

The Board agrees with the appellants that the term *weakness* could have been inappropriately used.

Whilst agreeing with the appellants that "the equipment listed was to include only the equipment proposed and available for the execution of the contract, and not the whole fleet of equipment owned by the tenderer" and intrinsically in stating this could not have been considered by any evaluator as a *weakness*, yet the so-called *weakness* would have been seen as such within the context that, once it is not yet possible for a bidder to define the subcontractor one is going to collaborate with for the execution of this tender, then how can one establish with certainty, 'a priori', the level of accessibility to the equipment contemplated or implied by a Tender Document? Once again the Pairwise method compares amongst what is seen to provide clear supporting documents and arguments against something which could cast doubts in any way. This is largely why an evaluator compares (it is a Comparison Method after all) and one ends up demonstrating a preference towards one proposal vis-à-vis another.

The appellant company together with other bidders had been duly informed before the tendering date that the method to be used for adjudication was to be the Pairwise method. The appellants accepted this and even signed a document to that effect. The appellants did not query any aspect of how the method would be applied.

It is not a question of a tenderer not necessarily having what it takes but the Pairwise method allows for evaluators to separately make use of *subjectivity* to ultimately reach one common objective, namely the *Most Economically Advantageous Tender* (MEAT).

8. The Most Economically Advantageous Tender (MEAT)

The PCAB has taken note of the FINAL EVALUATION REPORT – LOT 1 comment in which the Evaluation Committee states:

> "All financial offers received for Lot 1 exceeded the budget. However, Clause no. 2 Volume 1 *Instructions to Tenderers, Financing*, clearly states that 'Any offers exceeding the undermentioned budgets … may not be taken into consideration'. In view of the foregoing, the Evaluation Committee was of the opinion NOT to eliminate any offer exceeding the budget but to apply the following Financial Evaluation method in order to produce a fair and equitable result…."

The fact that the appellant company was not eliminated at an early stage shows that the benchmark of admissibility for the tender had been reached. However, this in itself does not mean that, at this stage, the price should have become the principal element in deciding the winning bidder.

This is where the Most Economically Advantageous Tender (MEAT) principle comes into play. To arrive at the winning bidder based on this principle, the Evaluation Committee adopted the Pairwise method to which the appellant company had agreed. This is where the weightings of points in respect of the elements mentioned above worked against the appellants and in favour of the preferred company.

At this stage, having considered all the above issues (1 to 8 above) the PCAB notes that it has not been presented with any accusation or proof that the procedure used was faulty or that any member of the Evaluation Committee had carried out his duties irresponsibly, or worse, in a corrupt manner.

The PCAB acknowledges that the contracting authority, in this case Wasteserv Malta Ltd, had an option to either award the contract on the basis of one of two award criteria, namely based on the *lowest price* or the *most economically advantageous tender* where:

- *Lowest Price* implies that the lowest priced tender wins, i.e. no other element of the tender could be taken into account;

  or

- The *Most Economically Advantageous Tender* (MEAT) means that the contracting authority could take into account factors other than or in addition to price, like quality, technical merit and running costs. As a matter of fact MEAT allows any contracting authority to balance the requirements, for example, of price and quality which in certain cases may achieve best value for money.

Furthermore, this Board acknowledges that in this particular tender, the method for evaluation chosen was the MEAT, so much so that had the lowest price principle been chosen, the Evaluation Committee would have not expressed itself 'a priori' that the weighting of quality against price would have been based on a 60 (technical) / 40 (price) basis respectively! Also, this Board is further convinced that the Evaluation Committee was overall reasonable in its assessment because, apart from the issues raised in 1 to 8 above, the appellants were given the better assessment with regards to the financial aspect of the tender scoring maximum points, namely 40 against the total of 35.23 scored by the recommended tenderers. It was only with regards to the technical assessment that the Committee decided in favour of the recommended tenderers. The price factor alone would have not necessitated the use of the Pairwise method of comparison.

As was stated earlier this Board has not been presented with any accusation or proof that the procedure used was faulty – the major contestation was that the scores given were not according to what the appellants would have expected. However, in similar circumstances it is inconceivable for a non-selected bidder to be satisfied with the score achieved knowing well enough that this would have been naturally inferior to the one attained by the recommended tenderer!

The PCAB is aware that the taxpayer should not be forced to pay excessively for anything which one could buy cheaper. However, this Board, in its deliberations, considering that from a procedural aspect it could not but positively acknowledge the Evaluation Committee's overall assessment, proceeded to place more emphasis on the value for money concept and the extent of the MEAT principle in order to ensure that the price quoted by the recommended tenderer is justified.

In consideration of the fact that the recommended tenderer's overall score was naturally higher (see Table below), this Board tried to establish whether having heard and been presented with facts and figures, there could possibly be a scenario (considering issues discussed in 1 to 8 above) wherein the appellants could possibly overturn the excessive score variant and the outcome of such deliberation was negative.

Name of Tenderer	Financial Score (Out of 40)	Technical Score (Out of 60)	Overall Score (Out of 100)	Overall Score Score Variance
Strabag AG (+ BTA GmbH & Co. KG + Polidano Bros. Ltd)	35.23	60.00	95.23	17.05
Haase Anlagenbau AG (+ Vassallo Builders Group Ltd.)	40.00	38.18	78.18	-

The ultimate consideration taken was whether, in the existing circumstances, the variance in the overall price expected to be paid if the recommended tenderer were to be confirmed was justified or not.

The Table shown hereunder was compiled by the PCAB and, following a close scrutiny of the figures arrived at, it was resolved that a variance of Lm 375,929.75 in a tender whose estimated cost is Lm 2,500,000 is more than justified having

a. favourably accepted the technical merits of the bid concerned

and

b. considered the opportunity cost of not accepting it solely for the price factor, having already established that this Board had taken note of the FINAL EVALUATION REPORT – LOT 1 comment in which the Evaluation Committee states:

"All financial offers received for Lot 1 exceeded the budget. However, Clause no. 2 Volume 1 *Instructions to Tenderers, Financing*, clearly states that 'Any offers exceeding the undermentioned budgets … may not be taken into consideration'. In view of the foregoing, The Evaluation Committee was of the opinion NOT to eliminate any offer exceeding the budget but to apply the following Financial Evaluation method in order to produce a fair and equitable result…."

Name of Tenderer	Price in Lm (excluding VAT)	Price in Lm (excluding VAT)	Overall Price Variance in Lm (excluding VAT)	Overall Price Variance (Recommended Tenderer vs Appellants) in %age terms	Overall Price Variance (Recommended Tenderer vs Estimated Cost) in %age terms
Strabag AG (+ BTA GmbH & Co. KG + Polidano Bros. Ltd)		3,149,824.07	375,929.75	13.55%	25.99%
Haase Anlagenbau AG (+ Vassallo Builders Group Ltd.)		2,773,894.32			10.96%
TOTAL ESTIMATED VALUE OF TENDER	2,500,000.00				

This reasoning fully vindicates the MEAT principle in this particular instance.

In view of (1) to (8) above, this Board does not find in favour of the appellants and in terms of the Public Contracts Regulations, 2005, this Board recommends that the deposit submitted by same objectors should not be refunded.

Alfred R Triganza
Chairman

Anthony Pavia
Member

Edwin Muscat
Member

1 November 2006