PUBLIC CONTRACTS REVIEW BOARD

Case 1943 – CT2032/2022 – Works - Competitive Procedure with Negotiation: for the Design, Build/Construction and Operating of a Waste to Energy Facility in Malta in an Environmentally Friendly Manner – Wasteserv Malta

23rd February 2024

The Board,

Having noted the letter of objection filed Dr Matthew Paris and Dr Adrian Delia acting for and on behalf of Hitachi Zosen Inova AG-Terna S.A., (hereinafter referred to as the appellant) filed on the 23rd October 2023;

Having also noted the letter of reply filed by Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja on behalf of Ganado Advocates acting for and on behalf of Wasteserv Malta Ltd, (hereinafter referred to as the Contracting Authority) filed on the 2nd November 2023;

Having also noted the letter of reply filed by Dr Daniel Inguanez acting for and on behalf of the Department of Contracts, (hereinafter referred to as the DOC) filed on the 2nd November 2023;

Having also noted the letter of reply filed by Dr John L. Gauci and Dr Joseph Camilleri on behalf of Dr John L. Gauci & Associates and Mamo TCV respectively acting for and on behalf of Paprec Energies International – BBL Malta (hereinafter referred to as the Preferred Bidder) filed on the 2nd November 2023;

Having also noted the letter of reply filed by Dr Steve Decesare on behalf of Camilleri Preziosi acting for and on behalf of FCC Medioambiente Internacional S.L.U (hereinafter referred to as the Interested Party) filed on the 2nd November 2023;

Having heard and evaluated the testimony of the witness Dr Claudette Fenech (Representative of the Malta Business Registry) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Ms Branica Xuereb (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Francesco Javier Aizpuru (Representative of Hitachi Zosen Inova AG-Terna S.A.) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Panagiotis Baikas (Representative of European Dynamics) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Markus Reinhard (Representative of Hitachi Zosen Inova AG-Terna S.A.) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Dr Robert James Couth (Representative of Frith Resources Management) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Anthony Cachia (Representative of the Department of Contracts) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Yoannis Nousis (Representative of Hitachi Zosen Inova AG-Terna S.A.) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Charlon Buttigieg (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Louis Buhagiar (Representative of Jobsplus) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Ms Alexia Kountouri (Cypriot Procurement Lawyer) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Stephen Dimech (Member of the Evaluation Committee till PQQ stage) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Adrian Dalli (Director General of the Department of Contracts) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Dimitrius Nectarius (Representative of Deloitte Athens) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Prof Frank Bezzina (Chairperson of Wasteserv Malta Ltd) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Henry Fenech (Board Secretary of the Public Contracts Review Board) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Ms Stephanie Scicluna Laiviera (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Jonathan Scerri (Chairperson of the Evaluation Committee) as summoned by Dr Matthew Paris acting for Hitachi Zosen Inova AG-Terna S.A.;

Having heard and evaluated the testimony of the witness Mr Jeppe Rasmussen (Representative of COWI) as summoned by Dr Clement Mifsud Bonnici acting for Wasteserv Malta Ltd;

Having heard and evaluated the testimony of the witness Dr Rasmus Dilling (Representative of COWI) as summoned by Dr Clement Mifsud Bonnici acting for Wasteserv Malta Ltd;

Having heard and evaluated the testimony of the witness Mr Richard Bilocca (Representative of Wasteserv Malta Ltd) as summoned by Dr Clement Mifsud Bonnici acting for Wasteserv Malta Ltd;

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

Having noted and evaluated the minutes of the Board sittings of the 22nd November 2023, 24th November 2023, 14th December 2023, 16th January 2024 and 17th January 2024 hereunder-reproduced.

Minutes

Case 1943 – CT2032/2022 – Works - Competitive Procedure with Negotiation: For the Design, Build/Construction and Operating of Waste to Energy Facility in Malta in an Environmentally Friendly Manner

The publication date of BAFO was the 26th June 2023 and the closing date was the 31st July 2023.

The estimated value of this tender, excluding VAT, was € 549,000,000.

On the 23rd October 2023 Hitachi Zosen Inova AG-Terna S.A. filed an appeal against Wasteserv Malta Ltd as the Contracting Authority objecting to its disqualification on the grounds that its bid failed the satisfy the criterion for award being the offer with the Best Price Quality Ratio (BPQR).

A deposit of € 50,000 was paid.

There were three bids.

On the 22nd November 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Hitachi Zosen Inova AG-Terna S.A.

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Efstathios Natsis	Representative
Mr Thanos Karvelis	Representative
Mr Yoannis Nousis	Representative
Mr Silin Alesander	Representative
Mr Markus Reinhard	Representative

Contracting Authority – Wasteserv Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Jonathan Scerri	Chairperson Evaluation Committee
Ms Susan Portelli	Secretary Evaluation Committee

Mr Charlon Buttigieg	Evaluator
Ms Stephanie Scicluna Laiviera	Evaluator
Ms Branica Xuereb	Evaluator
Mr Richard Bilocca	Representative
Mr Lars Rasmussen	Representative - COWI
Mr Jeppe Rasmussen	Representative – COWI
Dr Robert Couth	Representative – Frith Resources Management

Recommended Bidder – Paprec Energies International

Dr John L Gauci	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Gilbert Bonnici	Representative
Mr Steeve Pendel	Representative
Mr Jose Carlos Casino	Representative

Department of Contracts

Dr Daniel Inguanez	Legal Representative
Dr Mark Anthony Debono	Legal Representative
Ms Marisa Gauci	Representative

Interested Party – FCC Medioambiente Internacional S.L.U.

Dr Steve Decesare	Legal Representative (Online)
Mr Carlos Alfonso	Representative (Online)
Mr Carlos Hernandez Laste	Representative (Online)

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties participating in this appeal. He reminded attendees that in terms of S.L. 12.09 part 13 no photographs or video recording may be made of the proceedings. He then noted that apart from the letter of appeal there have been a number of further applications which can be decided upon if and when they become relevant. An application deemed to be important for case management issues, was filed by Wasteserv on the 17th November after a Board decree that it will not accept further applications. The Board is a quasi-judicial body and under Public Procurement Regulation (PPR) 90(2) is empowered to determine the procedure for the hearings.

At this stage Dr Adrian Delia Legal Representative for Hitachi Zosen Inova Ag-Terna S.A. (hereinafter referred to as Hitachi or Hitachi-Terna) interrupted the Chairman's opening statement and requested permission to file an urgent application on behalf of his clients in accordance with article 737 of Chapter 12 and article 85(1) of S.L. 601.03 of the Laws of Malta requesting the disqualification of a number of members of the Public Contracts Review Board (PCRB) from hearing the case. According to the application, Mr Kenneth Swain, and Dr Vincent Micallef both serve on Boards of other Government entities, whilst Ms Stephanie Scicluna Laiviera is an employee of Wasteserv Malta Ltd and Mr Lawrence Ancilleri is the father of a Wasteserv Malta Director. Since in the view of the applicant the current composition of the Board cannot guarantee the impartiality that one expects the Appellants are requesting that the four persons mentioned should be disqualified from hearing and determining this Case.

The Chairman said that in view of this development the Board will take a recess to consider the application.

On resumption, the Chairman said that the Board will hear the views of the other parties represented at this hearing before making a decision.

Dr Antoine Cremona Legal Representative for Wasteserv Malta Ltd (hereinafter referred to as Wasteserv) said that Appellant was raising the point of impartiality. Wasteserv agrees that the hearing should be an impartial and independent process and this is a fundamental right and agrees with Dr Delia on the provision of article 737. Another aspect to consider is that it is up to the Board to respond to the challenge. One needs to go through the details of each ground of the application – up till now Appellant is in contempt of the order to explain the nature of their claim. Some of the facts are right and some wrong but the application should be heard.

Dr Inguanez Legal Representative for the Department of Contracts (hereinafter referred to as DoC) said that as a preliminary comment he agrees with Wasteserv counsel's submission. It is a matter of regret that the application has come at this stage when the composition of the PCRB has been known for some time and after many witnesses have been called. Nonetheless the application must be heard.

Dr John Gauci Legal Representative for Paprec Energies International (hereinafter referred to as Paprec) said that he concurs that there should be an independent and fair process and he looks forward to discuss the merits of the case.

Dr Steve Decesare Legal Representative for FCC Medioambiente Internacional S.L.U. (hereinafter referred to as FCC) said that his clients deferred to the decision of the Board on this application.

The Chairman said that since it was a state of fact that himself and Dr Vincent Micallef hold directorships with certain Government entities there was no point to hear witnesses called to testify precisely on this point and he therefore requested the agreement of all the parties for these witnesses and the representative of Jobsplus to be released.

Dr Delia said that there was no option to present the application any earlier. Since article 737 applies this was the first opportunity. Appellant wishes to have the statement that the composition of the Board was known beforehand to be substantiated.

Dr Inguanez replied that the entire membership of the PCRB has been known for some time.

Dr Paris said that the Secretaries of the various Government entities called to testify are no longer required and can be released as witnesses.

The Chairman called for another recess to consider the various representations made.

On resumption the Chairman made the following statement:

"Prior to recess, this Board has heard arguments from the appellant that in a nutshell are requesting that two members of this Board are to recuse themselves from continuing to hear this appeal.

This for the reasons outlined by the appellant just now and duly minuted by the Board Secretary.

The Board is hereby conceding the appellant's submission that a request for recusal is to be made in open court and this in line with article 737 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

The relevant regulation challenged by the appellant emanates from the public procurement regulations i.e. regulation 85(1) which reads as follows:

"The chairman or other members of the Review Board shall be disqualified from hearing a case in such circumstances as would disqualify a judge in a civil suit, and in any such case the chairman or member shall be substituted by another member on the panel."

Since reference is made to the disqualification of a judge in a civil suit, what now becomes relevant is article 734 of the Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta).

This Board has gone through all the grounds mentioned for the challenge or abstention of a judge (in this case board members of the PCRB) and finds absolutely no instance which should make a member of this Board to recuse himself.

It must also be pointed out that members of the legal team of the appellant have, in the past (not so long ago), resorted before this same Board, as now composed, on appeals where the Ministry, departments and/or authorities fell under the remit of the same Minister responsible for Wasteserv Malta Ltd. This point which was brought up today, was never ever raised. It begs the question of why now?

It is moreover, important to also mention that this Board takes the recusal of any of its members from any appeals in a very responsible manner. In fact, and it is no secret that for example, I as Chairman of this Board, also hold a directorship within Enemalta Plc. I can solemnly declare that I have never chaired any appeal whenever Enemalta plc was involved. Same goes for the other members making up this Board.

Therefore this Board's decree is that from a purely legal and technical point of view it is fully capable of continuing to hear this appeal in its entirety and finds no legal base at all and at law which allows for such recusal or abstention.

That said, reference is also made to article 39(2) of the Constitution of Malta which states that *"Any court or other adjudicating authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."*

Therefore, the *dictum "Justice must not only be done, but must also be seen to be done"* becomes also relevant.

Once this Board has decreed that technically and lawfully there is no reason for some of its members to recuse themselves, what must now be analysed is that 'justice must also be seen to be done'.

To this end, reference is now being made to the Case of *Campbell and Fell v. The United Kingdom* (Application no 7819/77; 7878/77) before the European Court of Human Rights, based in Strasbourg with Judgement delivered on 28 June 1984.

With regards to the issue raised on the 'Independence' of the tribunal the court stated the following.

"Para 77.

Mr. Campbell alleged that the Board of Visitors which heard his case was not an "independent" tribunal, within the meaning of Article 6 para. 1 (art. 6-1). He contended that Boards were mere "cyphers", were not seen by prisoners to be independent and were, in practice, an arm of the executive: as regards many of their functions, they were under the control of the prison authorities

and had to accept the Home Secretary's directions. In particular, it was submitted that they were not independent in exercising their role. The Commission, whilst recognising that Boards were under a legal obligation to act independently and impartially, stated that this was not of itself sufficient: to be truly "independent" the body concerned must be independent of the executive in its functions and as an institution, such independence ensuring, notably, that justice is seen to be done. In the Commission's view, a Board did not possess the necessary institutional independence: firstly, its members were appointed for limited periods by the Home Secretary and did not appear to be irremovable; secondly, although a Board was not part of the administration, its other functions were such as to bring it into day to day contact with the officials of the prison in such a way as to identify it with the management of the prison. This conclusion was contested by the Government. They maintained, inter alia, that a Board was not part of the management structure of the prison: it was independent of the prison administration locally and nationally and, in discharging its administrative role, did not act on behalf of the executive."

Para 78

"In determining whether a body can be considered to be "independent" - notably of the executive and of the parties to the case, the Court of Human Rights has had regard to the manner of appointment of its members and the duration of their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence"

Therefore it established four (4) separate tests.

<u>With regards to the manner of appointment of its members, the ECHR stated that:</u>

Members of Boards are appointed by the Home Secretary, who is himself responsible for the administration of prisons in England and Wales. The Court does not consider that this establishes that the members are not independent of the executive: to hold otherwise would mean that judges appointed by or on the advice of a Minister having responsibilities in the field of the administration of the courts were also not "independent". Moreover, although it is true that the Home Office may issue Boards with guidelines as to the performance of their functions, they are not subject to its instructions in their role.

In this context, the Board submits that in the same manner as the Prime Minister of Malta appoints members to this Board on the advice of the Minister For Finance, this similarly does not impact on the Board's independence.

<u>With regards to the second test, duration of their term of office, the ECHR stated that:</u>

Members of Boards hold office for a term of three years or such less period as the Home Secretary may appoint. The term of office is admittedly relatively short but the Court notes that there is a very understandable reason: the members are unpaid and it might well prove difficult to find individuals willing and suitable to undertake the onerous and important tasks involved if the period were longer. The Court notes that the Rules contain neither any regulation governing the removal of members of a Board nor any guarantee for their irremovability. Although it appears that the Home Secretary could require the resignation of a member, this would be done only in the most exceptional circumstances and the existence of this possibility cannot be regarded as threatening in any respect to the independence of the members of a Board in the performance of their judicial function.

In this context, it must be noted that the term of office of this Board is exactly the same, i.e. for a three year period. However, in the present case it must be noted that other than this, the removal of members of this Board is covered by regulation 82 of the PPR whereby apart from the term of office,

the removal of members is similar to that of judges and magistrates as opposed to the ECHR concern cited above. Therefore, it does offer security of tenure.

<u>With regards to the third and fourth tests, existence of guarantees against outside pressures and the question whether the body presents an appearance of independence" the ECHR stated that:</u>

The impression which prisoners may have that Boards are closely associated with the executive and the prison administration is a factor of greater weight, particularly bearing in mind the importance in the context of Article 6 of the maxim "justice must not only be done: it must also be seen to be done". However, the existence of such sentiments on the part of inmates, which is probably unavoidable in a custodial setting, is not sufficient to establish a lack of "independence". This requirement of Article 6 (art. 6) would not be satisfied if prisoners were reasonably entitled, on account of the frequent contacts between a Board and the authorities, to think that the former was dependent on the latter however, the Court does not consider that the mere fact of these contacts, which exist also with the prisoners themselves, could justify such an impression.

In the light of the foregoing, the Court sees no reason to conclude that the Board in question was not "independent", within the meaning of Article 6 (art. 6).

Similarly, in the given context, the mere fact that certain members of this Board hold NON Executive roles on other Boards does not in this Board's view mean that this Board is not Independent.

With regards to the test regarding the 'Impartiality of the tribunal' the ECHR stated the following.

Mr. Campbell further contended that the Board of Visitors which heard his case was not an "impartial" tribunal. The Government contested this allegation.

Para 84.

The personal impartiality of members of a body covered by Article 6 (art. 6) is to be presumed until there is proof to the contrary. In the cited case, the applicant has adduced no evidence to give the Court any cause for doubt on this score………. The Court, therefore, perceives nothing in the actual organisation of the adjudication that would reflect adversely on the Board's objective "impartiality". There remains the fact that Mr. Campbell might not have seen the Board as being totally free from bias. However, for reasons similar to those given in paragraph 81 above, the Court does not consider that, in the particular context, this suffices to establish that this requirement of Article 6 (art. 6) was not satisfied.

Having noted that the main point of concern, *inter alia,* seems to be that Enemalta would eventually benefit from the award of the contract this Board submits that should this be the case Enemalta would likewise benefit from such award indiscriminately and independently of who is awarded the tender. There is definitely no interest at risk in this context. This is even for the sake of saying that the appellant wins successfully this bid the terms and conditions stipulated in the power purchase agreement would still become binding on the appellant company should that be the case.

This Board also submits that the alleged grievance raised in terms of Article 734(1)(e) does not hold water precisely because it fails deliberately to specify that the Members Mr Kenneth Swain and Dr Vincent Micallef have indeed any direct or indirect interest with any of the bidders appearing before this Board as duly constituted. As regards the mention of Article 734(1)(a) whereby appellant mentioned the challenge or abstention of any of the Members if they are related to any of the parties by consanguinity of affinity the Appellant can clearly notice that no such member of the Board as duly constituted are those mentioned by that same appellant.

Therefore, this Board submits that from an independence and impartiality point of view it can also serenely state that notions of independence and impartiality are fully and will remain fully observed. Application is therefore decided.

Therefore, this Board is finally inviting the appellant to start initial submissions on the grievances listed in its letter of appeal".

Following this statement Dr Delia stated that the Appellant reserves the right to take appropriate action at the appropriate time.

Dr Paris requested a representative of the Malta Business Registry to testify.

Dr Claudette Fenech (53572M) called to testify by Hitachi stated on oath that she a representative of the Malta Business Registry and as requested she can provide the certificate of registration with regard to Waste Management Services Ltd (C30560) but could not produce one for Wasteserv Ltd or Wasteserv Malta Ltd as there is no such company registered in that name. Asked for information about Mediterranean Offshore Bunkering Co Ltd (C6052) witness stated that that company is a subscriber in another company named Sant' Iermu Shipping Co Ltd (C13997). As regards Enemalta plc (C65836) it is a subscriber in five other companies, namely 3Power Generation Ltd (C66510), Energy Service Centre Ltd (C66511), International Clean Energy Ltd (C66509) and International Energy Development Ltd (C68860) and Automated Revenue Management Services Ltd (C46054). Clean Flow Plus plc (C38895) is involved in another company named WSC International Ltd (C78356). Asked again to provide information on incorporation of Wasteserv Ltd and Wasteserv Malta Ltd witness stated that the company named Waste Management Services Ltd changed its name to Wasteserv Malta Ltd (C30560) as at 28th January 2003.

There were no further questions and no cross examination.

Dr Delia referring again to the composition of the Board, had the full list of members forming the Board confirmed to him. He then asked that it be minuted that Ms Stephanie Scicluna Laiviera who is one of the Board members is today appearing as one of the representatives of Wasteserv Ltd. There is clear conflict here as she is an employee and representative of one of the parties subject to this tribunal.

The Chairman stated that the Board takes the question of recusal of any of its members very seriously. The Board is made up of three permanent and three substitute members and there were several instances where members of the Board have recused themselves. Member Mr Ancilleri has recused himself in this case. Ms Scicluna Laiviera is part of this Board.

Dr Delia said that she is also an employee of a party to these proceedings and comes within Regulation 86. A decision is therefore required on her position.

Dr Cremona said if that is the case Dr Delia should either submit a claim or a request on this point.

Dr Delia re-iterated that he is making a claim and is asking for a decision.

The Chairman said that the Board wishes to hear the views of the other parties on this request.

Dr Cremona said that Wasteserv is always in favour of a fair hearing and will defend that right. The Authority can see the strategy of Hitachi emerging – that of delaying discussing the merits of the case. Ms Scicluna Laiviera was a member of the Tender Evaluation Committee (TEC) and is not sitting on the PCRB at this hearing – this is similar to the situation in the Courts where a judge who has recused

himself can still hear other cases. The real challenge is to the adjudicating board not to members not hearing this appeal.

The Chairman pointed out that the application referred to four particular members in regard to recusal. The reply covered Mr Swain and Dr Micallef as the other two mentioned were not at this hearing.

Dr Inguanez mentioned that Ms Scicluna Laiviera and Mr Ancilleri were not sitting on the current case and therefore there was no need for recusals in their case.

Dr Gauci and Dr Decesare indicated that they had nothing to add to what has been stated.

The Chairman stated that the Board concurs with these views. Ms Scicluna Laiviera is not presiding at this case and there is nothing further to add. This request is now considered closed and the Board will now proceed to hear the merits of the case.

There followed a discussion between the parties as to the order of the hearing of witnesses and to their presence in the Hall during the hearing. After various proposals the Chairman directed that the technical experts can stay for the whole duration of proceedings except when members of the TEC are testifying. If at some stage any objection arises then a decision will be made thereon.

Dr Paris reminded the Board that his application of the 14th November requesting certain information was still pending.

Dr Mifsud Bonnici Legal Representative for Wasteserv informed the Board that some of the requested information is commercially sensitive and the Authority has rejected the request. If the request is upheld it should be limited and made available to all parties.

Dr Paris referring to the 14th November application said that request for information was mostly on Wasteserv reasoned letter of reply and referred to the technical advice received. In the reasoned letter it is stated that the final two bidders did not submit a final binding bid at BAFO stage. Appellant wishes to know why, even if the reason is in redacted form. The Frith Resources Management (hereinafter referred to as Frith) audit report has now been supplied. The names of the partners in the Paprec JV Consortium are required as well as the breakdown of the key financial figures of the submission made by FCC.

Dr Mifsud Bonnici replying on behalf of the Authority stated that the advice given to Wasteserv on the procurement procedure was given verbally by COWI so no document exists. Documents from the other two bidders who did not participate in BAFO contain commercially sensitive information which the Authority is not at liberty to disclose, so it has not been given but is subject to the decision of the Board. If given it should be shared on legal counsel basis. A redacted version of the Frith report has been produced and is available to all. The names of the Paprec consortium are Paprec Energies International as the lead partner and Bonnici Bros Ltd. The Authority has confirmed that the key financial figures of FCC are not confidential and can be made available.

Dr Decesare said that on the 15th November 2023 Wasteserv and the DoC jointly rejected his request for the scoring awarded to the other two bidders on the grounds that FCC as an interested party was not entitled to any effective remedy. Citing PPR 89, 93 and 276c, Dr Decesare said that interested parties are entitled to information and he will be making submissions on this point during the hearing. FCC requires this information to make proper submissions. In respect of the grounds for appeal FCC submits that the claims underpinning Hitachi’s bid are a wrong evaluation, that the price offered is

abnormally low and the irregularity of proceedings. The Board *ex-officio* has the powers under the PPR to determine and cancel a process if within the parameters of the law.

With regard to the matter of the scores, continued Dr Decesare, the General Rules Governing Tenders (GRGT) state that interested parties are entitled to have disclosure and the Authority is bound to provide them. Scores awarded have been given but no justification has been provided as to how these scores were awarded. The Authority and the DoC claim confidentiality but the *South Lease* case obliges the Board to provide the relevant information.

Dr Mifsud Bonnici stated that the FCC is not entitled to jump on the Appellant's bandwagon – it made a decision not to challenge the recommendation of the award and they are confusing the right of defence with the concept of effective judicial protection afforded to protect the exercise of rights emanating from EU law. To claim that right, one must exercise remedy and that remedy is to pay the price to appeal and therefore FCC are not entitled to request information or file new grievances. Article 558 of the Code of Organisation and Civil Procedure states that all evidence must be relevant to the matter at issue – the information requested has no bearing on this appeal. GRGT 19.2 deals with disclosing the characteristics and relative advantages of the recommended bidder; these have been already disclosed.

Dr Inguanez agreed fully with what the Authority stated. He went on to say that the right to pursue its own case has not been made by FCC and any grievance by them is outside the parameters of Regulation 272. There was no formal objection and no deposit paid whilst the information requested is outside the appeal itself. Fair competition concept and technical capacity of each bidder have a direct bearing on all parties.

Dr Mark Anthony Debono Legal Representative for the DoC said that for an interested party the right to request information is limited. The Authority has adhered to the requirements of PPR 272 and GRGT 10.2.

Dr Gauci said that his clients have not received the application. The FCC are using the letter of reply as a form of appeal; this does not meet the requirements of PPR 270 as they have not filed an appeal. They simply cannot pretend to be an appellant and Paprec agrees entirely with the position stated by the Authority and the DoC.

Dr Paris stated that as there was no release to issue information Hitachi would make the FCC application as their own. The appeal was submitted and request falls within the remit of grievances. It is crucial and fundamental to compare the scores given and any party is entitled to this information again following the *dictum* in South Lease besides many European Court cases citing the right to information. This is fundamental to have equality of arms. The Board can allow limitedly such information to be made available to legal counsel as otherwise it prejudices the making of one's case.

Dr Mifsud Bonnici said that Appellant's statement making FCC's request its own makes it essential to have another round of submissions. Hitachi then should not have any objection to disclosure of the justification of their offer being provided to all parties. The ground of appeal is limited to its own score. The selection and eligibility of Paprec is irrelevant to this ground. There is no justification on the claim of an abnormally low bid as this is irrelevant and there is no link with the scoring. The Court of Appeal (CofA) has ruled that the request for information is not unfettered. CofA Case 11/2016 rejected the disclosure of clarification and rectification requests as they are strictly not relevant to the claim.

Dr Delia expressed incomprehension at the reluctance to provide information. The reason for refusal is based on an exercise in comparatives – given that, how can the Board be assured that the exercise

was properly and correctly carried out and falls within the scope of the appeal. The major underlying principle of the PPR is transparency, so the request is fundamental to make the case.

Dr Decesare said that the Board is right in protecting the confidentiality principle but what was requested is allowed by the GRGT and the Procurement Policy Notes.

The Chairman proposed a recess to enable the Board to consider the submissions just heard.

When the hearing resumed the Chairman said that he will deal with the Hitachi application of 14th November 2023 and FCC request of the 13th November 2023.

On the Hitachi application, the Chairman said there are five separate and distinct requests.

On the first it was established that the advice requested had been given orally and there was no written advice. This request was therefore exhausted.

The grievances in the second request covered the wrong evaluation of the Appellant's bid; the wrong evaluation of the recommended bid on two points and irregularities in the procedure. The Board accedes to this request but such disclosure is to be strictly limited to the legal counsel of the parties.

The Contracting Authority has already rebutted this third request by stating that a redacted copy of the Firth Report has been made available to all and therefore this is also exhausted.

The makeup of the partners in the Paprec JV has been disclosed and this fourth request too is exhausted.

The Authority informed the Board during this sitting that the financial information was not confidential and can be made available. The fifth request is therefore acceded to.

The Chairman concluded by saying that the Board hopes that it can start to hear submissions on this case.

Dr Paris said that before going into the merits Hitachi requests the Board to allow it to submit a new grievance in accordance with article 175(1) of Chapter 12 of the Laws of Malta and this is regard to the position of Ms Scicluna Laiviera as a member of the evaluation committee which is in direct conflict with her role as member of the Public Contracts Review Board and which runs counter to the provisions at law and consequently for the Board to declare the conclusions of the evaluation committee null and void.

The Chairman directed a recess so that all parties could consider this new application following which submissions were made.

Dr Cremona said that in regard to the admissibility of the application in the records he re-iterates the statement about an impartial hearing and Wasteserv have no objection to admitting it but leaves it to the Board to decide on the point. However, this is nothing but a complete sideshow to have the Appellant 'have his day in Court'. There was nothing irregular or unethical in the evaluation process. As to the merits of the application, Dr Cremona requested that the Authority is allowed to reply in writing to deal with it but at this stage would mention that there is an objection to the way the application is worded with an underlying inference that there is something untoward in the formation of the Board.

Dr Paris agreed that the wording may not have been too well-chosen but the aim of the application is to add an extra grievance.

Dr Gauci referred to PCRB Case 1898 in which the PCRB held that an extra grievance cannot be filed at the hearing stage. He reserved the right to deal with the merits of the application.

Dr Decesare said that a recent CofA case 451/23/1 confirmed the point regarding the addition of a grievance whilst Dr Delia pointed out that till this case started nobody knew the make-up of the TEC and therefore Hitachi could not have submitted their application any earlier.

After a short recess the Chairman said that the Board took cognisance of the application presented at today's sitting and accedes to the request by the Appellant to submit a new grievance in terms of Regulation 86. As proposed by the same Appellant the Board is giving it till noon tomorrow to submit the new grievance specifically and as limited as postulated in this application. All parties to this appeal are given till tomorrow at end of business to file a reply. In this context the Board makes ample reference to the CofA decision in the case *Support Services Ltd vs Agenzija Sapport, Direttur tal-Kuntratti u Executive Services et*. whereby the Board will be deciding on the merits of the newly submitted grievance in the final decision. He then invited the Appellant to make submissions on the merits.

Dr Paris stated that on the 13th October 2023 the Consortium received a letter stating that its offer was not successful according to the table indicating the scoring. This was the end result of a three cycle competitive procedure with negotiation procurement process. This involved a Pre - Qualification Questionnaire (PQQ) for which there were eleven entries. Five of these made it to the Invitation to Tender (ITT) stage and were invited to submit a Best and Final Offer (BAFO). This procedure directed by a Euro Directive was unusual for Malta. The Appellant strongly believes that throughout the process there have been irregularities and a number of mistakes and inconsistencies. Appellant has filed three grievances under Regulation 270.

The first grievance, said Dr Paris, is that the Appellant's bid was wrongly evaluated - there was a breach of the doctrine of self-limitation and it was judged on items which were not in these cycles of the tender document and hence affected the scoring. The second grievance concerns the alleged claim by the TEC that certain documents claimed not to have been included were in fact, included but not retrieved by the TEC. During the negotiations Hitachi were given feedback that what they were providing was of a high degree and it was what was expected. If documentation could not be traced a clarification should have been requested. The technical score given was not adequate and should have been much higher as whatever was asked for was submitted. The claim by the Authority that a higher score would not change the ranking order is irrelevant since if it shown that the marking should have been higher then it is a clear indication that the evaluation was not done correctly and a re-evaluation would be in order.

On the second grievance, continued Dr Paris, one is also referring to the Paprec bid and deals with the point of the reliance on the capacity of third parties. A number of entities were relied upon in the first part to satisfy certain requirements involving certain commitments. The quoted price is practically impossible to offer the solution requested by the Authority and experts will show that the offer is either not of the calibre requested or else additional payments will have to be made as the project cannot be sustained.

Dr Paris further claims that there are irregularities in the process as the Appellant did not have an opportunity to submit any applications between the second and third stages. The PQQ refers to the PPR and specifically to Regulation 262 but this is not referred to in any other cycle. This is one tender with one procedure and the irregularity could only be flagged now and nowhere else. Regulation 262 was only available prior to the first cycle – thereafter only Regulation 270 was possible. Through a

request for information it is established that four out of the invited five submitted a financial offer – the grievance here is that in a negotiating situation where one is bound by non-disclosure no one is allowed to publish the price; this is distortion of competition and an irregular procedure. Once the DoC and Wasteserv discovered an irregularity they should have taken action by cancelling as provided in regulation 13 of the BAFO. Appellant will show that there were breaches of various articles of the Euro Directive which leads to one conclusion – the sanction of cancellation under Regulation 90(3).

Dr Cremona started by saying that the point of this hearing is to review the appeal by the Appellant of the largest tender issued in the history of Malta. Three bids were offered – Paprec at € 599,659,900; Hitachi at € 781,512,463 and FCC at € 830,665,087. Wasteserv welcomes this opportunity to review what was a process carried out rigorously, methodically with an external review and best practice and which will show that the unjustified and unsubstantiated allegations are unfounded in fact and in law. Public procurement processes can be obnoxious and not being a winner does not mean being cheated – one can simply lose by being € 178 million higher than the competition. Public procurement can be frustrating as it is a human effort which cannot be absolutely perfect. Appellant has to prove that the law has been broken and that the Authority has failed to follow the specific rules of the tender and fair treatment and that such mistakes, if any, made a real impact. The only document that falls below the high standard of all parties in this tender is the appeal which is highly speculative and fact allergic with no leg to stand on.

There were three stages in this process, said Dr Cremona, the PQQ which attracted eleven international participants, five of which went forward to the ITT stage who were then invited to submit a BAFO; three bids were received and the decision followed. An intricate and detailed BPQR was built into the process –technical and divided into a number of sub-criteria with an ultimate number of 228 Specific Added Value Considerations (SPAVC) with a final assessment carried out by COWI. All bids were high level offers which achieved high grades in response to a well written tender document. The deciding factor was the financial bid which was the crux of the offer. To provide fair competition and a compliant process the Authority relied on a triple process.

First, continued Dr Cremona, was the high calibre of the TEC members who however were not experts In the subject of energy-to-waste. There was no requirement that the TEC had to have inhouse expertise and there was nothing wrong in obtaining outside expertise. The second level is COWI which firm has 90 years vast experience in designing solid waste management matters and who were selected through a competitive process with involvement from the very beginning. On a further level was Frith Resource Management whose task was to carry out a live review of the technical element of the evaluation process and who came to the same result as COWI. The Authority engaged Willis Towers Watson, a top insurance firm to assist in the insurance aspect.

According to Dr Cremona there was no breach of the law, no wrong evaluation, no misstep to breach the right of the other parties. The outcome can withstand any challenge under the PPR in Malta. After a complex procedure all that Appellant could come up with are three paltry points with grounds that are speculative, unclear and full of assertions and totally out of sync with the offers received. The very detailed legal framework of the PPR and the local and European case law were meticulously handled by the TEC. The appeal is based on an academic claim.

Dealing with the first grievance, Dr Cremona stated that this claim is completely circular and would have no effect on the outcome, because even if awarded maximum points it would have no effect on the result – it is purely an academic argument. By reproducing a table which is a collage of factors of their own making and not one produced by the Authority, the Appellant has done the TEC an injustice. The second grievance makes observations regarding the composition of Paprec JV and expresses

concerns in regard to certain technical aspects – shots in the dark with no concrete basis. The third grievance raised the point on abnormally low bid which FCC states in their reply. The winning bid is 9% higher than the estimated value of the tender and the claim is therefore conceptually impossible. The fourth ground which deals with the disclosure of the financial bids at ITT stage can never be an issue. There was total unreserved acquiescence by the Appellant to the disclosure once it submitted the bid at BAFO after the disclosure. There was nothing wrong at all in publishing the aggregate bids. Things have not happened the way described by the Appellant and it cannot deal with what right FCC have to reply and participate. You need to buy a ticket to go to the show and only one is admitted on that ticket. FCC have the right to reply but they have no *locus standi* to make requests. The allegation made on the grievance raised on the technical score and the claim that it is an error of assessment must be proven. Wasteserv are confident that the result will be vindicated as they have three exceptionally high level bids from international companies lined up for the project but it depends on the best financial performance.

Dr Inguanez said that Hitachi are claiming that the procedure is a new one and raises doubts that the Authority is not experienced in this respect. Both the DoC and the Authority have dealt with the utmost responsibility, care and confidence with a number of checks and reviews along the way and no mistakes due to inexperience. The procedure is flexible with only a couple of Regulations regulating it and with transparency to obtain the best solution at the best price. The Appellant knew full well the terms at every stage. It was only after the ranking became known that Appellant raised objections. The inadmissibility of the pleas raised highlight the mindset of the appeal. Hitachi's argument is that even if the error was made at an early point then the process is incorrect and necessitates re-evaluation. This would only be of use if the ranking changed – if it remains the same what is the point? Certain grievances could have been raised at an earlier stage. Hitachi's approach in their listing of grievances makes clear their intentions – if Hitachi cannot win no one can.

Dr Camilleri started by saying that there were initial submissions with others later in this tender. This is a review process and it is the task of the Board to decide if it is fair and correct; there is no merit in repeating this point as it has been explained by the Authority. We heard a great deal on the depth which the evaluation was carried out with the input of the technical experts supported by live auditors and one must not detract from the level of the offers submitted. The purpose is to defend the winning bid of the consortium. This review process should be carried out serenely by the Board with no politicising, media debate or allegations against the Board or members of the TEC. One is convinced that it will be shown that the process was fair and in line with PPR. The grievances are often vague and allegations have been made but not substantiated. One should have reasonable basis if one is to make allegations in the vain and vague hope of finding something to make further allegations. Several requests have been made indicating that a fishing expedition is being embarked on. Two grievances made; one that Appellant should have received a higher score makes no sense in claiming it should lead to cancellation and hoping that through some mistake or another it might lead to it being given a second bite. This is not what this process is about. The other is the point on the revelation of prices – the law does not specify that it should bring nullity of tender. In a situation where this affected the element of competition it is strongly contended that this is trying to get a cancellation situation at all costs. The preferred bidder maintains the right of further submissions.

Dr Decesare said that he had two point to make. In relation to the bids, the fact that three bidders were less than two points within each other is an indication that a proper valuation was not carried out. As to the claim about an abnormally low bid FCC explained how the offer can be assessed as such in the guidelines indicated in its reply and will provide further case law in support – otherwise it relied on its reasoned reply.

Dr Paris requested that witnesses be heard.

Ms Branica Xuereb (139591M) called to testify by Hitachi stated on oath that she was part of the evaluation team and her colleagues were Stephanie Scicluna Laiviera, Charlon Buttigieg and Jonathan Scerri as Chairman and Susan Portelli Secretary. Once the tender was published the evaluation committee was nominated and it was the same committee throughout but it was not involved in the negotiations. Witness was not privy to who formed the negotiating committee. There were eleven bidders at PQQ stage and a report was prepared by the evaluation team. Asked about the team's competences, witness stated that her competence was in procurement, Stephanie is also in procurement, Charlon is technical and the CFO has a basis of procurement and financial background.

Witness went on to testify that once the report on the PQQ was complete it was forwarded to the Department of Contracts. Eventually she was informed orally of the outcome of the negotiations at an internal meeting. She again re-iterated that she did not know who were the members of the negotiating team. After the negotiations the number of bidders was reduced to five which had to be evaluated on the BAFO document. Witness was not appraised how the others 'fell through' nor did she see the report so she could not say on which competence they failed. The five bidders selected were FCC, Hitachi, Paprec, Maghtab Environmental and Sacyr - she was not informed why these last two mentioned did not submit a financial offer. On the three bidders who submitted a financial offer the evaluators had to see if they met the requirements of the BAFO document, to see whether they were compliant, whether they gave the full documentation required and everything that was listed in the document. The evaluation was very extensive and very complex and in fact the evaluation committee met several times and with the assistance of the technical advisers throughout this process.

Asked about Paprec, witness said that the consortium consisted of Bonnici and Paprec itself and there were a number of parties they relied on, namely: LCB La Corbeille Bleue, Tiru, Paprec Energies Centre Est, Paprec Energies 66, Zrar Ltd, Paprec Energies Reseau, Thiverval Grignon, Paprec Energies Azerbaijan and Paprec Engineering CNIM. Witness confirmed that Paprec named entities are all limited companies and that they had given declarations under clause 2.3.5 of the tender that 'in regard to criteria relating to economic and financial standing the other entity or entities shall together with the candidate and its partners be jointly liable for the execution of the contract'. A sample of the undertaking given was read out in full by witness who stated that overall the undertakings are quite similar except for that of Zrar Ltd which states that it 'shall ensure that throughout the whole tendering process all terms and conditions of the PQQ documents be respected and that in the eventuality that the joint ventures bid is successful, all terms and conditions of the contract will be adhered to.' This was done through a letter of undertaking which also gave a breakdown of how the support will be given. Witness confirmed that ESPDs were submitted for all entities.

Further questions were put to the witness regarding the economic and financial support or other reasons such as technical that the consortium Paprec Bonnici was relying on and the documentation that had been submitted indicating that support. Witness mentioned random cases where documents presented consisted of forms detailing projects carried out, value, the date of signing of contract, the commercial operation, number of plant lines etc. Witness confirmed that the tender requested a declaration of undertaking in the case of these entities. She was then asked if, having collected the information, she was involved in the markings and the rankings of the various bidders.

Witness replied that if the question relates to the third cycle, then yes. The exercise was not a comparative one but a collective one based on discussions, with each bidder being given a mark. Witness was referred to the rejection letter of the 13th October 2023 which *inter-alia* stated in the 3rd

column 'technical score in proportion to offer with highest average technical score' and it was pointed out to her that this indicated that it was a comparative exercise. Witness stated that the markings were done individually so there was no comparison. The marks were computed according to the criteria, then according to the formula on page 29, clause 5.1. Witness further said that the evaluators discussed the components, where they did not fully understand them the technical experts COWI clarified and helped them to understand fully and after further discussion in that manner the decision was reached on points to be given. COWI did not determine the points; they guided and helped. Asked to explain further witness said among the evaluators there were people who had procurement expertise, others who had a financial background and another evaluator, Charlon Buttigieg, who had a background in engineering. The evaluation team reviewed the documentation and according to it they gave the points and then computed the points according to the evaluation grid. Asked about the weighted scores achieved witness replied that Paprec had achieved a score of 8.54 and the second placed candidate, Hitachi, 8.45. This information was passed in an extensive report to the Department of Contracts which report indicated the ranking of each economic operator but did not recommend a reserve candidate.

At this stage the Chairman said that unless there were any objections cross examination will be reserved, thanked the parties and adjourned the hearing.

End of first day of hearing

SECOND DAY

On the 24th November 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider further the appeal.

The attendance for this public hearing was as follows:

Appellant – Hitachi Zosen Inova AG-Terna S.A.

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Thanos Karvelis	Representative
Mr Yoannis Nousis	Representative
Mr Silin Alesander	Representative
Mr Markus Reinhard	Representative (Online)
Mr Francesco Javier Aizpuru	Representative (Online)
Mr Panagiotis Baikas	Representative (Online)

Contracting Authority – Wasteserv Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Dr Calvin Calleja	Legal Representative
Mr Jonathan Scerri	Chairperson Evaluation Committee
Ms Susan Portelli	Secretary Evaluation Committee
Mr Charlon Buttigieg	Evaluator
Ms Stephanie Scicluna Laiviera	Evaluator

Ms Branica Xuereb	Evaluator
Mr Richard Bilocca	Representative
Mr Jeppe Rasmussen	Representative – COWI
Dr Bob Couth	Representative – Frith Resources Management

Recommended Bidder – Paprec Energies International

Dr John L Gauci	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Gilbert Bonnici	Representative
Mr Desire Ben-Dahan	Representative
Mr Jose Carlos Casino	Representative
Mr Xavier Jacquemont	Representative

Department of Contracts

Dr Daniel Inguanez	Legal Representative
Dr Mark Anthony Debono	Legal Representative
Ms Marisa Gauci	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited further submissions.

Prior to proceeding with the case there was a short discussion on the procedure to be followed in the hearing of witnesses especially because of travel arrangements. The Chairman directed that priority be given to witnesses according to the time of their flight departure with the rest being called later.

Dr Cremona asked that it be noted that the Contracting Authority did not wish to cross examine Ms Branica Xuereb as the documents speak for themselves.

Dr Mifsud Bonnici requested that a Minute be entered to the effect that the Contracting Authority noted that FCC has decided not to appear for today's hearing. The Contracting Authority reiterates that it welcomes the review process by this Board and that it will defend any and all parties right of defence. But, FCC's request for disclosure went beyond the scope of the Appellant's grounds of appeal, of FCC's rights as a non-appealing interested third party and that is why its request has been rejected, in a motivated decree, by this Board. The Contracting Authority notes FCC's refusal to engage further in these proceedings because it did not get its way can only be taken to mean a complete withdrawal with prejudice from these proceedings notwithstanding the artificial and meaningless 'reservation of rights' contained in the blanket statement of the last sentence of the note filed yesterday 23 November 2023. For the sake of good order, it is also to be pointed out by the Contracting Authority that this is the second time FCC has shown contempt to the Board's ruling. The first one, not objected to by the Contracting Authority is FCC's refusal to be present physically at the hearing and to do so remotely notwithstanding a clear procedural order to that effect.

Dr Paris said that Appellant has no comments to make on the Minute as it has no representation rights on behalf of FCC. He requested that he be given leave to extend the right of reply to FCC as due to an oversight he failed to include them in the original submission and the documents were sent late.

Dr Mifsud Bonnici said that he has no observations to make on the above statement. He then requested that one of the technical people remains present during the testimonies so that the parties can have explained to them technicalities being stated by witnesses.

Dr Paris objected to this as according to him there is a precise and clear arrangement that technical people will not be present during testimonies.

Dr Mifsud Bonnici pointed out that to protect the right of defence a technical adviser should be present to help legal counsel.

Dr Cremona said that the purpose of this request is not to influence each other but there is the need for a technical person when it comes to cross examination.

Dr Paris stated that he would need to consult to enable their expert to give his views.

After a short break Dr Mifsud Bonnici in a joint note said that all the parties present agree that in view of the technical nature of the witnesses to be brought forward by Appellant each party is to have one expert present for the testimony. Such individuals will not be prohibited from testifying in the same procedure. In this respect the Contracting Authority nominates for this purpose Mr Jeppe Rasmussen, from the appellant Mr Yoannis Nousis and from the preferred bidder Mr Desire Ben-Dahan.

After a short recess the Chairman said that on basis of the joint note just presented to the Board it upholds the request made by all the parties present and does hereby reform the previous Board's decree *a contrario imperio* limitedly to the request made during today's hearing 24 November 2023.

Witnesses were then called.

Mr Francesco Javier Aizpuru (CH PP 64177924) called to testify by Appellant stated on oath that he is responsible at Hitachi Zosen for the tender process and that he is an Engineer with a Masters in administration and degrees from Berlin Technical University and Cambridge University. Witness stated that he has been working in the power generation industry since 2000, until in 2018 he joined Hitachi. He then went on to detail the role of Hitachi as market leaders in international markets in the construction of waste to energy projects. Plants varying from one million tons to 200 million tons located in the UK and Dubai respectively were cited as examples. Witness explained that he was leading the tendering process which is divided into two parts – one is the construction of the plant and the other one is the running of the plant for the next 20 years. The running of the plant is done with a sub-contractor Iconic.

Witness stated that he was involved in the initial submission and in the BAFO stage following which he received the evaluation report showing the scoring that Hitachi obtained which in his opinion was not correct on five issues. Witness was referred to a document (Exhibit 21) filed by Appellants in their submissions and stated that he would limit himself to points 9,10,11 and 12 in that document. On maintenance (point 9) witness said that the Authority raised concern on life cycle maintenance. He agreed that the exact timing was not written but once it was included in the price it would be changed when technically needed. He went on to explain that usually a matrix is provided to enable forecasting on when major components will be changed – this was not asked for either at the ITT stage nor at BAFO and the Authority now claims that it is missing. On building maintenance Hitachi 's offer indicated that they will do whatever is needed but they never thought that this was relevant and that it will cause them to lose marks.

On the matter of the key experts (point 10) where the Authority commented that SPAVC was not addressed and blind CVs could not be located, witness said that instead of CVs they had provided

descriptions of the people who would be doing the job. In his mind this made sense because nobody can guarantee which individual is going to be doing that job in five years' time. A blind CV is just a picture of the moment and there is no guarantee that it is that person which will be employed; it is written in the contract what role people have to fulfill. Moving on to Organisation (point 11) the comment of the Authority was that the submission raises concern as section is missing. Witness' position on this is that one must go by the whole plan of the plant and how Hitachi are going to organise it which is clearly stated in the key document indicating also the division of responsibility assigned to Iconic. This requirement was satisfied with the organigram provided. Commenting on the interfaces between plants, witness said that there are no interfaces between the different parts of the plant because there is one person responsible overall who would allocate the different responsibilities. Hitachi has a hierarchical structure and this interface makes sense when one has different contractors. As regard point 12 where it is claimed that the information was not full and robust, witness expressed surprise since a full document on Health & Safety was provided combining Hitachi's and Iconic's experience. Referring to his experience in Dubai witness said that this document is usually not asked for at this stage but later.

Replying to questions from Dr Cremona witness confirmed that he was not involved at the PQQ stage. He reiterated that in his view the job description is a useful instrument because it has all the information and is much more enforceable whilst the CV cannot guarantee that that is the person you are going to hire. He went on to say that he thought that he found the evaluation on this specific point strange and unfair but would not commit himself what would be fair.

Questioned by Dr Inguanez, witness said that the Dubai project, the biggest in the world, had a contract value of 1.1 billion dollars for the operational maintenance – to that one has to add the construction and the rest of the asset management and insurances.

In reply to questions from Dr Gauci witness said that he had only reviewed but not prepared Exhibit 21, and he was only competent to testify on points 9,10,11 and 12. Referred to the life cycle maintenance witness said that what he previously stated was not that Hitachi were not doing the lifecycle because they are doing it and it is included in the price as it is part of the job. There are different things – one is the obligation to do and that is included in the price and another thing was that it was not required to provide documentation that Hitachi could have provided. Witness went on to state that lifecycle maintenance is the replacement of the parts that have finished their lifetime and finally said that Hitachi have no experience in sea water cooling plants.

Mr Panagiotis Baikas (Greek PP AH 560926) called to testify by the Appellant stated on oath that he was representing European Dynamics, that he has been senior consultant for e-procurement at the company since 2007 and that his employer company has implemented the e-procurement system that the Department of Contracts in Malta is using and which they are still maintaining. Witness produced an audit trail about the tender and then went on to explain in great detail the protocol and actions in submitting a tender on line, the different types of tenders and the configuration for each procedure.

Witness then produced a spreadsheet of the audit trail. From the moment that the draft tender workspace was created on 24th March 2022, a total of 5837 actions were performed on the system. Since there were no issues from the Department of Contracts regarding the information that was going to be available on this tender the default design was used. Requested to give details on the part when the price and bidders' name was published in relation to the second stage, witness identified the date as the 17th February 2023 and the user name as ys-gcc6 and user gilij001 submitted the list of tenders for unlocking which means that the names of all suppliers that have submitted a bid are published. According to the configuration of the system as soon as the unlocking is finished the name

of the suppliers, the tender ID and the financial details go public. Witness was asked to state how many bids were submitted on the 17th February and what details were released on that date and in particular in relation to the bid of FCC.

Witness said that the audit trail only displays the actions that are performed not what information is displayed.

At this stage Dr Paris said that all he was trying to establish is that out of five offers only four indicated a financial offer. He suggested that the testimony be suspended to clarify this point.

Dr Inguanez intervened to request that the following note be recorded:

"Dr Inguanez for the Department of Contracts clarifies that out of five bids submitted at ITT stage the details for all five bids were published but specifically for the bid submitted by FCC Medioambiente Internacional S.L.U. the published global financial offer appears as '01' as inputted by the economic operator precisely because that operator decided not to submit the grand aggregate total at ITT stage".

Dr Mifsud Bonnici stated that the Authority would like to clarify further that more than five bids are published on the ePPS but substantively five short listed bidders submitted bids on ePPS at ITT stage whilst Dr Gauci said that the preferred bidder defers on this point.

The testimony of Mr Baikas resumed. He was referred to the European Dynamics Economic Operators User Manual and confirmed that this was provided to the Department of Contracts. Page 9 of the Manual makes reference to the two envelope system and witness explained the use and structure of this which was the responsibility of the Contracting Authority.

In reply to questions from Dr Inguanez, witness confirmed that the same configurations applied for a competitive tender as for a negotiated one and that the e-procurement system is by default designed to publish the financial price upon tender opening. Cyprus and Ireland use the same system as Malta for competitive tendering and negotiation. Details of some of the cases in these two countries were given by the witness. Finally, he stated that the system administrators cannot change the configurations of the system.

Dr Paris, in further questions, asked for details of the cases in Cyprus and Ireland.

Mr Markus Reinhard (ID C7260049) called to testify by the Appellant stated on oath that he has been in the waste to energy business for 17 years and holds a diploma in mechanical engineering from the Swiss Institute of Technology and a post graduate diploma in business economics. He has led many complex waste to energy tenders from first clause up to tender close and signature of contracts in the UK, Spain, Italy and Germany. His specific role at Hitachi headquarters in Zurich is as a single proposal manager with a team of dedicated engineers and it was as such that he led the Malta project. The scope of Hitachi in this consortium with Terna Company is for the former to be responsible for the complete electro mechanical process whilst the latter would be responsible for the civil scope and some other dedicated scopes.

Witness stated that he was involved in the second and third cycles of the project and also in the negotiations during the course of which Hitachi received much positive feedback and an understanding that the client was very satisfied with the initial offer. Subsequent to this there were certain clarifications and deviations and these were handled in time for the final offer. Referred to the rejection letter and the low scoring witness was asked to comment on certain items in Exhibit 21 and said that he will deal with point 1 to 7 in a presentation he had prepared.

The testimony was suspended whilst the legal counsel had a discussion as to whether fresh documents can be introduced. Dr Mifsud Bonnici asked for it to be noted that the Contracting Authority and the Department of Contracts do not object to Mr Reinhard referring to a presentation slide that was filed with the PCRB about an hour prior to the sitting.

Dr Paris asked that a Minute be recorded that with regard to the request filed by Wasteserv on 17th November , exhibit reference WSM13 entitled COWI presentation, Appellant finds no objection to release such document to other parties in these proceedings.

The Chairman stated that the Board accedes to the request as minuted by the parties.

Mr Reinhard resumed his testimony with the use of a slideshow. After a short introduction on Hitachi's experience and market share in the waste to energy industry witness went on to deal with the evaluation report and the claim that Hitachi's bid had been underscored since it is claimed the information provided was not detailed enough to be considered full and robust. Hitachi feels that with the massive amount of documentation submitted their offer was robust and detailed and included the preparation of a 3D model, detailed calculations, maintenance descriptions and logistics. This more than covered the concerns raised by the Authority on Item 1.

Item 2 covered the suitability of layout roads, traffic solutions, escape routes and Weighbridge which were not considered full and robust. The witness demonstrated the layout of the roads and escape routes for all five levels, the delivery in and out of the trucks, manoeuvrability areas. With regard to the third item, according to the witness, the raw gas area composition is usually defined by the client but in this case it was left to the bidder. This created problems with producing a proper design due to the possible variations in the type of gases. The boiler design (Item 4) referred to documents missing on the water balance. A witness from Terna who will testify later will provide information where this document can be found according to Mr Reinhard who demonstrated on the slideshow that Hitachi has provided sufficient details for the client or his consultants to know how the boiler is performing. On item 5 the Authority complained that the building layout turbine and related areas were not considered full and robust. Witness stated that on investigation Hitachi found that building shown in the tender was too small to fit in all the equipment and so they redesigned an enlarged building.

Bidder was given a low score on item 6 which covered the process description and capacity margins. Witness said that Hitachi has provided around 150 pages on project description for all areas, descriptions in the method statement itself and supporting descriptions in schemes and drawings. For the capacity margins the bidders have included documents fully aligned with the tender documents and have allowed for further more redundancy than it has been asked for. Flexibility (item 7) was the next item to be contested. Bidder's view is that in their reference document 103, especially the file diagram, they have explained flexibility very well and they are unable to understand what was not clear, more so because they have had no request for clarification. Following best and final offer Hitachi received a letter from the Authority for clarifications and one of the points was about the waste piece size and it was confirmed that bidders were in line with the tender specifications. On the load fluctuations and the heat steam export Hitachi clearly described the turbine capacity and what it can export so it is not clear to them what is claimed to be missing.

In reply to questions from Dr Mifsud Bonnici, witness confirmed that he is a senior proposal manager, has 17 years' experience at Hitachi and was managing the bid on this tender with many other parties and was also involved in the drafting of the submissions, which he had reviewed along with a team. The main items and the most important documents had been reviewed but it was not possible to review every little detail. Witness agreed that he had seen a letter dated 29th July 2023 written by Mr

Kenan Sirin, a sales manager at Hitachi, to the Authority, submitted with the BAFO, thanking them for the interactive and comprehensive negotiations.

Dr Delia objected to the line of questioning as witness was only testifying on technical matters.

Dr Mifsud Bonnici said that in cross examination questions can be asked to test the credibility of a witness. Witness is a very senior man in his Company and between February and July he is praising the process so why could questions not be asked?

Dr Delia - Witness credibility is only in doubt if his report could be criticised.

Chairman – Objection sustained.

Dr Mifsud Bonnici proceeding with his cross examination asked the witness to confirm if items 5 and 6 (Exhibit 21) are cross referring to the first and second SPAVCs (specific added value considerations) under SPAV. This was confirmed by Mr Reinhard who believes that under these items their offer should have been considered full and robust but agreed that two concerns were raised by the Evaluation Committee on these two SPAVCs and that they were not addressed in their presentation. After protracted questioning witness agreed that since there were two concerns for the SPAVCs on items 5 and 6, Hitachi could not be allocated more than eight points in terms of score. Witness was asked next to comment on his remark that Hitachi were disappointed that they were given a low technical score and replied that that is correct and in relation to scoring given to other bidders he expected Hitachi to have been given a score of 90 instead of 84.1.

In reply to further questions by Dr Delia, witness said it was correct to state that in at least seven instances every single concern raised by the Authority was unreasonable, incorrect or outright not right and that his colleague from Terna will confirm that full presentation and documentation were actually submitted.

Dr Robert James Couth (UK PP 564081434) called to testify by the Appellant stated on oath that he had been on previous visits to Malta but that his two day visit of the 2nd October was to fulfill an independent technical audit of the BAFO submissions for the energy from waste facility. Originally hired in 2020 the brief of his company Frith Resources Management was to act as an observer whilst assisting the evaluation team to adjudicate the first round of procurement. Frith has been in business for 15 years with their line of business being waste management. Witness then went on to explain how the audit was carried out at BAFO stage both in preparatory work before the tenders were sent out and subsequently on the evaluation and compared this with their model suggesting items which could be reviewed and comparing the scoring for the three bids with their model evaluation.

Witness went on to testify that Frith was first engaged in relation to this project in 2016/2017 to assist with the sizing of the project as a preliminary process and then went on to when the tender was being prepared for the first round and assisted the adjudication team by monitoring the evaluation. The first round involved the PQQ to select bidders, followed by six rounds of dialogue and one round of negotiations which Frith observed and made comments to try and add value. According to the witness Frith were not involved in selecting or auditing the appointment of the evaluation committee. The meeting with the bidders was in the week commencing 27th March at which Frith monitored on Teams and made comments after the negotiations and provided a negotiation report. A series of questions were put to witness regarding his attendance at Team meetings and other meetings during the evaluation process. Part of the minutes of meetings were read out by witness who made it clear that the minutes and reports thereon were a summary or oversight report. Frith was not involved in the decision to publish prices as this was the remit of the Department of Contracts; after detailing what

the procurement process involved witness reiterated that the publication of documents is a Department of Contracts matter. Witness confirmed that after the preferred bidder had been chosen based on the BAFO evaluation Frith undertook an independent evaluation of the BAFO document and recommended that the contract be awarded. Notification was a matter for the Department of Contracts. Further questions were asked of Dr Couth regarding the correct name of the Contracting Authority and he replied that he is not involved in the structure of the Wasteserv organisation.

None of the other parties wished to cross examine the witness.

Dr Cremona objected to the Appellant's proposal to call Prof Sanchez Graells as a witness on EU procurement and competitive law. An article has already been presented regarding EU procurement. Under Maltese law a witness can testify either on matters of fact which does not appear to be the case here, said Dr Cremona, or on technical matters or as an expert on foreign law. EU law and Maltese law are not foreign and no witness can give evidence on Maltese law - reference PCAB Case 46 of 2004. Tribunal expert evidence on EU law is not admissible as Maltese law is Euro law. In the case cited the PCAB rejected witnesses on law.

Dr Gauci also objected to the production of this witness on the basis that EU law is part of the Maltese legal system and does not require interpretation – legal points should be made at the final submission stage not as evidence. Dr Inguanez also objected for reasons stated.

Dr Paris quoted Article 90(6) of the PPR and Article 563a (i) of Chapter 12 of the laws of Malta regarding the admissibility of expert witnesses. Profs Graells is extremely experienced in public procurement and competition and suitably qualified to testify and there should be no grounds for objections. The Board requires to hear this sort of expertise.

Dr Cremona pointed out that the cited Article 563(a) regulates technical expert witnesses – experts on law are regulated by Article 563(c) which states that one cannot have an expert on our own law.

Chairman – the Board upholds the objection.

Dr Delia asked that the following note be recorded:

"On behalf of Hitachi Terna the Appellant would like to clarify that the expert being requested to give testimony was never requested to interpret Maltese law and therefore including EU law, but specifically put simply to tap into the expertise in public procurement process in its extended interpretation of Prof Sanchez. Opposing counsel would still have all opportunity to object to any specific questions which could counter legislation or regulation."

Dr Cremona requested the following note to be entered in the records:

"Counsel for Wasteserv the Contracting Authority wishes to point out that this clarification is being made after the Board having heard both sides and having issued its decree is a shift in position as debated and decided by the PCRB. The additional witness which they like to produce is a professor whose area of expertise is Euro law and specifically public procurement law and the concept of an expert on local law, EU law being local law, is alien to Maltese civil justice procedure."

Dr Gauci and Dr Inguanez both agreed that their position is consonant with that expressed by Dr Cremona.

Mr Anthony Cachia (142658M) called to testify by the Appellant stated on oath that he is presently a Grade 3 officer in the Department of Contracts having previously been the Director General of the Department of Contracts till 12th November 2023. He stated that the Contracting Authority had chosen

and he had approved the use of the competitive procedure with negotiations on 3 February 2022. This procedure was not usually used but was applied this time as there had been a previous procedure using competitive dialogue in 2020 which was unsuccessful and that it was the best type of procedure to adopt as it allowed negotiations as part of the initial solutions. The evaluation committee is always chosen by the Contracting Authority – in this case Wasteserv and approved by the Director of Contracts. The expertise of the proposed evaluators is checked through their CVs. The witness listed the members of the evaluation committee noting that member engineer Stephen Dimech was replaced by engineer Charlon Buttigieg. The technical advisors COWI and Frith were also approved. Witness then went on to list the areas of expertise of each of the evaluators and mentioned that he did not see anything irregular in a member of the PCRB being an evaluator because he did not expect that she would be part of the the Board hearing this case. Witness was referred to Regulation 86 if the PPR and asked to explain how this did not amount to a conflict of interest.

Legal counsel objected to this line of questioning, on the basis that witness was testifying on facts and he was being asked to make legal submissions.

Witness reiterated that he did not see any conflict of interest and confirmed that the members of the evaluating team had signed the document of impartiality and confidentiality and this applied also to Mr Charlon Buttigieg. COWI and Frith were nominated by Wasteserv, the former as technical advisors and the latter as an observer. Whilst the appointment of technical advisors is normal to help the evaluators, observers are not. Asked if Frith had signed the confidentiality document witness stated that they were nominated by Wasteserv and he left it to the knowledge and discretion of that Authority to appoint somebody that they had confidence in and that they thought was capable of helping them throughout. In the case of COWI they had been involved in the process from the start so witness did not question their impartiality.

Questions to the witness then turned on to the evaluation process and he related how 11 companies applied at the PQQ stage and of these five were successful. Both successful and eliminated bidders were notified by letter via e-mail on the same day. There were no objections so the process moved on to the ITT stage with five contenders. Witness confirmed that under the present system of tendering, once bids are unlocked all the information is given. The ITT cycle closed on the 16th June 2023 by virtue of a notice published on the ePPS, and bidders notified on the 22nd June by letter, which according to the witness, did not state a standstill period and just stated that the negotiation phase has been concluded with no indication of price or preferred and/or reserve candidates.

The BAFO stage, stated the witness, started on the 26th June 2023 and was concluded on the 31st July 2023, and in reply to a question, agreed that before the initiation of the third cycle there was no ten day period. The prices were publicised on the 17th February 2023 before the closing of the ITT stage as part of the initial bid submitted by the economic operators to act as a basis for the negotiations. It is the usual procedure that prices are made public whenever the tenders are opened. Asked to clarify exact dates, witness stated that economic operators were given the opportunity to prepare an initial bid and there was a timeframe which closed on the 17th February when they submitted their bids. Once they submitted the bids, these were published. This was the first competitive procedure that the Department had carried out and the publication was to maintain transparency. The bids were non-binding and could be changed at the BAFO stage and in fact one bidder did not submit a global price and was not excluded because there was nothing in the tender document to disqualify such action. The Department of Contracts, which oversaw the publication of BAFO informed the candidates of the outcome through letters of rejection and acceptance dated 13th October 2023. Paprec Energies International was indicated as the preferred bidder but there was no indication of a reserve candidate as required in article 40.7 of the tender.

In reply to a question from Dr Cremona, witness confirmed that COWI had signed the declaration of impartiality and confidentiality. [For the purpose of the Minutes this is filed In File 7 Blue Tab 12 of the Procurement File].

Witness confirmed to Dr Gauci that no objections or contestations were received when the notice of the public procurement process was published.

Mr Yoannis Nousis (PP AT 5266508) called to testify by the Appellant stated on oath that he is the proposals manager for Terna S.A. and has 14 years' experience in that role. He is a qualified mechanical engineer with a PhD in mechanical engineering and a MBA qualification. He went on to describe Terna as a construction company forming part of the GEK Terna Group one of the largest groups in Greece in the power generation, construction and waste management, with assets of 5.5 billion euro and turnover of 3.9 billion euro. It has established itself in 16 different countries and employs roughly 70,000 people. Referred to the evaluation report, witness mentioned that the Authority claims that overall there is lack of information on the cooling water emissions, water balance, water treatment and effluent systems. This is not correct, said the witness as all the mentioned systems are included in their bid and in any case during the BAFO stage no clarifications were sought by the Authority asking where this specific information could be found. So, according to the witness, there is a defect in the evaluation.

Asked to indicate where this information is located in the bid, witness said that, on point 8, it is in "Table 1 folder 1 or 7, subfolder cooling water drawings, reference drawings 243 to 245". Point 4 on the design technical element is covered in the same way and so are the concerns raised by the evaluation regarding missing water balance. The only communication received from the evaluation committee after BAFO submission was a letter dated 31st July with four high level comments concerning some broad technical issues to which Terna replied positively. Witness further stated that the feedback they got on their bid was technically speaking fast and detailed even though it was very close to the final BAFO. Contrariwise, after the BAFO bid there was no communication or requests for documents or clarifications.

Referred to points number 1 and 2 which concern the design of building layout, roads layout, traffic solutions and escape routes, both issues are outlined on page 1 of the detailed report, according to the witness, but were found not robust and detailed enough. This surprised Terna as in this instance they had developed a basic design with very detailed drawings, bearing structure drawings, 3D views etc. and in their view should have been evaluated better. Points 1, 2, 4 and 8, said the witness, were similar in scope and identical between the ITT and BAFO and that at the negotiation stage the feedback they had received was that the design and progress were at a very good stage and at the higher end technically speaking.

Asked to comment on the price of the preferred bidder's offer, witness said that they had carefully costed the detailed bill of quantities to the exact configuration requested by the client. That rendered Terna at a very competitive level in terms of determining the actual and real direct cost of the works for the complete plant and their price is very, very close to the actual reality considering the very demanding specifications of this project. The proposed Malta plant has certain peculiarities and is a difficult plant and needs a very experienced contractor to execute the works – this point, according to the witness, was made since the water system including the unloading of the sea water of the discharge, the sea water intake and the arm piping up to the plant is very complicated, is not very common in power plants nowadays and needs to be priced very carefully. Secondly, said the witness, the canopy specified by the Authority is also a very demanding and expensive structure; for all these

points the offer price is competitive. The price submitted by FCC was slightly higher than Hitachi but more comparable to their offer.

Questioned by Dr Mifsud Bonnici witness confirmed that he was involved in the competitive dialogue and also in the competitive procedure with negotiations and that in the competitive dialogue Terna had a different partner. He explained that for a company to price a bid first of all they had to have clarity in the technical element and based on this it is priced and that he was involved in this process with the technical manager, overseeing a team of engineers, co-ordinating with their partner and in some cases also drafting the actual bill of quantities. It was correct to say that witness had substantively reviewed the bid submitted by Hitachi consortium and approved of it. Witness claimed that there were certain changes between the ITT stage and BAFO and was asked to identify them.

Dr Delia objected to the question on the basis that this was commercially sensitive information in terms of financial figures.

Dr Mifsud Bonnici said that these are public proceedings but Dr Delia countered by saying that there are persons in the room which are extraneous to the proceedings. The witness may be able to determine whether it is sensitive information or not so he requested the Chairman to indicate to the witness if there is anything in the question which he deems sensitive and confidential he tells us first before he discloses it.

Dr Mifsud Bonnici said that in the nature of these proceedings there is an element of commercial sensitivity. The PCRB has access to the bids submitted by the economic operators. This case is more sensitive than others and the Authority has taken unprecedented steps to preserve the sensitivity of each party in the process – there should therefore be no problem with a question being put to witness and that question being answered when the PCRB, the Appellant and the Authority are present.

Dr Delia said the problem arises if the reply is of a sensitive nature, disclosing data.

The Chairman directed that the question should be put and the section can also be identified but the question should be put in such a way that even an approximate percentage increase or decrease can be indicated.

Witness was referred by Dr Mifsud Bonnici to his earlier testimony on the part in Method Statement 1 which specified that supporting information must be provided as an appendix immediately following the Statement and must be fully cross referenced – witness replied that a reference list had been provided in that regard. When it was pointed out that bidders were not allowed to generate a list instead of cross references, witness said that the Authority should have asked for a clarification. Further questioned about the score that Hitachi expected for their bid witness said that for their technical bid they should have been awarded 100%.

Questioned by Dr Cremona, witness stated that although they have experience in waste management they were never involved in waste to energy projects and that Hitachi are pursuing this project and really want to win and execute this project.

In reply to questions from Dr Inguanez, witness replied that he was part of the team that computed the initial price offered at ITT stage and part of the team that computed the BAFO financial score and that between the two offers there was down pricing. Asked if this down pricing was brought about as a result of knowledge of the price of other bids witness said that after having all the designs in all aspects they were able to price more accurately.

This concluded the testimonies called by the Appellant on the second day and after thanking all the parties the Chairman declared closed the hearing on the second day.

THIRD DAY

On the 14th December 2023 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider further the appeal.

The attendance for this public hearing was as follows:

Appellant – Hitachi Zosen Inova AG-Terna S.A.

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Kenan Sirin	Representative
Mr Yoannis Nousis	Representative
Mr Thanos Karvelis	Representative (Online)
Ms Alexia Kountouri	Representative (Online)

Contracting Authority – Wasteserv Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Mr Jonathan Scerri	Chairperson Evaluation Committee
Ms Susan Portelli	Secretary Evaluation Committee
Mr Charlon Buttigieg	Evaluator
Ms Stephanie Scicluna Laiviera	Evaluator
Ms Branica Xuereb	Evaluator
Mr Richard Bilocca	Representative
Mr Jeppe Rasmussen	Representative – COWI
Mr Lars Rasmussen	Representative - COWI

Recommended Bidder – Paprec Energies International

Dr John L Gauci	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Desire Ben-Dahan	Representative
Mr Jose Carlos Casino	Representative
Mr Steeve Pendel	Representative

Department of Contracts

Dr Daniel Inguanez	Legal Representative
Dr Mark Anthony Debono	Legal Representative
Ms Marisa Gauci	Representative
Mr Adrian Dalli	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties to this third hearing and then went on to state that before proceeding with the day's business the Board has taken note of the urgent application filed by the Appellant on the 6th December requesting the revocation

contrario imperio of the decree dated 24th November 2023 and henceforth the request to allow the testimony of Professor Albert Sanchez Graells. The Board also takes note of the replies by the Contracting Authority, the Recommended Bidder and Interested Party.

At this point the Board would like to re-confirm its decision of the 24th November and thereby proceeds to reject the urgent application filed on the 6th December.

The Board also takes cognisance of the list of witnesses sent by the Appellant on 6th December and an e-mail sent to the Board on the 11th December by the Contracting Authority.

Reference is made to Code of Civil Procedure Article 156(4) which states that :

"The plaintiff shall together with the declaration also give the names of the witnesses he intends to produce in evidence stating in respect of each of them the facts and proofs he intends to establish by their evidence."

Therefore, the Board is hereby ordering the Appellant to declare the object of the evidence for witnesses listed under numbers 3,4,5,6,7,8,9,10 and 11 in its list presented on the 6th December 2023.

Dr Paris replied to this point by stating that the proofs he intends to establish on the listed witnesses was as follows:

> No 3,4 and 5 was in regard to the evaluation process
>
> No 6 in regard to the second stage of the ITT
>
> No 7 to discover if witness is fully aware of all proceedings
>
> No 8 to enquire into the role in the proceedings
>
> No 9 will not give evidence as the Board has decided on this
>
> No 10 in regard to the position of Ms Stephanie Scicluna Laiviera
>
> No 11 to understand why FCC did not submit a financial bid and the implication of the financial bid once published.

Dr Mifsud Bonnici stated that the appeal is limited on specific grounds and the evidence has to be on that issue. It is only fair that witnesses should be given a chance to be prepared.

Dr Delia pointed out that procedurally questions are asked and if objections arise then they are dealt with as they arise and the Board deals with them.

Dr Paris pointed out that Appellant was the only party to declare who their witnesses are and then asked for the first witness to be called.

Mr Charlon Buttigieg (262888M) called to testify by the Appellant stated on oath that he has been employed by Wasteserv for the last eight years, originally at one of the facilities, tal-Kus in Gozo, and lately as project manager on waste to energy project. He has been exposed to procurement and has sat on more than ten evaluation boards and his degree in control and electronics engineering gives him a technical background all the better to understand the technical side of this whole process.

Referred back to his time at tal-Kus, witness said that his role there was as head for seven years of a transfer station from Gozo to Malta with some processing also taking place. Asked if during that time there were any proceedings pertinent to some incident involving an injury to an employee, witness replied that there was one civil and one criminal proceedings against the contractor involved – Sidercamma and Bonnici joint venture.

Witness was asked to leave the sitting.

Dr Mifsud Bonnici objected to this line of questioning on the grounds that criminal proceedings were not part of the case before the Board. Dr Delia replied that it was not his intention to raise details of the criminal case but merely to establish which parties were involved. The relevance of the incident is that it involves the contractor which is part of the consortium in the current case. Dr Gauci said that he had no objection to the parties being mentioned by name and to establishing the facts on the tal-Kus contract.

Resuming his evidence witness said that both proceedings were in Malta and witness was aware that there are also proceedings abroad. The criminal case in Malta, started in March 2021, is still ongoing with witnesses being heard - the civil case is closed but there is an appeal on it. Witness is being sued in the criminal case.

Witness said that he became involved in November 2022 in this particular tender during the ITT stage, by which time the names of the bidders were already known and he was also part of the evaluation committee at BAFO stage. He had signed the electronic declaration on any possible conflict of interest at the time of his initial involvement as he did not see any conflict since Bonnici was not involved in the criminal case and in the civil case he was merely a witness.

Witness was then referred to the present tender and said that he had had meetings with Engineer Stephen Dimech on taking over from him and was given a brief on the state of the three cycles of the whole process. He was given access to the ePPS system, documents relating to the ITT and PQQ stages and anything that was relevant to the tender. There were no prices published at the time he started sitting on the evaluation committee as these became available only at the ITT bidding stage. After further detailed questions witness clarified that at ITT stage he was merely an observer during the negotiations and the evaluation committee came in in the end at the BAFO stage. At the negotiating stage, said the witness, there were five meetings, one with each bidder, and apart from representatives of Wasteserv there was also three representative of COWI and Frith was available online. Witness recalled, following a suggestion from Appellant's counsel, that at the meeting of 29 March 2023, COWI had six representatives present. Witness agreed that not all persons present at the negotiating meetings were listed in the minutes of those meetings. As far as witness was aware he could not tell if Hitachi Zosen had given the committee a waiver to release information.

According to the witness, prior to the BAFO stage he had not been given any reports. There were then over 20 meetings of the evaluation committee and apart from the bids they had a technical report from COWI. Towards the end of the evaluation process Frith handed in an audit report on how the process and the evaluation was conducted. Witness stated that after the evaluators studied and discussed the COWI report they made that report their own. COWI's report, said the witness, also covered the payment element. The evaluation ended on the 5th October and the report was sent to the DoC on the 10th.

Questioned by Dr Gauci about the tal-Kus incident, witness confirmed that the contractor in that project was a joint venture formed by Sidercamma and Bonnici Brothers Contractors Ltd and that there were 14 or 16 persons involved in the criminal case being the directors of Wasteserv and the directors or managers of the labour hire company JF Security or Services. Witness also confirmed that there were no allegations that officials or employees of Bonnici Brothers Contractor Services or Group were somehow involved in these court proceedings and neither was he involved in any proceedings where Bonnici was involved.

At this stage Dr Paris gave notice to the Board that later on in the day on behalf of the Appellant he would be filing an application to include a new grievance in relation to a breach of Article 2 of the PPR on conflict of interest.

Mr Louis Buhagiar (312878M) called by the Appellant testified on oath that he is a Senior Executive at Jobsplus. Having been granted exemption to reveal personal information on individuals he presented to the Board a list of employees of Wasteserv Malta (Doc LB1). Witness then gave the employment history of Susan Portelli, Stephanie Scicluna Laiviera, Charlon Buttigieg, Branica Xuereb and Jonathan Scerri (marked as Docs LB2 to LB6). No details could be provided on Stephen Dimech as his ID card number was not available, but witness undertook to provide this as soon as he is provided with the ID number.

Dr Paris said that the next witness, a Cypriot lawyer, will provide information on the three public procurement cases in Cyprus referred to by the Euro Dynamics witness.

Ms Alexia Kountouri (ID CY740777) called to testify by the Appellant stated on oath that she is a qualified licensed lawyer in Nicosia since 1999 and was called to the Bar specialising in public procurement law. She was referred to a list of procurement procedures in Cyprus going back to 2016 and 2018 and was asked to comment on the types of procedures.

Witness referred to tender number 11/2016 for the supply of chloride solution which was originally published as an open procedure. Only one bid was submitted and the price was considered too high. This was converted to a competitive negotiation procedure with that same bidder. The contract has been executed with no appeals submitted. As the original price was too high the Contracting Authority did not publish the price.

Moving on to the second procedure, tender 8/2018, was for a service contract. In this case it was a direct award process with negotiation as the economic operator was known to the Authority. There was no appeal. The third case was tender number 10/2018 for a service contract with the contracting authority being the Director General, Ministry of Finance. A competitive procedure with negotiation was chosen so only one tenderer was invited and there was no appeal.

Questioned by Dr Inguanez, witness confirmed that all three instances were competitive procedures with negotiations.

Mr Stephen Dimech (468778M) called to testify by the Appellant stated on oath that he is an engineer who till December last year was employed by Wasteserv for 19½ years and currently works for the Public Works Department. He was involved as project leader in the waste to energy tender from its inception till the PQQ evaluation, having been appointed in that role by the CEO and his appointment approved by the Department of Contracts. He recalls that the he and members of the evaluation committee signed the declaration on conflict of interest online. To his recollection there were about 20 meetings which started around June or July 2022 up to the close of the PQQ process.

Witness stated that the proceedings of the evaluation committee were restricted to the five members; however they communicated or sought technical assistance via email from consultants COWI and Frith who were appointed following a request to the Department of Contracts. These consultants were given access to the documents presented by the bidders and as part of their remit they had to draw up a report. Witness further stated that as project leader he requested the report from COWI and that the engagement of COWI and Frith was in fact before the PQQ offer submissions closed and it was him as project leader, not the evaluation committee, that gave them their brief. However, their service with Wasteserv was ongoing from the previous competitive tender.

According to the witness the final report from COWI and Frith was drawn up towards the end of the PQQ evaluation and was annexed to the committee's report and sent to the DOC and the DCC for approval. He was not involved in the process thereafter as he had handed in his notice to leave his job and was aware that the full three stage evaluation might mean changes in the evaluation committee. He did not resign from the committee neither was he removed but simply his job was concluded at PQQ stage and he was no longer involved.

At this stage Dr Cremona intervened to ask the Board to stop Dr Delia's self-serving line of questioning and the only reason for which was to bring forward a fake narrative. When examining one's own witness one should be after the facts not after one own self-serving questions. On the Authority's part the answers of Engineer Dimech are completely irrelevant. It is just the question that Dr Delia is after.

The Chairman stated that the Board was happy with the way witness had replied to the questions posed and upheld the objections of the Authority.

Continuing his testimony, witness stated that he attended just one presentation meeting after September but he cannot say whether he was invited as an evaluator or as the project leader. He never received any authorisation from Hitachi Zosen to release their information to third parties nor was he made aware who had replaced him on the evaluation committee or asked to give a hand-over.

Cross examined by Dr Mifsud Bonnici witness confirmed that the evaluation committee at PQQ stage was assisted by a technical consultant COWI who had done preliminary studies and Frith as observers. COWI had signed the declarations of impartiality before they started assisting the evaluation committee at PQQ stage. It was confirmed by witness that the report prepared by COWI was annexed to the evaluation report which was only concluded after the report by COWI had been delivered, and that he gave a handover on the project to Mr Charlon Buttigieg.

In reply to a further question from Dr Delia witness confirmed that the evaluation committee had made the COWI report their own.

Mr Adrian Dalli (480479M) called to testify by the Appellant stated on oath that he was appointed Director General of Department of Contracts as from the 12th November 2023. As requested he listed confirmation and dates when the declarations of impartiality were signed on the ePPS of participants in the evaluation, namely: Mr Jonathan Scerri, Mr Stephen Dimech, Ms Branica Xuereb, Ms Susan Portelli, Ms Stephanie Scicluna Laiviera; as representative for COWI those persons who signed the physical form were Mr Lars Rasmussen, Mr Jeppe Fischer Rasmussen, Dr Rasmus Dilling and Mr Ermazio Hansen. On behalf of Frith the declarations were made by Ms Cheri Whiteman, Dr Robert Couth and Mr Paul Frith on handwritten forms.

Witness confirmed that the ePPS and the physical form are worded exactly the same and basically confirm that the signatories are privy to the information received regarding the bidders and also that as far as they know at that point in time they did not have any conflict of interest with the respective bidders. Witness did not have the information whether the declarations were signed prior to the opening of the bids or after, but promised to provide the information. Moving on to the negotiating stage (ITT) declarations were signed by Mr Richard Bilocca, Engineer Ryan Cauchi, Dr Hannah Vassallo and Engineer Erdem Ergon. At BAFO stage there was only one change – Mr Charlon Buttigieg replacing Engineer Stephen Dimech. Asked to comment about the appointment of technical experts witness stated that that depends on the complexity of the case and about the nature of the subject and that their report usually forms part of the evaluation report. As far as witness was aware all reports in this case were approved by the General Contracts Committee but he was not given any handover documents on this present process.

Subsequently Mr Dalli provided the information that in the case of Mr Jonathan Scerri, Mr Stephen Dimech, Ms Branica Xuereb, Ms Stephanie Scicluna Laiviera and Ms Susan Portelli the respective conflict of interest forms were in each and every case signed after the opening of the bids. Ms Portelli and Mr Buttigieg's declarations were made through the ePPS.

Witnesses resumed testifying after a short recess.

Mr Dimitrius Nectarius (P764249) called to testify by the Appellant stated on oath that he is a fully qualified partner in Deloitte Athens in the Capital Projects Sector that includes PPPs, public works and project finance arrangements in the infrastructure and energy segment. At the request of Appellant,

Deloitte were asked to perform a financial analysis and benchmarking on similar waste management treatment units in Greece which all deal with solid waste treatment but not incineration. The Malta project involving incineration, a water cooling system, boilers etc. is more complicated and expensive compared to other technologies used in countries like Greece. Referring to the document prepared by witness (Doc Del/1), displayed also on screen share, he stated that the large part of deviation in the figures between the three offers is in the O&M part of the bids. These have been compared to three projects in Greece varying in tonnage capacity between 70,000 and 200,000 tons per annum. Witness then dwelt at great length on the processes and differences between the Greek projects and the Malta project in terms of costs and the macro-economic environment. Referring to the document produced witness said that in his view the O&M cost of 42 in the Paprec case is from the low to the too low side and past projects that had O&M figures of between 44 or 54 euros reached a very close stage of default – so it is an area of risk. A low O&M might also indicate a lower level of service quality. There is also the factor of inflation, which could be running at 40 to 50% to be considered between the PQQ stage to the final binding stage. The other element to be considered is the comparison between the capex where there are departures between the three bids. There are very strict details and requirements in the tender and these items, like the canopy and the cooling system definitely increase the capex by at least 15 to 20%.

Questioned by Dr Cremona, witness stated that the exercise exhibited is a Deloitte product and that he saw his role as an expert witness owing duty to the PCRB. He did not have his letter of engagement at hand but assured the Board that he would make it available. He described his terms of engagement as to review the case and provide Deloitte's opinion as a financial expert on the financial elements, the financial bids as compared to other projects with charges at the standard hourly rates. Deloitte have client relationships with both Hitachi and Terna but not with FCC. Asked to provide a list of documentation witness was given to compile his report he stated that he was given all the set of the tender documents from the PQQ to BAFO stage, the financial offer of Hitachi Zosen-Terna, the financial model and the waste load model and the correspondence dealing with the appeal. Deloitte were not provided with the COWI estimate report nor the EPV of the project and only abstracts of the financial offers of the other competitors.

In reply to further questions from Dr Cremona, witness stated that there is a difference in costs both in capex and in opex but it seems the big departure comes from the O&M agreement. Economies of scale were not taken as factors in the case of the two small Greek units. Witness agreed that all three Greek projects have no incineration facilities and that the three are not representative of the whole market or represent the whole spectrum. Witness insisted, in reply to the question being put to him several times, that the tonnage payment is included in his calculations as a cost.

Questioned by Dr Mifsud Bonnici witness agreed that to 'share the purpose of similarity' the tonnage cost had been excluded from the figures for the Malta project.

Dr Inguanez asked the witness if project 2 in Greece was operating and he replied that it was. He also agreed that he did not go into the technical terms of the Maltese offers as it was not part of his scope and that the quality assessment was not part of the financial analysis.

Dr Gauci asked the witness to provide the Board with the full title of each of the Greek projects, which was the contracting authority, the town where the project was installed and the technology used. Subject to clearance from his clients witness agreed to provide this information on all three projects which are all in operation. He again re-iterated that the tonnage aspect had not been included for comparability purposes between the Malta and the Greek contracts were the payment mechanisms and the gate fee system is different.

The Chairman directed that the requested documents be produced in good time and that at the next sitting this witness may be requested to be available for further cross examination.

Prof Frank Bezzina (250173M) called as a witness by the Appellant stated on oath that he is the non-executive Chairman of Wasteserv Malta Ltd and that he has been in that position since February 2020, and in that role he is not involved in the day-to-day running of the company and not involved in any way in the procurement process. However, at Board meetings the CEO is asked to provide the members with updates related to projects to keep them abreast with developments, so his information is usually what appears in press releases. At no point was he involved in the appointment of experts or consultants as these decisions were taken by the CEO. At a Board meeting members were informed by the CEO of the appointment of Frith after the tender procedure had actually ended and the bidder chosen. Frith was described as having carried out an internal audit which had concluded that everything was as it should be.

Witness stated that the Board members understood that the audit meant that all procurement procedures that had taken place were vetted and that the conclusions drawn by the auditor were similar to the conclusions drawn by Wasteserv. Throughout the process of the tender the CEO gave the members of the Board the same information that would appear in press releases but he never reported to them that the prices had been published neither did he make any representation regarding the order of ranking in prices nor was the Frith report ever presented to them.

In reply to further questions witness stated that he is aware of some criminal proceedings in Malta and Italy, that Wasteserv is a party in the Malta one but that he is not aware if Bonnici are a party to the proceedings. Witness is also not aware if any contingency provision has been made in the Wasteserv audited accounts for this. He was also not informed of changes in the evaluation committee.

Dr Paris asked leave to submit an urgent application by Hitachi Zosen Inova AG-Terna SA to add a new grievance invoking Article 2 of the PPR, in view of the declaration made earlier in the day wherein the member of the evaluation committee Mr Charlon Buttigieg confirmed that he is currently undergoing criminal proceedings in a case involving a joint venture composed of Sidercomma and Bonnici although he has signed a conflict of interest declaration.

Dr Cremona said that once the Authority has seen the grievance a decision will be made on whether there will be an objection to the application.

Dr Gauci pointed out that the basis of the application is that there are criminal proceedings against Charlon Buttigieg when he had in fact stated that he is not personally involved in the proceedings.

Dr Paris stated that the information is based limitedly on the testimony of Charlon Buttigieg and on what the law states on conflict of interest; directly or indirectly the companies are the same as participants. In relation to the grievance there is clearly a conflict of interest as one case is still pending.

The Chairman proposed a recess to enable the Board to consider Hitachi's application.

On resumption Dr Delia advised the Board that agreement had been reached between legal counsels of the parties and that the Contracting Authority will not object to the new grievance without prejudice to their position and their right of reply. The information required from the Appellant will be supplied as follows; as far as Bonnici Companies are concerned Dr Gauci for the preferred bidder would supply the information himself and regarding the proceedings in Malta and Italy either Wasteserv or the Department of Contracts will supply the names of parties involved, the stage litigation has reached and reference to merit. This was agreed to by all parties.

The Chairman directed that all submissions to be filed by close of business on Tuesday 19th December 2023.

Mr Henry (Harry) Fenech (236237M) called to testify by the Appellant stated on oath that he is the Secretary of the PCRB and that the Board is composed of one panel consisting of six members, three of whom, Mr Swain, Mr Ancilleri and Dr Cassar are permanent members and three are substitute

members- Dr Micallef, Ms Scicluna Laiviera and Mr Matrenza. Asked to explain why Dr Micallef, a substitute member, was serving on this panel witness said that Mr Ancilleri had recused himself from hearing the case due to consanguinity with an employee of Wasteserv and he understood that Mr Matrenza has not been well lately. The composition of the Board was as it is straightaway since Mr Ancilleri recused himself as soon as the case came up for hearing by the Board.

Ms Stephanie Scicluna Laiviera (15685M) called to testify by the Appellant stated on oath that she was appointed to the PCRB on 9th November 2021and that she has sat frequently on the Board in different hearings. As regards her employment, witness stated that she has an on loan agreement from the 27th May 2020 between Water Services and Wasteserv whereby her salary is issued by Water Services but she provided her managerial services at Wasteserv, which then reimburses her employer. In June 2020 the CEO of Wasteserv appointed witness as an evaluator on the competitive dialogue tender which was eventually cancelled. On the 30th May 2022, when she was already sitting on the PCRB, she was appointed an evaluator on this present procedure and signed an impartiality and confidentiality declaration through the ePPS. She declared to her CEO (Mr Richard Bilocca) and CFO (Mr Jonathan Scerri) that she is a member of the PCRB. As these senior people in the Wasteserv organisation were already aware that she was a sitting member of PCRB she did not feel the need to declare a conflict of interest. She could not possibly hear any appeals on this tender as she had already recused herself from hearing any cases against Wasteserv or Water Services; this was established with the Chairman of the PCRB straightaway on being appointed to the PCRB on the 9th November 2021.

Witness further stated that she was aware that one of the evaluators resigned from Wasteserv and was replaced on the evaluation committee but was not aware if he had officially resigned from the committee or if it was a condition that evaluators had to be employees of Wasteserv. Asked what the function of Frith was at the PQQ stage witness replied that they did the evaluation in its entirety independently and then it was compared with the work of the evaluation committee, and their report together with COWI's report were attached to the evaluation report for the PQQ. Both Frith and COWI had contracts with Wasteserv prior to the publication of the procedures.

In reply to further questions, witness went on to detail how the evaluation process was carried out and how they needed the assistance of the technical advisers to confirm that they were doing their jobs correctly and particularly in her case with regard to the O&M and the design and construction. There was no point on which the evaluation committee disagreed with the specialists' reports and basically made the reports their own.

Since witness did not form part of the negotiating team, questions moved on to the BAFO stage, and at the initial meeting the evaluators were told by the CFO that for transparency's sake the prices had been released. Witness stated that she was not given any authorisation by Hitachi Zosen at any point in time to release information to third parties. The end result of the BAFO evaluation was that Paprec International BB Malta Joint Venture was ranked first, Hitachi Zosen AG Terna second and FCC Medioambiente International third with no reserve candidate being established. Reverting back to the question of the release of prices witness explained that according to the information from the DoC this happened because the system is designed to publish them. Because of her knowledge of how the ePPS system works, witness could deduce why only four out of five prices were released.

Mr Jonathan Scerri (559584M) called as a witness by the Appellant testified on oath that he is a certified public accountant and the Chief financial Officer at Wasteserv Malta responsible for the procurement department. He chaired the evaluation committee at the PQQ and BAFO stages but was not involved in the negotiation stage. The PQQ evaluation was spread over three months and there were over 20 meetings and BAFO was less than three months and there were also some 20 meetings. According to the witness the evaluation committee at PQQ stage stopped functioning once it made its recommendation and was reappointed for the BAFO stage. The appointments were made by the head of the Authority and approved by the Department of Contracts. The conflict of interest

confirmation was done again on the ePPS at BAFO stage. Asked about the changes in the composition of the committee, witness stated that the CEO had chosen the committee for the PQQ and witness had recommended the same persons for the BAFO with the exception of Stephen Dimech who had resigned from Wasteserv. He went on to explain that it is not automatic that an evaluator has to be changed because he was no longer an employee of Wasteserv. Stephen Dimech, an engineer, was the technical person in the PQQ evaluation and Charlon Buttigieg who has a technical background in the second evaluation. The BAFO evaluation was more technical which is the reason why it needed the resources of the technical advisers. Witness did not know if the substitute evaluator for Stephen Dimech was also a qualified engineer, he merely knew that he had a technical background.

Moving on to the question of the release of the prices witness confirmed that at BAFO first meeting he felt the need that the committee should be made aware of that information which had by then become public. This was after the matter had been discussed with his CEO and with the Department of Contracts which gave them the feedback that publication was by design for transparency's sake. Witness stated that correspondence with the DoC on this matter was through e-mail. The first email (dated 3rd April 2023) from the witness to the DoC said that Wasteserv "had been made aware by their technical consultants regarding the fact that there was publication, including the aggregate financial totals and we are seeking feedback by the Department of Contracts that this was in line with procedure". It was COWI who made Wasteserv aware of the publication. The reply (dated 6th April) from the Director General was "that the official position of the Department is that we enforce strict adherence to transparency. In fact the ePPS is tailored in such a way as to inform such open and transparent procedures in its procurement method".

Witness said that since he was not part of the negotiation team he could not comment on the fact that one of the bids put in a value instead of a price in their bid although in the tender the bidders were instructed to put in a full offer to be able to negotiate all the aspects of their offer. Witness confirmed that at no stage did Hitachi-Zosen give authority to disclose the initial price to the other parties.

The testimony was suspended whilst Dr Delia asked for copies of the exchange of e-mails with the DoC that witness referred to in his testimony. The Chairman said that the e-mails had been read in full by the witness and the Board will also peruse the e-mails and does not believe that it is necessary to circulate them.

Dr Delia then asked for this note to be recorded:

" I would like to specifically lay down that the documentation which is being referred to by deposing under oath by witness Mr Jonathan Scerri be made available to appellant or his counsel in order to be able to confirm this particular line of questioning."

In support of Dr Delia's request, Dr Paris made reference to two judgements – *South Lease Ltd vs CPSU* and *Care Malta Ltd vs Active Ageing and Community Care* (C/A 413/22/1) where PCRB allowed documents to be distributed.

Dr Cremona asked that the following note to be recorded:

"The counsel for the Contracting Authority, first of all would like to specify that by documentation we are referring to two e-mails in exchanges between the CFO of Wasteserv and the Department of Contracts and is the whole scope of this objection. No further documentation or access thereto was being limited or somehow pertained. The second point is that the content of these e-mails was read out in open Court by the witness except for points which the witness confirmed on oath to relate to different matters and the third point is that the case mentioned by Dr Paris namely the Care Malta case was based on a completely factual matrix and in that case there was no objection by counterparty for the submission of those documents. The fourth and last point was that it is the practice of the Board to limit unfettered access to the procurement file."

Dr Inguanez requested the following note to be recorded:

"The Department of Contracts also objects to the release of these e-mails. Under Regulation 242 of the Public Procurement Regulations tenderers have a right to access information pertaining to the reasons for the rejection of their own tender and of the characteristics and relative advantages of the selected tender. The Care Malta and South Lease judgements cited by the appellant, in fact specifically address these issues. The e-mails in question do not fall within any category expressly provided for under Regulation 242 and since it is internal documentation of the administration, should not be disclosed any further to the extent in which it has already been disclosed to all parties. The case law of the European Court of Justice expressly precludes fishing exercises. I refer to case C 561/10 Evropaki Dinamike paragraph 25. I refer also to the opinion of the Advocate General Bobek in case C 298/16 Ispas paragraph 116 and 121."

Dr Gauci said that on this matter the recommended bidder defers to the decision of the Board.

The Chairman stated that the Board will be upholding the objection of the Contracting Authority based on the following facts. Basically, this Board has gone through these e-mails which are actually before the Board now. The Board is of the opinion that what Mr Scerri read out during his testimony is the verbatim content of the e-mails, therefore they will also be included in the transcript of his testimony and therefore there is absolutely no need for it to be divulged. The whole content is available to everyone.

Resuming his testimony, Mr Scerri said that what he was referring to earlier was Article 34 of the ITT document, and specifically 34.2 part of which states that the initial tender is expected to be as complete as possible and shall meet all submission requirements and goes on to say full submission includes but not limited to all method statements, tables, price indication, price breakdown. Witness agreed that although this clause was unusual in tenders it was mandatory to provide what the tender required.

Dr Delia mentioned that this witness concludes their proofs. The other parties stated that they reserve their right to cross examine the witness.

The Chairman thanked the parties and adjourned the hearing to the 9th January 2024.

This concluded the third day of the hearing.

FOURTH DAY

On the 16th January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider further the appeal.

The attendance for this public hearing was as follows:

Appellant – Hitachi Zosen Inova AG-Terna S.A.

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Kenan Sirin	Representative
Mr Yoannis Nousis	Representative

Mr Thanos Karvelis	Representative (Online)
Mr Alexander Silin	Representative (Online)

Contracting Authority – Wasteserv Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative
Mr Calvin Calleja	Legal Representative
Mr Jonathan Scerri	Chairperson Evaluation Committee
Ms Susan Portelli	Secretary Evaluation Committee
Mr Charlon Buttigieg	Evaluator
Ms Stephanie Scicluna Laiviera	Evaluator
Ms Branica Xuereb	Evaluator
Mr Richard Bilocca	Representative
Dr Pearl Agius	Representative
Mr Jeppe Rasmussen	Representative – COWI
Mr Lars Rasmussen	Representative – COWI
Dr Rasmus Dilling	Representative - COWI

Recommended Bidder – Paprec Energies International

Dr John L Gauci	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Steeve Pendel	Representative

Department of Contracts

Dr Daniel Inguanez	Legal Representative
Dr Mark Anthony Debono	Legal Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited the Contracting Authority to present their case.

Dr Paris requested that prior to that, the Appellant wished to raise some points. In the Minutes he noted that there was a discrepancy between the information supplied by Dr Gauci and what the Minutes stated in the hearing of the 22nd November 2023, page 8, paragraph 8, line 6 starting 'Dr Mifsud Bonnici replying on behalf of the Authority……..' in that Dr Gauci's document shows that Bonnici Bros Services Ltd are part of the joint venture with Paprec and not Bonnici Bros Ltd.

Dr Mifsud Bonnici on behalf of the Contracting Authority asked that it be minuted "that the relevant Bonnici entity party to the consortium which has been recommended the award of this procedure is Bonnici Bros Services Ltd".

Dr Paris then referred to the note submitted by Wasteserv referring to criminal proceedings in which the last name mentioned was that of Mr Charlon Buttigieg. He requested confirmation that that person was the same individual serving on the evaluation committee.

Dr Mifsud Bonnici on behalf of the Contracting Authority confirmed that the Mr Charlon Buttigieg referred to in paragraph 4(a) of its note filed on 20th December 2023 is the same person who was nominated on the evaluation committee.

Dr Paris then raised a point regarding the disclosure of witnesses and noted that the Appellant had complied with the 6th December deadline to provide the list of witnesses. Wasteserv filed an application that witnesses be declared together with their relevance to the case – all this had been provided. Appellant now needs to know who is testifying on behalf of the Contracting Authority and the object of their evidence as they had not been provided with this information. .

Dr Mifsud Bonnici stated that the context of the application Appellant was referring to was to establish the witnesses who the Appellant had summoned outside the control of the Appellant. In the case of the Authority only persons involved in the evaluation will testify.

Dr Delia said that at law there was no distinction between witnesses and whether they were extraneous or not and witnesses must be notified beforehand with the object of their testimony.

Dr Cremona pointed out that all three witnesses are from the Contracting Authority as was made clear and declared from day one that COWI are part of the evaluation process.

The Chairman said that the Board takes note that Dr Mifsud Bonnici on behalf of the Authority has already indicated that the witnesses are all relevant to the case.

Prior to hearing testimonies Dr Mifsud Bonnici requested that it be minuted that the PCRB has authorised the disclosure of the presentation that is to follow as part of the testimony to legal counsel to the parties.

Mr Jeppe Rasmussen (PP 207712342 DNK) stated that he is a Project Director of COWI and has been in that role for some four-and-a-half years and has an MSc in mechanical engineering from the University of Denmark. With the aid of screenshare he gave details of COWI's high international ranking with an annual turnover of some € 800 million, near 7000 employees and 10,000 projects ongoing. Their role in the Malta tender was the technical evaluation and financial advice and COWI provided technical advice in all three stages of the procurement based on their experience in waste to energy projects. Witness demonstrated slides prepared for the outline development permit and explained the layout of the proposed plant, detailing with areas such as the sea water system for cooling needs, the requirement for the canopy structure, the flue gas treatment system.

Witness stated that all three bidders complied with these requirements. At BAFO stage, through screen shots, the phases of the evaluation were explained – first the compliance check, then the Method Technical Statement with a pass or fail followed by the Technical, Contractual and Payment Elements and finally the financial price evaluation. The technical evaluation schematic model was displayed and explained with indications of where there were discrepancies in the bids submitted. Detailed formulae were displayed on how the technical scores were worked out. These scores were communicated to the bidders with justification provided and with details of key points missed out by the Appellant. On the technical side Hitachi was very close to Paprec but there was a difference in the financial offer which made a substantial difference in the scoring. Even if Hitachi had been awarded maximum technical points Paprec would still rank first. Hitachi's appeal missed the key detail

provided in the evaluation report on the raw gas pollutants composition causing concern to the evaluators. The appeal includes misrepresentative information.

According to the witness, when it was pointed out to the Appellant that there was the need to comply with the waste throughput, Hitachi came back stating that it would be dangerous and would not be possible to operate in the area. When such key detail was missing in Appellant's design it was unjustified to claim a higher technical score. There was no actual design for roads and weighbridge. Areas vital to Wasteserv were missed out and needed to be designed again in several instances. Appellant's bid was in many cases not structured and documents not found as contrary to instructions there was no cross referencing. The evaluation parameters were not followed throughout the evaluation of the tender. Appellant failed to state key maintenance periods although the term 'life cycle' is well known and well used in maintenance terms.

The financial offers were displayed on screen by witness and showed that FCC's and Hitachi 's offers were significantly above Paprec's price. The annual fixed payment accounts for ⅔ of the difference in pricing. A comparison was made of figures submitted such as contract revenue and profit margins where Hitachi showed an 8% figure against Paprec's 5.9%. The Hitachi figure stands out - according to the witness "this is the root cause, the smoking gun."

Cross-examined by Dr Delia witness said COWI were acting for Wasteserv before he joined the company since COWI were employed to support Wasteserv as technical consultants in solid waste management throughout the project. Their role was the engineering side and reviewing processes. [Copy of the contract of engagement was requested and made available]. Referred to the presentation, witness stated that the design shown is what is required for Outline Development Permit (ODP) with some degree of leeway without violating certain red lines. The photos demonstrated were an intrinsic part of the tender but included more details when submitted with the planning application together with some fifty further drawings and layouts. Shot number 6 showed phases of the evaluation at BAFO stage defining some 40 out of 600 submissions – these 40 demanded a pass or fail marking and all three bidders passed all 40 of them. The next three shots showed the evaluation model and showed that even if Hitachi had the best technical offer it still would not be the winner – with reasonable pricing the result could be different. Figures in the tables shown were all based on figures submitted by bidders.

Following BAFO, continued the witness in answer to further questions, clarifications were sought but not on missing information. This was decided by the Authority as there was no obligation to seek missing information; this applied to all bidders. Life cycle maintenance is a technological term and there was no need to clarify it. Clarification was asked relating to important items that were not clear or ambiguous and needed confirmation in relation to compliance. The process of rectification had to be different between the negotiating and evaluation stages as at BAFO stage clarifications have value. The COWI report, according to the witness was work in progress with Wasteserv during the evaluation and the draft final report was then sent to Frith to enable the live audit to proceed. A reserve candidate was not officially nominated.

Asked if any background checking had taken place on candidates, witness said that the PQQ was the stage at which candidates were looked at in terms of the PPR where ranking was given following the financial and technical assessments. The PQQ technical evaluation was based on strict rules on what could be looked at giving benefit to those with dual plant usage etc. Hitachi and Paprec both have a high number of waste to energy products throughout the world but consultants tend to concentrate

on recent projects not what happened many years ago; as a matter of fact Hitachi build but do not operate many plants.

Referring to the terms of engagement witness said that out of the listed tasks, numbers 1 to 5 were concluded, item 6 was concluded at cut off and items 7 and 8 will be completed at contract signature and the start of the commercial operation with the preferred bidder, thus giving a complete package.

Mr Dimitrius Nectarius called by the Contracting Authority to give further evidence under oath was referred by Dr Mifsud Bonnici to the benchmark exercise and the table shown previously by him. He stated that the reason why three plants in the Peloponnese where shown as one plant in his exercise, was that the there was one payment for all three plants and the separate tonnage of each plants was not known. Witness stated that he could not estimate other projects in other countries as no details were available. Hitachi Zosen were also part of the benchmark exercise but did not provide details of other plants in Europe. Some capex data was provided but no opex data.

In reply to questions from Dr Paris witness said that the outcome would be the same if the O&M figures were included as they are the same for all three. Malta does not have a guaranteed tonnage scheme where even if no waste is delivered to the plant there is still payment – this is something similar to the fixed payment amount. To compare figures for Malta the ratio between guaranteed and non-guaranteed would have to be about 75 to 80%. From experience Deloitte have a rule of thumb that the ratio should be about 80%. In the case of Paprec this means a guaranteed element of 50% which is considered low; in the case of Hitachi the ratio would be over 60%.

The Chairman thanked the parties and adjourned the hearing to the 17th January 2024 at 9.00am.

This concluded the fourth day of the hearing.

FIFTH DAY

On the 17th January 2024 the Public Contracts Review Board composed of Mr Kenneth Swain as Chairman, Dr Charles Cassar and Dr Vincent Micallef as members convened a public hearing to consider further the appeal.

The attendance for this public hearing was as follows:

Appellant – Hitachi Zosen Inova AG-Terna S.A.

Dr Matthew Paris	Legal Representative
Dr Adrian Delia	Legal Representative
Dr Zach Esmail	Legal Representative
Mr Kenan Sirin	Representative
Mr Yoannis Nousis	Representative
Mr Thanos Karvelis	Representative (Online)
Mr Alexander Silin	Representative (Online)

Contracting Authority – Wasteserv Malta Ltd

Dr Antoine Cremona	Legal Representative
Dr Clement Mifsud Bonnici	Legal Representative

Mr Calvin Calleja	Legal Representative
Mr Jonathan Scerri	Chairperson Evaluation Committee
Ms Susan Portelli	Secretary Evaluation Committee
Mr Charlon Buttigieg	Evaluator
Ms Stephanie Scicluna Laiviera	Evaluator
Ms Branica Xuereb	Evaluator
Mr Richard Bilocca	Representative
Dr Pearl Agius	Representative
Dr John Axiak	Representative
Mr Jeppe Rasmussen	Representative – COWI
Mr Lars Rasmussen	Representative – COWI
Dr Rasmus Dilling	Representative - COWI

Recommended Bidder – Paprec Energies International

Dr John L Gauci	Legal Representative
Dr Joseph Camilleri	Legal Representative
Mr Steeve Pendel	Representative

Department of Contracts

Dr Daniel Inguanez	Legal Representative
Dr Mark Anthony Debono	Legal Representative
Ms Marisa Gauci	Representative
Mr Lawrence Gatt	Representative

Mr Kenneth Swain Chairman of the Public Contracts Review Board welcomed the parties and invited the Contracting Authority to proceed with their case.

Dr Mifsud Bonnici said that the Authority will be calling further witnesses. The first one, Dr Rasmus Dilling will be giving evidence purely as a technical advisor on questions of fact.

Dr Rasmus Dilling (PP 211760039) called to testify by the Contracting Authority stated on oath that he is a legal director at COWI possessing a Master of Laws degree, and is a barrister with a Euro Ph.D. qualification. He has 20 years' experience in procurement and complicated procedures. Witness was a key expert assisting Wasteserv and the evaluation committee in the PQQ attending to the legal and commercial requirements and in selecting suitable candidates. It is usual for big international firms handling contracts like the present one to seek support from other groups. There was a request in this tender that groups will be jointly liable for the execution of contracts. He was involved in negotiations with all five candidates from the ITT stage who offered to participate in BAFO. Article 34.2 of the tender was referred to and witness said that FCC were not disqualified as, although the Authority was expecting a full submission, the mentioned Article has to be read in conjunction with Article 44.4 which stated that this was not grounds to disqualify.

In reply to questions from Dr Delia, witness said that disqualification was not an issue – there was no absolute requirement to disqualify or seek clarification at ITT stage and there was no error on the part of the TEC in not disqualifying FCC. Witness was assigned to this project by COWI and was not aware that there was more than one engagement contract. Referred to the list of tasks listed 1 to 8

in the contract witness agreed that that is the extent of COWI's involvement but he could only speak about tasks in which he was involved as a key expert.

In reply to further questions witness stated that the preferred bidder submitted reliance documents exactly as required to support unconditionally with duly signed declarations from each entity as to what was requested from the legal and procurement point of view - all declarations from Paprec, Bonnici Group and Zrar Ltd included. Bonnici Bros Service Ltd forms part of the Bonnici Bros group of companies. Witness read out the letter of understanding on reliance [Doc ZL1 File Blue 5 Tab 11] emphasising four points - "all resources necessary including technical or otherwise" "offer JV all technical support throughout the project even if extended" "all terms of PQQ respected" and "will duly comply with joint and several liability".

Mr Richard Bilocca (1185M) called to testify by the Authority stated on oath that he is the Chief Executive Officer at Wasteserv with a B.A. Hons and M.SC qualifications and has worked on various major projects in Malta with also previous experience as EU Permanent Representative and Water Services Corporation CEO. Wasteserv employs around 900 people with plants working 24/7 processing waste. He explained the need of this waste to energy plant and its benefits for Malta. It will eliminate the need for landfills and is environmentally friendly and it is absolutely essential to have this project which is bound by EU key target requirements. Waste to energy in Malta is a long story. It started being discussed in 2009, then four or five years ago designs were drawn up and it was close to launching. In 2020 the first project was launched but the level of knowledge was not there, so COWI was engaged and this gave guaranteed seriousness to the project. The first procedure was on competitive dialogue basis and the second one was a competitive with negotiations project specific to the needs of Malta.

Witness proceeded with his testimony by stating that there were extensive dialogue sessions to further ideas and more concise procedure in negotiation process to complete a well thought out project. Procedure was in four stages - preliminary information notice in official EU journals that a PQQ was being issued; then followed the issuing of the PQQ, then the ITT and lastly BAFO. The PQQ, stating all requirements and budget expectation was accessible to all; it was clear that the Authority intended to short list five bidders. The full ITT documents were crucial as this made bidders aware of the budget and technical solution being sought. Eleven submissions resulted from the PQQ and these were evaluated to establish criteria; no appeals were received and there was a very good market interest by international participation. The short-listed candidates were invited to make presentations and to make initial non-binding offers. Five bids were received and the bidders were invited to the negotiation stage. There were meetings with each bidder and this helped to refine the BAFO. The bidders had an open channel to the Authority and all five bidders were invited to tender. At the PQQ and BAFO stage the witness had no role except to nominate the members to serve on the TEC and chairing the clarification meeting at PQQ. At ITT stage witness was the Chair of the negotiating team.

Referring to the selection of the TEC, witness said that he wanted to ensure that it had expertise and a good knowledge of procurement due to the size and complexity of the project. COWI had the technical expertise lacking locally. Mr Jonathan Scerri the CFO as Chairperson is the most complete expert in procurement with the right skills in leadership; Ms Susan Portelli is experienced in audit and procedures; Ms Branica Xuereb is experienced in procurement and has served in other Ministries; Ms Stephanie Scicluna Laiviera is a senior figure in local procurement with experience at Mater Dei Hospital; Engineer Stephen Dimech a technical expert was not involved after PQQ as he could not be 100% involved due to his new commitment. Mr Charlon Buttigieg has knowledge of procurement and

technical experience of infrastructure; Willis was brought to advice on insurance in view of this being a long term contract with Frith's individual employees being experienced in the energy sector – they had to advice the adjudication team but also to work independently when it came to scoring to ensure that the process was completed correctly especially at BAFO stage. At the ITT stage there were no complaints on the budget but there were discussions on price-indexing, which the Authority refused to consider. Bidders at all times had an open channel to the Authority.

Witness was asked by Dr Delia why no action was taken against FCC in line with Articles 34.2 and 44.4 in the tender for their failing to submit a price and he replied that there was no need to take any action. Witness further stated that he did not need any authority to issue prices as part of the conditions in the tender conferred that right since the system was designed as such in Malta and since that's how the General Conditions are drafted.

The Chairman noted that this was the final witness and that after a short recess the hearing would move on to final submissions.

Dr Paris on behalf of Hitachi-Terna said that he would deal with five grievances, namely:

1. Wrong evaluation of the Hitachi bid
2. Reliance on capacity of third parties
3. Abnormally low price
4. Irregularity in the procedure
5. Irregular composition of the TEC.

Dealing with the first grievance Dr Paris said that Wasteserv and DoC claim that the PCRB is precluded from investigating the technical perspective of the Hitachi submission as it has no technical expertise. Court judgements cited by them have held that the Board cannot substitute itself for the TEC as it is not technical. The judgements cited are inapplicable as the cases refer specifically to the Courts but this Board is composed in a way that it has the ability to investigate. Regulation 91 gives the Board power to appoint experts if needed to assist it – an example was the appointment of COWI by the TEC. Most of the points on which Appellant has been damaged are not technical; it was a case of documents not being found or not clarified. The argument cannot be sustained that the Board does not have competence. CofA Case 249/23/1 *Attard Farm Supplies* was quoted as an instance where the matter contested was not of a technical nature but if the tender conditions were met. Most of the matters being heard in this Case are not of a technical nature.

It was not correct, continued Dr Paris, to claim that clarifications were not sought. Mr Rasmusson testified that there were no clarifications when in fact they had been requested. The TEC had difficulty tracing certain points but did not bother to clarify – what is strange is that clarifications were not sought even though the presentation was praised. In CJEU Case T 211/02 it was held that even in the case of an ambiguous offer there is a duty to a certain degree of care and clarification should be sought rather than the tender rejected. The TEC should have given Appellant the opportunity to indicate where the misplaced documents were in line with the direction in CJEU Case T 195/8. This obligation also emerges from Procurement Policy Note 40 where in page 3 it is stated that if ambiguous or contrasting information is given the economic operator shall be requested to clarify –this is the DoC own policy.

Dr Paris went on to state that marks were deducted from his client as clarifications were not sought. Witnesses Mr Noussis, Mr Reinhart and Mr Aizpuru specifically indicated where the allegedly missing

documents could actually be found. On the life cycle maintenance, Mr Aizpuru had testified that this was limited to the ITT document and no mention of it was included in the BAFO document thus clearly indicating that parameters that did not exist were used to score Hitachi down. Again reference was made to CofA Case 249/23/1 wherein it was held that there is an obligation for transparency to avoid arbitrary decisions and further CJEU Case T 415/10 stating that criteria cannot be changed. Self-limitation principles cannot be breached and neither the need for transparency and equal treatment. The claim put forward that even if given full points the result would have been no different is totally irrelevant once there was a breach of obligation. The Appellant, said Dr Paris, is requesting the Board to appoint an expert as there are mistakes in the evaluation; then the PCRB can request a re-evaluation or appoint an expert to judge if the evaluation was correctly carried out. It has been acknowledged that mistakes were made even if not specifically admitted and the PCRB can look at the financial and technical aspects which are both flawed.

On the second grievance, said Dr Paris, the Authority is claiming that any objection on the PQQ stage cannot be raised at this stage once the standstill period has expired. Regulations 270 and 271 state that an economic operator 'having an interest' has the opportunity to seek an application to review now or could have had it before. The law is structured to give the possibility of having the decision analysed. Further Regulation 271 reads '……..sent its proposed award decision………….after the lapse of the publication period'. At PQQ stage there was no award decision – the award was only determined on the 13th December. Hitachi did not receive a rejection letter and therefore had no legal remedy to resort to proceedings; the only remedy under Regulations 270 and 271 was available only now and thus it was only now that it was possible to raise concern on the capacity of third parties. Reference was made to Chapter 9, page 22, of Prof Arrowsmith's book 'The Law of Public and Utilities Procurement'.

Dr Paris said that Hitachi made many requests to the DoC regarding reliance and asked if the preferred bidder relied on the capacity of third parties and information was provided on Paprec's reliance. The DoC confirmed that all entities have submitted letters confirming support for the duration of the contract. In Ms Xuereb's testimony it emerged that three of the firms offered joint liability only if required when the tender requested joint liability for the duration of the contract. CofA Case 374/2002/1 is clear on the reliance on third parties – a 'mere letter of comfort' is in breach of the obligation at law, the reliance must be total not a hazy statement. Further CoA Case 265/20 held that the offer has to be from all parties in a joint venture. Finally CJEU Case C 324/14 states that the tenderer has to produce evidence that it has to have resources available to it. From the above decisions it is clear that the commitment obligation has to be clear and not a marriage of convenience.

Dealing with the third grievance on abnormally low price, Dr Paris stated that the Authority claims that when the PQQ was issued Appellant should have acted then and used Regulation 262 if there were any objections to the figures indicated. Under Regulation 262 there is no provision for capping - this is simply an indication and therefore there was no need to ask for a remedy. The PCRB is determined that, at law, there is no definition of an abnormally low price but has given a number of indicators. How does a price appear to be abnormally low? The first step is the tender estimated value. According to CJEU Case T 392/15 it is clear that price is not the only parameter and one must look at other prices. The proper analysis is not to include non-binding prices but only actual prices. If one considers only the three bid prices in this case, then either Paprec is abnormally low or the other two are abnormally high. No analysis has been presented on this point by the Authority. If it appears that something is not right it should be investigated. In the absence of such an analysis the PCRB

should *de minimis* ask for this. CJEU Cases T 570/13 and C 669/20 deal with the assessment of abnormally low bids and the obligation to investigate.

The only analysis, said Dr Paris, is the one made by Mr Nektarius of Deloitte. The important element looked at by him is the price per ton. Paprec's is € 42 compared to Hitachi's € 72.4 and FCC's € 67.9. From these figures it is clear that something is not right in the difference between two of the bidders and Paprec. From the analysis made by Deloitte of the guaranteed and non-guaranteed element it concluded that the price of Hitachi and FCC are not abnormally high but Paprec's offer is not viable and not bankable. There is an obligation to refer this back to the TEC.

On the fourth grievance, the Contracting Authority claims, according to Dr Paris, that Regulation 262 should have been used but by participating the Appellant forfeited all rights to complain. The PQQ in page 84 Annex 2 refers to Regulation 262; therefore at PQQ stage the right was clear and could have been used. The PQQ also refers to Regulation 270 but BAFO refers only to 270. This is indicative that any right under 262 was only available at PQQ stage. Mr Bilocca, in evidence, stated that PQQ and ITT were issued jointly and clearly allowed 262 only at PQQ stage. Exhibit 26 refers to different types of open procedures and illustrates the processes in the different procedures and is amply clear that 262 was available only at the initial part. This Regulation 262 uses the word 'may' and hence the right is discretionary. Contrary to what was claimed, the *Truevo* case is not pertinent as it was an open procedure and the DoC is ill-equipped to handle the case under review as it used procedures which were not suitable. Regulation 262 creates an exhaustive list which does not speak of procedure – in this case the complaint is about the procedure adopted by the DoC. In regard to Regulations 270 and 271 the only legal opportunity for the Appellant to make submissions is after the award – the only remedy available was only available to the DoC which had the right to cancel the procedure according to Article 13.1 of BAFO. The DoC claims that there is nothing wrong in the process and therefore the only relief available to the Appellant is Regulation 270 and 271.

The Authority, continued Dr Paris, claims that once the Appellant participated it forfeited its rights. If Hitachi had not participated it would have forfeited its rights to make representation anyway. According to CJEU Case C 320/02 if a tender is not submitted it is difficult to show that one has an interest whilst in IEHC 54/2022 (paragraph 87) it was held that the almost exclusive way is to submit a tender in order to render it eligible to challenge the tender rules. The objection that silence should motivate against it is not true. It is crucial that any information given by an economic operator at ITT stage is not made available to everyone since once something is disclosed it leads to a distortion of competition and goes against general and specific directives, and against the DoC commitment that there will be no disclosure prior to permission being granted. The ITT document, page 35, states that negotiations shall be kept confidential – this is a commitment by the DoC for confidentiality and commercial integrity.

Directive 2016/943 of the European Parliament deals with protection of undisclosed trade secrets and does not release public authorities from the obligation not to disclose confidential information in respect of procurement procedures. The consistent theme in several judgements is that all information given is confidential which confidentiality must be maintained. Article 21 creates a general obligation for confidentiality. The Contracting Authority had to seek consent to release any form of information. All witnesses confirmed that no authority was sought to publish information – the only exception was Mr Bilocca who stated that the Authority did not require such authority as the general conditions allowed this. This is the very opposite to what Article 29 of the Directive states which is that there should be no publication without authority and it should not be in the form of a

general waiver. According to his testimony Mr Cachia took the decision to publish. Even the General Rules Governing Tenders (GTGT) in Article 14 have a generic provision not to publish information.

Dr Paris stated further that Mr Baikas of European Dynamics in his testimony referred to systems and jurisdictions in Cyprus and Ireland and mentioned that in all 48 cases referred to, confidentiality is being observed. Ms Kountouri had testified that the only three procedures in Cyprus were under € 5,000 and had only one participant and therefore were not comparable. In the Guidance Notes on how to handle procedure (Pages 26 and 27) mention is made that the contracting authority must ensure equal treatment and not reveal information to other parties. Not all prices were revealed as the price of FCC was not published as it was not submitted. Article 44.4 of the tender referred to by witnesses refers to the BAFO stage and deals with the obligation to submit a price. Appellant claims that nothing should have been published as there was no authority to do so. Once only four out of five prices were submitted the obligation of equal treatment was breached as FCC had figures of all other bidders and there was no longer a level playing field.

The World Bank document on procurement (Exhibit 20) highlights the principles of competitive dialogue and states that confidentiality is fundamental and failure to maintain it undermines competition. In CofA Case 429/23/1 there was a request for cancellation of tender on grounds of validity obligation but the Court held that it should not be cancelled as prices were known and that would affect fresh calls and hence competition. Also cited was CJEU Case C 54/21 which held that the contracting authority should not release information which could distort public competition and C 450/06 stating that the economic operator provided information without fear that disclosure could be damaging.

Dr Paris further stated that regarding the claim that Hitachi waived their rights by participating in the proceedings one must refer to ECHR Cases 405/75/10 and 67/474/10 wherein it was stated that any waiver requires that it is freely given and that it is unequivocal. No one can claim that the waiver was done freely and no one indicated that they were giving a waiver. There can never be an implicit waiver as that breaches regulations.

The final grievance, said Dr Paris, raised by leave of the Board, covers two instances; that of Miss Stephanie Scicluna Laiviera and Mr Charlon Buttigieg. In the case of Ms Scicluna Laiviera there are no inadmissibility claims but only rebuttals. Reference is made to Regulation 86 of the PPR. The Board is a quasi-judicial body and appearing before it when one has an interest undermines the fundamental basis of independent impartiality of the Board. Starting to meddle with the system would lead to loss of faith in that system and there is a loss of trust. Why go down this route when discussing such a vital and costly tender and why is this a major issue? *Nemo judex in causa propria* is the principle here and whether the individual has an interest or however upright he is, the result is that there is no trust in the process, quoting from Case 3ALL/3/04 'not look at the mind of the judge but at impression given to other persons'. An impression is given that an individual in that situation creates doubts and the risk of jeopardising the tender. In theory, even if not in practice, the impression is given irrespective, even if no wrong committed. The PCRB which has always acted fairly does not require this situation and there will be awkwardness if in future one appears before that individual.

Dr Paris stated that the case of Mr Charlon Buttigieg has admissibility objections. The composition of the TEC first became known in the evidence of Ms Branica Xuereb. Upon discovery the Appellant applied to file a new grievance. The Board got to know of court proceedings which could jeopardise the case due to a conflict of interest. The Contracting Authority claims that Appellant had ten days

from the evidence of Ms Xuereb to put in an application but PPR 270 is totally silent on this pint. This new grievance should therefore be accepted.

There is an obligation, said Dr Paris, in Regulation 2 that covers individuals involved in the process who may influence the outcome of that decision directly or indirectly with a financial or economic interest or other personal interests. Mr Buttigieg is undergoing criminal proceedings in cases against Wasteserv and Bonnici Bros Contractors Ltd in Gozo and in Italy. Bonnici Bros Services Ltd is a member of the Consortium and the sole shareholder in both is Bonnici Bros – the companies have the same directors and both entities are full subsidiaries of Bonnici Bros Ltd. Who assesses if a conflict of interest arises? The assessment on conflict should be made not by Mr Buttigieg but by others. Even if a mere remote conflict could arise, directly or indirectly, then a declaration should have been made. Cases T 277/97 and C 315/99 were quoted to support the claim that there is no need to qualify a conflict of interest or if acting in good faith or otherwise and one does not have to prove anything – the moment there is a conflict the case is made.

In the present case, continued Dr Paris, the declaration has been made irrespective. The *Pembroke* and *Republika vs Avukat ta l-Istat* cases were cited as instances where any ground of doubt should be resolved in favour of recusal whilst CJEU Case T 160/15 specifically relates to indirect conflict. In the case of Ms Scicluna Laiviera the Appellant is demanding the cancellation of the award from day one whilst in the case of Mr Buttigieg the Appellant is precisely demanding a re-evaluation of the process.

After a short recess Dr Cremona on behalf of the Authority said that after every aspect of the tender has been scrutinised and after many assertions have been made against the process one can sum up this appeal as a lot of hot air with no real legal substance. A large number of witnesses have been called, questions put, even when not relevant, but the Appellant chose not to put questions to the key figures in this appeal; it filed many more documents and added two additional grounds of appeal – they have therefore had a very fair hearing. Despite ample opportunities the Appellant's case never kicked off for the simple reason that there is no case. After hearing the evidence of witnesses in charge of the procurement process Appellant abandoned its case and added two new grounds and concentrated his attacks as the case went on. As an example of this one could quote the letter of engagement of Deloitte which indicated that they were engaged after the first two days of this hearing. Appellant has given up on the bid as it was and now wants a rematch as it got its financials wrong and non-competitive.

What we have seen, continued Dr Cremona, is reverse engineering to suit the ultimate goal. There is absolutory no difference to Wasteserv as to which bidder won the award but Paprec JV submitted the best offer. The Appellant is trying to undo this award for one purpose – they were undone by a lower offer as they offered a more expensive package. The Authority's opening statement was correct in stating that it was an absolutely correct process as evidenced in this lengthy 40 hour hearing and it would stand up to the highest degree of scrutiny. Appellant failed although the proof rested on it. This was a highly complex process and Wasteserv adopted the approach of using the best procurement practices by using globally recognised experts. It was the Appellant which initially called COWI representatives as witnesses but then failed to cross examine them. Mr Rasmussen dealt forcefully in detail with the development plan legislation and scale of plan – matters which were extraneous to his knowledge and remit. Wasteserv engaged Frith for independent technical review and has shown that the claims against it were unjustified, without merit and unfounded in fact and at law. The Board's competence is to accede or reject the appeal and must scrutinise the submissions in detail – even

Appellant’s last minute grievances are without merit and on each of them the Authority has brought inadmissibility objections. Wasteserv are not trying to hide behind a legalistic defence.

Dr Cremona added that Wasteserv wanted to deal with inadmissible defences separately as the grievances are fraught with procedural irregularity in the statement of facts. Appellant simply does not want to accept the outcome. Instead of bringing a case on actual points Appellant resorted to questionable points and misrepresentation of justification by Wasteserv, very evident in the way it made up the letter of rejection.

The presentation of case law by Appellant, said Dr Cremona, was brutal with 85 to 90% of case law quoted coming from open procedure cases; when quoting Euro cases the specific contexts of the judgement should be given. In almost all the cases mentioned Appellant has focused on the principle established or what is law in the Euro cases by juxtaposition of those quoted cases onto the factual matrix of this case. How did that principle find application in the satisfaction of burden of proof in this case?

Dr Mifsud Bonnici said that the first ground of appeal dealt with the claim that Appellant should have been given a higher mark. This is of no utility to the Appellant and should be summarily dismissed. Mr Rasmussen explained that even if full marks on the technical side had been awarded it would not have any impact on the outcome. A key judgement on procurement process is CoA Case 1030/2009 stating that the Court should reject an appeal if it does not change anything because it would have no utility to the outcome. Similarly CoA 320/2020/1 held that if the offer cannot be met there is no need to consider other grievances; further in CJEU Case T 914/16it was held that Appellant’s argument for higher technical score was ineffective because it would not have affected outcome. The outcome of this appeal would not change and is of no benefit to the Appellant even if the claim is met.

Dr Mifsud Bonnici continued to state that the Appellant simply failed to prove its case; the onus was on it to prove it and only then the responsibility shifts onto the Contracting Authority. The case was not proven and Wasteserv can stop there. The relevant standard of proof is that of the manifest error. The Board and the Court of Appeal should scrutinise adjudications but Appellant has to show a manifest error of the assessment – only then can the Board or the Court of Appeal interfere in the workings of the adjudication.

Regarding the grievance on the evaluation of the bid, Dr Mifsud Bonnici said that the TEC was assisted by technical experts COWI and Willis and then scrutinised by independent firm Frith. The evaluation methodology eliminated all subjectivity risks. Mr Rasmussen explained the three steps involved and the specific weighting on each criteria and justification was given in the detail of the letter of rejection. Instead Appellant presented a mistaken juxtaposition of the letter of rejection. Appellant failed to provide any evidence of errors in the evaluation and seems to have misunderstood the method of evaluation which was clear from the evidence of Mr Reinhard. When challenged Mr Reinhard could not explain the lack of SPAVCs. Appellant’s representatives could not even agree as to what would have been a fair figure in points awarded with different figures being bandied about by different witnesses.

Dr Mifsud Bonnici further stated that the Appellant claims that it should have been given an opportunity to clarify the three instances of missing documents – the water balance information, boiler correction curves and the blind CVs. The latter two of these still cannot be traced but it would not have changed the outcome or ranking on the technical score; according to the testimony of Mr

Rasmussen the impact would have been 0.3%. Bidders were notified in ITT and in BAFO to follow instructions and given specific instructions to cross-reference with the Method Statement. This was not done by Appellant in over 24 instances. The list of literature which was provided was not what was requested.

The TEC, said Dr Mifsud Bonnici was under no obligation to request clarifications in the case of incomplete or ambiguous information according to Clause 44.3 of the BAFO. The principle of proportionality cited in CJEU cases must always be balanced by the principle of equal treatment. The TEC was consistent in not requesting clarifications on missing documents from any bidder and all were treated equally. Appellant's bid was not rejected it simply had a lower score and it participated fully till the last stage. Appellant claims that parameters were added when addressing the maintenance schedule. Maintenance is integral to the contract and life cycle maintenance is evident to anyone. BAFO required key maintenance periods – Paprec and FCC understood this and only Hitachi did not.

It is not clear, stated Dr Mifsud Bonnici, what Appellant was after in the second grievance of its appeal but it relates to Paprec's compliance with the selection and eligibility criteria at PQQ. On this two inadmissibility criteria are raised by Wasteserv. First the Appellant's remedy is extinguished because Paprec was compliant and this was disclosed to the other side and it was the other side which decided not to challenge at that stage. Arguments were put forward on Regulation 270 and on the interpretation of 'having had' – the interpretation given was that appeals which could be filed under Regulation 262 can be brought under Regulation 270. This is not so. In CJEU C 230/02 (paragraph 37) the Court decided that if the specifications were not challenged they could not be challenged later. If one reads the letter of rejection one would note that wording used quoted the terminology of the law – no appeal was raised at that stage and cannot do so now. The lack of clarity of a grievance is a further factor and PCRB Cases 1898/1933/1670/1622/1308 and 1119 were cited as cases which dealt with lack of knowledge of the ground for grievances.

Dr Mifsud Bonnici further stated that in the letter of objection no specific grievance was raised by Appellant. The role of the Board is to accede or reject the appeal as was explained in CoA Case 98/19 its role is not that of an inquisitor board seeking proofs but to listen to points raised. Any grievance should have been raised in time and cannot be raised now, whilst on the joint and several liability issue and the reliance on the capacity of others the wording used is parallel to the wording used by Hitachi subcontractors. It was confirmed by witnesses that Paprec satisfied all criteria.

According to the claim by Appellant, said Dr Mifsud Bonnici, the Paprec bid was abnormally low. This is tantamount to a claim that the tender estimated value, which was disclosed to the bidders at the start of the process, is abnormally low. Paprec's bid at € 599m is higher than the tender estimate. Appellant accepted the estimated value at PQQ, at ITT, at negotiations and at BAFO and could have sought a remedy under Regulation 262 if it felt that the price was abnormally low. Under subparagraph (a) Appellant could have claimed that tender was impossible to perform and exercised that right. The tender allows the Authority to reject or accept higher or lower bids and thus the Appellant ran the risk that the Authority would reject its bid as being too high in value. In PCRB Case 1769 the Board directed that the procurement value could have been challenged earlier. Eleven bidders accepted the tender estimated value at PQQ and this is a closed chapter – *res judicata*.

Wasteserv claim that the offer by Paprec is not abnormally low and Appellant has not proved its case or allegation. The matrix to use as the basis must be the tender estimated value when based on independent research as it does not depend on the value of the bids or what the incumbent is

charging. Reference was made to DoC Circular 12/2020 and CoA Case 127/2021/1 stating that it is more logical to compare prices to the tender rather than the highest offer. Witness Mr Scerri concluded that there was no appearance of abnormally low bid as it was worked on diligently and correctly by COWI. In CJEU Case T 54/21 (para 123) it was decided that if the price of a successful tender is lower it is not in itself capable of demonstrating the nature of an abnormally low tender. Paprec's financial offer is on par with the tender estimate and the only way that Appellant could find to prove his case was the testimony of Mr Nektarius of Deloitte who did a very superficial benchmarking exercise with three projects different to Malta and who forgot to bring in the compensation mechanism in the project which made the exercise completely irrelevant and made redundant by Mr Rasmussen's presentation. It would have made no difference to Wasteserv which bidder won the tender as all five participants were the *crème de la crème* of the industry. Maybe Hitachi's lack of experience in waste to energy operations was a contributing factor in getting its figures wrong.

Dr Mifsud Bonnici next dealt with the grievance that there is irregularity of procedure because the grand totals were published at ITT stage. Wasteserv has two inadmissibility points on this. The Appellant has acquiesced to that procedure irregularity they are now lamenting of. In their letter of the 31st July after BAFO Appellant thanked Wasteserv, obvious therefore that they had accepted the rules. Relevant here is GRGT Rule 9.4 which states that when submitting a tender it constitutes acceptance fully and unqualified and waives any reservations bidder might have had. The Truevo case is different in so much as the Court held that the issues raised were not within the scope of Regulation 270 but should have been under Regulation 262. The second inadmissibility objection is that the Appellant failed to exercise its remedies and are now extinguished. Appellant could have used Regulation 270 as soon as the alleged infringement was committed or could have used Regulation 262 to make sure that the call was not in violation of any law but has opted not to exercise that right. The law states that you have to exercise your right; one cannot refashion it and use it later. The argument that this is one process is ludicrous. The Truevo judgement made it clear that issue of procedures do not fall within the scope of Regulation 270.

On the merits of the fourth ground Dr Mifsud Bonnici said that there are three questions to be addressed by the Board. The grand total should have been published and was published and witnesses Mr Cachia and the European Dynamics representative both confirmed that this is done automatically and by design and Appellant aware of this under Rule 13 under which it is given that the price will be published and is obvious to any experienced bidder. It was the bidder who inputted that figure in the tender preparation tool. The grand total was requested by the ePPS and published by design of the DoC as a policy decision in favour of transparency.

The summary of the tender as published is not confidential. Wasteserv submit that there is a subjective and objective perspective to what is confidential. This is not defined in the Directive and the PPR do not define it. Subjective is if the information forwarded to it by the economic operator is designated as confidential. Hitachi did not designate the grand total confidential within the financial forms and therefore does not enjoy the benefit of Regulation 127(5). Waivers can only apply if information is confidential and therefore there was no need to obtain. Wasteserv submit that even under the objective perspective the information at issue is not confidential – three conditions have to be satisfied to deem information confidential – that it is known limitedly to a number of persons, that it is liable to cause harm and that harm is objectively worthy of protection. Is disclosure going to cause harm? Reference was made to the position of the EU in paragraph 20 of Protection of Confidential Information by National Courts in Proceedings for the Private Enforcement of Competition Law (C

242/01). The figures issued were aggregated total of three bids and could not have been commercially sensitive and is not a trade secret.
Appellant in fact requested disclosure from the DoC before it lodged appeal.

Proceeding further, Dr Mifsud Bonnici said that competition was not distorted; if the grand total is not confidential then its publication cannot impact competition. The test consistently applied by the European Commission is that information can impact competition if it is capable of influencing the commercial strategy of the remaining bidders. The biggest concern here is about facilitating bid rigging – there is no evidence of such in this procedure. This tender achieved the very objective of negotiations according to Regulation 127(1). There is a claim of breach of equal treatment for allowing FCC not to submit a price. FCC decided themselves on improving its offer by its actions. The Appellant did not show it suffered any harm as a result of this irregularity. Mr Bilocca confirmed this and that no one complained about this issue. All the Appellant is hoping is to restart the procurement process and to rerun the race – cancellation would give the Appellant that opportunity and should be considered in the light of applying the *Melchior Dimech* Case judgement that procurement process should not be cancelled as it gives appellant advantage over the recommended bidder.

Dr Cremona dealt with the fifth grievance which, he stated, was added late during proceedings. Appellant is arguing that Mrs Stephanie Scicluna Laiviera's appointment as PCRB substitute member and evaluation committee member falls foul of Regulation 86 of the PPR and therefore the whole re-evaluation is redone. All the Appellant is after is a rematch through an erratic conflation of legal concepts. Dr Paris introduced the *nemo judex in causa propria* to explain the principles behind justice, supported by chunks of case law. The problem with the argument of *nemo judex in causa propria* is that for Mrs Scicluna Laiviera there is no *judex* and no *causa propria* - this is where everything starts to unravel. *Judex* is the PCR Board members in this case and it is impossible to perceive the selection of the preferred bidder is a *causa propria* of Mrs Scicluna Laiviera. How can you have a *causa propria* of Ms Scicluna Laiviera through Paprec winning the call instead of Hitachi. Regulation 86 deals with something else altogether as the law was enacted with completely set of different facts. Regulation 86 does not bar Ms Scicluna Laiviera or any PCRB member from sitting on an evaluation committee on which they are not deciding - the Regulation speaks of 'profession'. The legislators intention was to prohibit professionals from sitting on the PCRB and during that term representing parties before the Board. In the Data Protection Act, as an example, the Commissioner cannot hold any other office; where the law wants to create a bar it says so – in this case it has not. The PCRB has to interpret law as it is.

Dr Cremona further stated that it has not been proven how Mrs Scicluna Laiviera has harmed this specific case. This side agrees with Dr Paris about justice being done but that does not equate to his reference to impressions as impressions can be artfully created through several different processes. It is the law that needs to be breached not the impression. The Authority sees nothing wrong in her appointment which is an administrative matter. Appellant's appeal is *ex post facto*.

In the case of Mr Charlon Buttigieg, said Dr Cremona, the Authority has raised two inadmissible please – the right to raise such a challenge has been exhausted as it was raised ten days too late taking the latest possible date as when Appellant could have known the facts on Mr Buttigieg's appointment. Secondly, it relates to the nullity of this ground as Wasteserv were unable to defend this point. Appellant raised the *Pembroke Local Council* Case which has no relevance to this case. What relevance has the *Pembroke* Case to do with the unfortunate case of Mr Buttigieg being involved in a criminal case about an accident in Gozo – where is the conflict? This procurement required extensive work on

various aspects and the process was objective, with empirical data that made it successful. The fact that three top reputable companies put in bids is a reflection on how Wasteserv managed the process. Mr Nousis claimed that Hitachi really needs this contract – the fact that someone lost does not mean that the process was flawed. Losing to a competitor on the open market is not a grievance. Wasteserv's obligation was to have carried out a lawful process and it invites the Board to scrutinise all submissions made by all sides and dismiss this appeal with costs.

Dr Inguanez said that the DoC also raised inadmissibility plea on grievances identical to those of Wasteserv. One asks what is the whole point? Is it to have another go or to spite competition? What if Hitachi will not obtain anything from this process? The DoC did not argue, as claimed by Appellant, on whether the Board had technical ability to judge the appeal. The DoC argument was on what is the legal function of the Board and to check if any manifest error occurred but not to do re-evaluation themselves. As regards the technical score no evidence was produced and although Mr Reinhard emphasised the high quality of their bid nonetheless certain criteria were missed. The DoC raised an inadmissibility plea regarding clarifications – Article 44.3 of the ITT provides that the Authority is not obliged to seek clarifications. Mr Jeppe Rasmussen explained clearly that where there was any ambiguity clarifications were sought. In the *Slovensko* Case (C 599/10) the ECJ refused a challenge by bidder on the lack of seeking clarifications. The lack of information in tender bids is attributable to the bidders. The DoC relies on the written submissions regarding the merits on this point.

On the second grievance, said Dr Inguanez, the plea was inadmissible and cannot be considered at this stage as the appeal period had passed, hence the reason why a multi-stage tender was issued. Again the DoC would rely on written submissions. The reference by Dr Paris to Case 374/22/1 does not apply to this case, as in that instance the issue was on the financial capacity of the JV in question in supporting only one member of the whole group. Regarding the abnormally low claim the DoC's inadmissibility plea indicated what action should have been taken under Regulation 262 which allows appeals on tenders that are not feasible; in this case the recommended bid is higher than the tender estimated value. Appellant should have realised that it could not be abnormally low and the only obligation to investigate is if it appears to be abnormally low. Mr Reinhard testified on experience and high quality whilst Mr Jeppe Rasmussen compared the costs aspects of the bids with the odd man out being Hitachi. The DoC does not see the need to investigate Paprec's offer . Mr Nektarius assumed that all bidders had the same technical solutions which was not the case.

Dr Inguanez stated that there was also an inadmissibility plea on the fourth grievance. Regulation 262 allows a bidder to file a claim to set aside a decision. The process of the opening of tenders was known to all bidders and that the name and the price would be published – that is the norm. Hitachi's claim rests on three arguments. The waiver does not apply. Regulation 40 states that the bidder has to declare confidentiality. Stating the price at ITT stage was not confidential. By submitting a BAFO bid Appellant acquiesced to the procedure, citing in support CoA Case 305/22/1 which dealt with being bound when accepting the terms of a call. Hitachi knew the prices would be published, during negotiations knew the prices offered and in fact they trimmed their price to be more competitive. FCC not indicating a price was not a question of unequal treatment – this opportunity was open to all bidders and was therefore not advantageous to anyone. Mr Cachia testified that the decision to go public was to make the process more competitive. There was no obligation at law on the Contracting Authority how to plan the procedure. Regulation 123(b) is flexible and can be used to disclose prices.

The claim of irregularity is nonsensical said Dr Inguanez. If the Board were to accept the re-evaluation this could lead to a situation where the tender is cancelled and a new tender issued with probably the

same bidders but with all prices disclosed. On the fifth and final grievance the DoC would rely on the submissions already made by Wasteserv. PCRB members can belong to the Board and have a job. There is no *causa propria* and no *judex* as the individual is not sitting on the panel in this case. There is no issue and no conflict.

Dr Camilleri on behalf of Paprec said that much in this process has been explained by colleagues so he will merely sum up on some points. In the initial submissions he had made the point that this was not the procedure to make political or other statements but only in line with regulations and it should not be just a fishing expedition and an exercise in trying to find fault in whatever was carried out. This should not be an exercise to cancel the process at all costs – what we have seen was an exercise more directed to find fault to create new arguments. The crux of the appeal are the grievances raised. The conflict of interest claim is the perfect example of trying to find fault. The alleged conflict of interest of Ms Scicluna Laiviera is that the PCRB is not a board where members of which consult with other members. The fact that Ms Scicluna Laiviera is not involved in the decision is clear and that she is not part of some extended board.

In regard to Mr Charlon Buttigieg, Dr Camilleri said that he cannot understand where the conflict arises. This role in the tender does not affect criminal or civil proceedings in a case where Bonnici is not involved in a matter that has no bearing on this case. What undue advantage is Mr Buttigieg giving? What are Appellant exactly saying here? As to the grievances aspect on the wrong evaluation, this is a review board and not tasked to carry out a re-evaluation of the tender. There has to be a manifest error necessary for it to enter into the clinical details. Does the Board after all these hours of submissions have any serious doubts about the conduct of the process? Appellant has not produced a smoking gun and no real and objective grounds have been raised. Even if the award of extra points were to be accepted it would not change the result, even if extra marks were conceded it would not have changed the result. The problem was the high price which Appellant offered. The wrong evaluation issue is in regard to reliance on third parties with all the arguments and counter-arguments on the documents submitted. Appellants did not point out any specific points of concern on the technical side; this was more of a fishing expedition. And more emphasis was made on an abnormally low offer. There was nothing unusual in Paprec's offer according to several witnesses who objectively confirmed that the price of the offer was acceptable. Deloitte representative attempted to mislead the Board but even then he only stated that the low price might create problems and not that it was abnormally low. These were pure allegations that do not hold water. Nowhere has it been stated that the revelation of the prices was illegal or irregular – no specific breach or irregularity of any provision has been mentioned. It is inconsistent that the Appellant requested detailed breakdown of financial figures claiming that they were not confidential but is now claiming that the total prices which give no indication of the components of that price are confidential and had effect on the competition and prejudiced the parties. Only the preferred bidder was prejudiced by having the prices revealed. For the rest he preferred bidder relies on the written submissions.

Dr Delia requested that he be allowed a short rebuttal of the points made. In point order these were as follows:

- There was no grievance that the tender was flawed '*a priori'* – grievances were made at the time they occurred
- Appellant never requested the PCRB to review the technical side but to review how the technical submissions were handled

- Regarding the claim that there was no manifest error the Board should look at the points awarded for the technical submissions as the overall result might change if one considers also the abnormally low context
- Regarding the reliance on third parties the letter of the 30th September could apply equally to any of the parties ousted and therefore the argument is totally flawed
- The grievance on reliance is that any third party support in three cases is only 'to be provided if requested' which is totally different to 'hereby undertake'
- If there was no obligation to flag the bid as abnormally low there was at least an obligation to investigate
- There was no obligation on the Appellant to contest the estimated value
- The manifest error is evident in that there was an obvious abnormal price and no analysis was done
- Disclosure of price was justified by the system design even if illegal is to be disregarded
- Transparency should be on procedures and methodology not on price
- Submitting a bid does not mean waiving your rights of appeal – that argument is totally flawed
- All arguments regarding at least seven instances regarding the grievance on grounds for publication of price go against EU law, Directive 2014/24 and case law
- Disclosure of a candidates bid details is illegal under EU Directives and CJEU cases – in an open live tender how is it that the price is not safeguarded?
- Nobody can understand the position of Mr Charlon Buttigieg if criminal proceeding are underway with two parties who have a shared destiny
- The minute Ms Scicluna Laiviera sat the first time on the evaluation committee she was also part of the PCRB at law

That concluded the final submission.

There being no further submissions the Chairman thanked all the parties and declared the hearing concluded.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 22nd November 2023, 24th November 2023, 14th December 2023, 16th January 2024 and 17th January 2024.

Having noted the objection filed by Hitachi Zosen Inova AG-Terna S.A. (hereinafter referred to as the Appellant) on 23rd October 2023, refers to the claims made by the same Appellant with regard to the tender of reference CT2032/2022 listed as case No. 1943 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Matthew Paris & Dr Adrian Delia

Appearing for the Contracting Authority: Dr Antoine Cremona, Dr Clement Mifsud Bonnici & Dr Calvin Calleja

Appearing for the DoC: Dr Daniel Inguanez & Dr Mark Anthony Debono

Appearing for the Preferred Bidder: Dr John L. Gauci & Dr Joseph Camilleri

Appearing for the Interested Party: Dr Steve Decesare

Whereby, the Appellant contends that:

a) **Wrong evaluation of the appellant bid -**

The Appellant feels aggrieved by the decision of the evaluation committee, in particular since the technical score afforded to the offer by the appellants is not justified. The offer of the appellants was fully compliant, detailed to a high degree, and in accordance with the tender requirements thus the technical score given should be higher. In addition, and worse still, in some instances the evaluation concluded that certain information was missing, and proceeded to afford limited scoring, when in actual fact such information/documentation has been provided. In the eventuality that they didn't locate or find particular documentation within the submission, in accordance with article 146 of S.L. 601.03, the Contracting Authority could have asked the appellant to confirm or otherwise if such documentation was submitted with its bid, and not proceed to give a low scoring - which scoring is not justified since the documents/information requested are within the original bid. Without prejudice to the aforesaid, even if the evaluation committee had any doubts, or determined that there was an ambiguity, in accordance with the principle of proportionality, it should have sought to resolve such ambiguity through a clarification - as things stand, the evaluation committee did not explore all avenues, and thus low scoring is not justified. Finally, the Appellants feels aggrieved since it used parameters which were not part of the bid, to offer a reduced technical scoring. Hereby reference is made to the principle of self-limitation, wherein it is clear that the evaluation cannot and should not depart from the tender document, and/or introduce new elements at evaluation stage.

b) **Wrong evaluation of the recommended bid - Reliance on capacities of third parties**

In accordance with provision 2.3.5 of the PQQ *"A Candidate may, where appropriate and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. It must in that case prove to the Contracting Authority that it will have at its disposal the resources necessary, for example, by producing an undertaking by those entities to that effect. Where a Candidate relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the other entity/entities shall together with the Candidate and its partners be jointly liable for the execution of the Contract." I*n view of the aforesaid, the review before the PCRB must ascertain that the appropriate reliance documentation have been

provided, and that the appropriate confirmations and commitments have also been provided by all the third party entities on whose capacities the recommended bidder has been relied (sic). In addition, where reliance relates to economic and financial standing, it is important to verify and confirm that these entities have jointly committed and been rendered liable for the execution of the Contract. This aforesaid is being stated without prejudice to the tender obligations for economic and financial standing, which stipulated that: "Where the Candidate is a joint-venture/consortium of partner companies, each partner company shall fill in the forms hereunder, extracting data from the respective company audited financial statements. It is required that the lead company has the major share in terms of the joint-venture/consortium. The Candidate consolidated financial standing shall be established from the aggregate marks assigned relative to each partner company financial statements, weighted according to their individual share in joint venture/consortium of partner companies. However, for marks given to the Average Total Annual Turnover (Table B1.3.3), the individual turnover of each of the joint-venture/consortium members add to the consolidated total turn-over weighted according to their share in the joint-venture consortium."

c) **Wrong evaluation of the recommended bid - The technical solution**

In terms of the solution offered, the appellants are seriously concerned that the annual fixed payment/annual fixed amount of €8,062,000 and the capital cost of €284,819.900 reflect a very modest price for the stature of the project, and consequently as will be shown throughout the proceedings, the recommended bidder cannot sustain such a price with the mandatory technical requirements specified within the tender, alternatively it will sustain the price, but by offering a solution not compliant to the tender specifications! The appellants have concerns on the following points, when it comes to the technical tender requirements, i) Does the winning bidders solution include a water cooled solution for the waters steam cycle including sea water intake pipelines, pumphouse and water coolers? ii) Does the winning bidders solution include a canopy structure a fully compliant with the ITT? iii)Does the winning bidders include a compliant, full and robust detailed solution for the bottom ash treatment plant? iv) Does the winning bidders solution include à solution for flue gas treatment residue disposal fully in line with Maltese and European legislation?

d) **Irregularities in the procedure -**

The competitive procedure with negotiation under review was structured in three cycles, namely: i) The 1ST cycle - invitation to tender [ITT] ii) The 2nd cycle – 2nd ITT iii) The 3rd cycle - The best and final offer [BAFO]

Every cycle, as is mandatory through the GRGT, led to: a submission by individual bidders - the publication of the bidders, - to a decision to exclude or accept the bids, - the communication by the contracting authority of the rejection/acceptance and the standstill period.

The GRGT, in provision 13.2 stipulates that: *"At the tender opening session, the tenderers' names, the tender ID, and where applicable the tendered price will be published."* It is the submission of the appellants that the Contracting Authority/DOC irregularly published through the ePPS portal the "non-binding" financial offer value by some of the individual bidders at the second cycle. Such information should have not been published at such stage, but only upon submission of the BAFO. The disclosure of information, is an irregularity within the procedure, which has the effect of distorting competition and preventing fair competition. In accordance with inter alia article 13(2) of the BAFO, Cancellation may occur where: *"e) there have been irregularities in the procedure, where these have prevented fair competition."* Undoubtedly, and as will be shown throughout the proceedings, the irregularity in rendering public the financial offer value of four [4] bidders out five [5] bidders that have submitted their bid for the 2nd cycle, has had a negative impact on the procurement procedure itself, which irregularity should have been addressed in accordance with article 13[2] of the BAFO, and/or the equivalent cancellation provisions in the PPR. Through the second information requested, the DOC confirmed that only four out of five bids have had their offer published through the ePPS portal.

This Board also noted the Contracting Authority's Reasoned Letter of Reply filed on 2nd November 2023 and its verbal submission during the hearings held on 22nd November 2023, 24th November 2023, 14th December 2023, 16th January 2024 and 17th January 2024, in that:

a) **Inadmissibility of First Ground of Appeal: The Appellant's grievance is inadmissible at law because it has no utility to the outcome of this Appeal -**

   In brief, and by means of the Appellant's first ground of appeal (Wrong Evaluation of the Appellant Bid, the Appellant is claiming that it should have obtained a higher technical score on a handful of sub-criteria because the offer *"was fully compliant, detailed to a high degree"*. The Contracting Authority submits that, even if in *arguendo* the Appellant were right (which it is not), the higher technical score would not have changed the recommendation of the Competitive Negotiation to the Recommended Bidder. This is because the Appellant's offer would still not have been the first ranking offer even if it obtained the full technical score which it did not. Clause 50 of the BAFO provided that the award criteria for the Competitive Negotiation will be based on the best price quality ratio ("BPQR") with a weighting ratio of 45% to the technical aspect of the offer and a weighting ratio of 55% to the financial aspect of the offer. If, in *arguendo*, the Appellant obtained the highest possible Technical Score which it did not-nothing would have changed: the

Recommended Bidder would still have come first, and the Appellant would still have come second. In view of the above, the Contracting Authority submits that, in any case, the Appellant is not harmed because of this alleged grievance and the outcome of the evaluation would not change even if the Appellant were right--which it isn't.

b) **First Ground of Appeal: The Evaluation of the Appellant's Bid is Correct - First Allegation: The Contracting Authority could not have allocated a higher score to the Appellant's bid -**

The Contracting Authority submits that the detailed methodology left no room for subjectivity in the evaluation of the Technical Element and its Sub-Criteria. The allocation of points for each SPAV was made in line with this methodology and was disclosed to each bidder, including, the Appellant. On this issue, the Contracting Authority must say that the quotations from the technical evaluation sheet cited by the Appellant in their Appeal are a misrepresentation of the precise detail that was provided by the Contracting Authority to the Appellant in the letter of rejection on the scoring allocation on each SPAV. The Appellant appears, perhaps by way of genuine oversight, to have omitted the justifications (in particular, where and why the bid raised concerns) that were provided in the technical evaluation sheet attached to the letter of rejection. Rather, the evaluation committee has painstakingly explained whether the Appellant's bid satisfied the requirements set out in Annex A to this reply for each SPAVC, and as a result, the points allocated for each SPAV. This Honourable Board can verify itself that the detail provided by the Contracting Authority to the Appellant in the letter of rejection is satisfactory and certainly exceeds market practice. The Contracting Authority simply could not allocate more points on the Sub-Criteria and SPAVs identified by the Appellant in its Appeal without violating the clear and unambiguous terms of the procurement documentation and without acting in contravention of the general principles of public procurement: equal treatment, transparency and self-limitation.

c) **First Ground of Appeal: The Evaluation of the Appellant's Bid is Correct - Second Allegation: The Appellant's bid did contain missing information, and in any case, this was not a rectifiable matter -**

The Appellant, yet again, limited itself to a gratuitous and uncorroborated statement that information which was missing was provided. But, the Appellant did not point out where this information is to be located within the Appellant's bid. The Appellant bears the burden of proof on this issue. Incidentally, and on this issue, the Appellant attempts to rely on Regulation 146 of the PPR to argue that the Contracting Authority should have requested a clarification from the Appellant on this "missing information". The Contracting Authority cannot but observe that: a. *First*, Regulation 146 of the PPR applies to the "competitive dialogue" procedure regulated by Regulations 140 to 149 of the PPR and does not apply to the Competitive Negotiation which is a "competitive procedure with negotiation" b. *Second*, and in any case, the "missing information" related to the technical offer of the Appellant, and therefore, constitutes a substantial aspect of the

bid which cannot be altered after the submission of the bid. The law does not allow a bidder to supplement missing information relating to a substantial aspect of the bid by way of a "clarification" or "rectification". In fact, the BAFO expressly provided that *"no rectification to the information received in connection with the final Tender/BAFO submission (including the Technical and Financial offer) is allowed"*.

d) **First Ground of Appeal: The Evaluation of the Appellant's Bid is Correct - Third Allegation: The Contracting Authority applied the same parameters for the scoring which were present in the ITT -**

The Contracting Authority strongly rebuts the Appellant's allegation that it has used parameters which were not already communicated to the bidders in the ITT. The excerpt quoted by the Appellant in paragraph 1.10 is a misleading reconstitution of the technical evaluation sheet and it "mixes and matches" justifications provided by the evaluation committee for an SPAV with justification provided for another SPAV. Very much like what the Appellant has done with respect to the first allegation. The Contracting Authority maintains that the scoring was done in line with the evaluation methodology and this was explained in painstaking detail to the Appellant in the letter of rejection.

e) **Inadmissibility of Second Ground of Appeal: The Appellant's grievance is inadmissible at law because the remedy at law is extinguished and the grievance is not sufficiently clear -**

In brief, and by means of the Appellant's second ground of appeal ("Wrong evaluation of the recommended bid: Reliance on capacities of third parties"), the Appellant is expecting the PCRB to *"ascertain that the appropriate reliance documentation have been provided, and that the appropriate confirmations and commitments have also been provided by all the third party entities on whose capacities the recommended bidder has been relied"*.

The Contracting Authority submits that this second ground of appeal is inadmissible at law for 2 reasons. a. First, the Appellant has not set out *"in a very clear manner the reasons"* for its grievance under this indent. b. Second. the Appellant's right to challenge any grievance on the Recommended Bidder's reliance on third parties is extinguished and the Contracting Authority's decision to short-list the Recommended Bidder is final and definitive *(res judicata)*.

First, the Appellant has not set out *"in a very clear manner the reasons"* for its grievance under this indent. The Appellant's submissions in paragraphs 2.1.1 to 2.1.5 are descriptive at best. The Appellant simply reproduces extracts of the PQQ and information disclosed by DoC and the Contracting Authority on the Appellant's request, but stops short of raising an allegation or grievance with respect to Recommend Bidder's reliance on the capacities of third parties. This an *ad validitatem* requirement for appeals lodged in terms of Regulation 270 of the PPR. This rule is not merely a rule of procedure, a 'tick-the-box' exercise. The underlying justification for this requirement is to uphold *the audi alteram partem* principle and ensure that parties are placed on an

equal footing. As things stand, the Contracting Authority cannot meaningfully defend its position because it is unable to deduce from the descriptions made by the Appellant what is the allegation or grievance on this issue.

Second, the Appellant should have raised any grievance under this indent by 10 October 2022-being 10 days from DoC's and the Contracting Authority's decision of 30 September 2022 to short-list inter alia the Recommended Bidder for the second phase of the ITT.

The DoC's and the Contracting Authority's decision of 30 September 2022 to short-list the Recommended Bidder was to be taken that the Recommended Bidder (and the third parties on whose capacities it relied on) was found to comply with the selection and eligibility criteria and other requirements set out in the PQQ. If the Appellant had any grievance- something which is unclear to this day-on whether the Recommended Bidder and the third parties on whose capacities it relied on satisfied the requirements set out in the PQQ, such a grievance should have been brought before this Honourable Board in terms of Regulation 270 of the PPR. As a result, the DoC's and the Contracting Authority's decision to short-list has become final and definitive *(res judicata),* and therefore, it cannot be challenged at this late stage of the procurement procedure.

f) **Second Ground of Appeal: Recommended Bidder complied with all PQQ requirements -**

Save for the inadmissibility issues raised on this issue in the preceding Section 0, the Contracting Authority stands by the fact that the Recommended Bidder has complied with the requirements in the PQQ-which has been confirmed to the Appellant in writing before this Appeal was filed. This Honourable Board can easily verify from the procurement file which is confidential and cannot be freely accessible to the bidders--that the: a. *"appropriate reliance documentation"*, and b. *"appropriate confirmations and commitments",* have been provided by all the third parties on whose capacities the Recommended Bidder has relied.

g) **Inadmissibility of the Third Ground of Appeal: The Appellant's grievance is inadmissible at law because the Appellant has acquiesced to the estimated procurement value of the Competitive Negotiation and the remedy at law is now extinguished -**

In not so many words, and under this third ground of appeal, the Appellant is arguing that the Recommended Bidder has submitted an abnormally low tender. The fact of the matter is that the PQQ disclosed the estimated procurement value of the project and it was known to all economic operators at the outset of the procurement process (published together with the contract notice), hence also before participating in the Competitive Negotiation. The total estimated procurement value was €549 million. This was clearly indicated on ePPS. This was split as follows: (i) €214 million representing CAPEX; and (ii) €181 million representing the Annual Fixed Amount payable over a 20 year Service Period; and (iii) €153.6 million representing the maximum tonnage payment. This estimate was based on independent market research carried out by the Contracting Authority

before the Competitive Negotiation was issued. The Recommended Bidder's financial offer was around 9.3% higher than the Contracting Authority's estimated procurement value. Therefore, if the Appellant is "seriously concerned" about the Recommended Bidder's financial offer, it must have a grievance on the estimated procurement value of the Competitive Negotiation disclosed in the PQQ.

h) **Third Ground of Appeal: Recommended Bidder's financial offer was not abnormally low -**

At most, and upon an aggrieved bidder's specific and express request, this Honourable Board may decide that a bidder's financial offer appears to be abnormally low, and if so, direct a contracting authority to give the bidder in question an opportunity to explain in further detail the economic rationale of its purportedly abnormally low bid in line with Regulation 243 of the PPR. The Courts of Justice of the European Union have consistently held that a bidder, whose financial offer appears to be abnormally low, cannot be automatically excluded from the competitive tender process before it is given the opportunity of explaining the economic rationale of its tender. This Honourable Board has conformed to this position in past decisions.

i) **Inadmissibility of the Fourth Ground of Appeal: The Appellant's grievance is inadmissible at law because the Appellant has acquiesced to any alleged procedural irregularity and the remedy at law is extinguished -**

First, the Appellant waived any reservation or objection that it may have had on the conduct of the procurement procedure once it submitted its final and binding offer in the BAFO stage. The Contracting Authority can also confirm that, during the negotiation phase following the submission of the initial non-binding bid, the Appellant never requested a clarification on this issue and never raised any issue of a purported "procedural irregularity" in the Competitive Negotiation. Rather, the Appellant continued negotiating with the Contracting Authority as if nothing were (sic). The Appellant's submission of its final and binding bid at BAFO stage must be taken as a sign of trust and confidence in the Competitive Negotiation and the way it was handled by the Contracting Authority. The General Rules Governing Tenders, quoted by the Appellant in its submissions provide that the Appellant is taken to accept "in full and in its entirety" the content of the procurement documentation and that the Appellant's reservations on the procurement procedure are "waived" as a result of submitting a bid at BAFO stage.

Second, the Appellant failed to exhaust any remedies at law which might have been available to it as soon as it was aware of this "procedural irregularity" on 17 February 2023. This is the date on which the initial non-binding bids submitted by the shortlisted bidders were opened on ePPS in the ITT stage. The Appellant might have *inter alia* resorted to an appeal in terms of Regulation 270 of the PPR to review *"an alleged infringement or by any decision taken [...] after the lapse of the publication period"*. The wording of the law is sufficiently wide that the Appellant could have challenged either

the "alleged infringement itself purportedly committed on 17 February 2023, but also, the Contracting Authority's decision of 22 June 2023 to conclude the negotiation and to invite all shortlisted bidders to the BAFO stage. The Appellant might have *inter alia* also resorted to an application in terms of Regulation 262 of the PPR as soon as the DoC and the Contracting Authority, on 22 June 2023, invited the Appellant to submit its final and binding bid at BAFO by 31 July 2023.

j) **Fourth Ground of Appeal: There is no irregularity in the Competitive Negotiation -**

Save for the inadmissibility issues raised on this issue above, the Contracting Authority submits that there is no procedural irregularity in the Competitive Negotiation. The Contracting Authority submits that the publication of the "Grand Total" of the financial offer in the initial non-binding bid submitted at ITT did not and could not have the "effect of distorting competition and preventing fair competition". The Appellant does not explain how competition was distorted and how fair competition was prevented. The Contracting Authority submits these are gratuitous statements which are uncorroborated and untrue. The Grand Total of the non-binding financial offers was automatically published on ePPS upon the opening of the non-binding bids by the DoC through ePPS. There is nothing untoward on this issue.

First, the Grand Total of the financial offer is simply not confidential or commercially sensitive. The Contracting Authority submits that aggregated information, at least in the circumstances, cannot constitute confidential or commercially sensitive information. The Appellant must agree with this submission because it has expressly requested this information on 19 October 2023 and argued that it is not confidential in terms of Regulation 40 of the PPR: *"The JV understands that the information requested is not confidential, neither sensitive nor privileged, and thus the JV expects that its request is upheld by the department."*

Second, the DoC and the Contracting Authority were not barred from the disclosure of information which is not confidential or commercially sensitive, and rather, it could have done so to achieve primary objective of the ensuing negotiation phase- the improvement of the shortlisted bidders- and toguarantee transparency.

Therefore, and if the information in question is not confidential, and in any case, the DoC and the Contracting Authority were permitted to disclose it, it is difficult to understand how competition could have been distorted and how fair competition was prevented. The Contracting Authority reiterates that neither took place, and consequently, there is no "procedural irregularity" in the Competitive Negotiation.

This Board also noted the Department of Contract's Reasoned Letter of Reply filed on 2nd November 2023 and its verbal submission during the hearings held on 22nd November 2023, 24th November 2023, 14th December 2023, 16th January 2024 and 17th January 2024, in that:

a) **First grievance - First Plea: since the first grievance of the Appellant is inadmissible since it is of no utility to the Appellant**

The award criterion in the procurement procedure is the Best Price Quality Ratio (BPOR) which weighs the quality of each bid (the technical score) against its price (the financial score). According to the terms set out in Art. 51 of the Invitation to Tender (ITT) the technical score is given a weighting of 45% whereas the financial score is given a 55% weighting.

By means of its first grievance the Appellant attacks the technical evaluation of its bid, effectively, arguing for a higher technical score.

Given that, even if successful in its first claim (which is nevertheless being contested by the Respondent), the Appellant would still rank second with no utility derived from the success of its first grievance. This renders the first grievance, and all of the individual claims made therein, inadmissible.

b) **First grievance - Second Plea: review cannot amount to this Board exercising administrative discretion itself -**

The case law of the Court of Appeal has invariably held that the review bodies (this Board and the Court of Appeal itself) cannot exercise themselves the decision-making power that is legally vested in the administrative authorities. It follows that whether the Appellant, or even this Board, agree with how the points were allotted is immaterial. The question to be determined by the Board is whether the allotment of points by the evaluation board is reasonable and affected by any manifest error of assessment. The first grievance of the Appellant cannot, therefore, be successful unless the Appellant proves that the allotment of points by the evaluation board was unreasonable and affected by any manifest error of assessment.

c) **First grievance - Third Plea: the Appellant's grievance (i.a.) is unfounded -**

As has already been submitted above, where the award criterion is the BPQR, the assessment of the offers and of the points to be awarded necessarily give some leeway and discretion to the evaluation board. It is not a matter of simply being 'fully compliant' or in accordance with the tender requirements' as the Appellant seems to claim. In the same manner, it is not sufficient that the Appellant to claim, or even to prove, that its offer was detailed to a high degree. What must be shown is that evaluation board's decision in allotting the points was reasonable.

d) **First grievance - Fourth Plea: the Appellant's grievance (i.b.) is inadmissible in so far as it claims that the contracting authority should have sought clarifications -**

It is manifestly clear from Art. 44.3 of the ITT that the contracting authority could not request rectifications and it could, but was not obliged to, seek clarification of tenders. This is in line with the Reg. 62(2) of the Public Procurement Regulations (Subsidiary Legislation 601.03), transposing Art. 56(3) of the Directive 2014/24/EU on Public Procurement. This is also compatible with Reg. 146 of thr Public Procurement Regulations which is cited in the appeal application (see para. 1.6) (albeit regulating competitive dialogue procedures - an entirely different procurement procedure than that used here). In the absence of a hard line as to whether contracting authorities should seek clarifications or not, the Public Procurement Regulations have left this matter to be further regulated in the tender documentation itself. In most ordinary open procedures the practice is to regulate this matter by marking different sections of the tender document by so-called Notes', whereby contracting authorities are obliged to request clarifications with respect to sections of the tender marked as 'Note 2' and prohibited from doing so with respect to sections marked as 'Note 3'. To the contrary, in the case of the present procurement procedure, the tender documentation did not oblige the contracting authority to seek clarification of the submitted offers. Art. 44.3 of the ITT makes it manifestly clear that it was at its discretion to do so or not within the defined parameters of that provision and subject to the principle of equal treatment.

e) **First grievance - Fifth Plea (being raised without prejudice to the Fourth Plea): the Appellant's grievance (i.b.) is unfounded -**

The Appellant claims that it should have been given the opportunity to confirm whether the information had been submitted with its technical submission through clarification requests (see para. 1.6 et seq. of the appeal application). Without prejudice to the Third Plea of the inadmissibilty of this claim, even if this claim were to be deemed admissible and examined in its substance, it is unfounded. The deficiencies identified in the Appellant's technical submission, with respect to the elements cited in the appeal application, could not be remedied by a mere clarification.

The Board must answer two questions in order to determine whether clarification requests were even possible in the instances mentioned by the Appellant.

<u>The first question:</u> Can it be said that the deficiencies of the Appellant's bid are obvious errors, mere formalities, or minor clerical errors? In the view of the Respondent Department of Contracts the answer must be a definite no. The deficiencies in the Appellant's technical offer constitute an essential part of the negotiated solution. The technical elements assessed constituted the very essence of the solution being offered by the appellant.

<u>The second question:</u> Would a clarification request, in the instances complained of by the Appellant, have adversely affected open competition or favoured the Appellant? In the view of the Respondent Department of Contract, the answer must be in the affirmative.

Had the evaluation board sought clarifications, as the Appellant expects, it would have favoured the Appellant. The Appellant took the risk of offering a technical solution of the quality that it has, not knowing whether other tenderers would offer a better-quality technical solution which necessarily entails more costs and burden. The Appellant expects that it should have been afforded the opportunity to rectify its submitted technical offer and alter it to match any better-quality bids and be again in the chance of being award the contract. The gamble that the Appellant played is that, had there been no better-quality bids, it would have been in the game to being awarded the contract for a lower quality, that is lower cost and burden, technical solution.

In a competitive procedure with negotiation, since tenders are negotiated and solutions discussed, it is expected that all the issues as to the technical solution to be offered by the tenderer have been settled by the time of the submission of the final tenders, as indicated in Art. 33.1 of the ITT. The discretion of the contracting authority to seek clarification on obvious or clerical errors cannot be used to effectively open a re-negotiation of the technical solution with any one tenderer for it to be able to offer a better system than it had previous to the final submission of its tender.

f) **First grievance - Sixth Plea: the Appellant's grievance (i.c.) is unfounded -**

In the third part of its first grievance, the Appellant claims that the evaluation board has used parameters which depart from the procurement documentation. The Appellant raises this grievance in relation to two Specific Added Value (SPAV) elements. For clarity's sake, the justification for the allotment of points for each SPAV in question shall be reproduced since the appeal application misquotes the technical sheet and lumps them as a single element (see para. 1.10 of the appeal application). The Respondent rebuts that the any (sic) tender requirement was changed or departed from at evaluation stage. The justifications for the points allotted are strictly within the tender conditions and the Appellant's grievance (i.c.) in this respect must be dismissed.

g) **Second Grievance - Seventh Plea: the Appellant's second grievance is inadmissible at this stage and any such grievance should have been raised in the appeal period provided in the Pre-Qualification Questionnaire (PQQ) -**

In terms of Art. 2.3.5 of the PQQ, any reliance on third parties in the candidates' bids has been evaluated at PQQ stage in the process of short-listing candidates. Following the shortlisting decision there was a standstill period of ten days, in accordance with Art. 3.5.3, to allow for candidates to appeal that decision in terms of Reg. 270 of the Public Procurement Regulations before moving on to issue the Invitation to Tender (ITT).

Any complaint on the shortlisting decision is inadmissible at this stage. The ECJ has, in its judgment in the Universale-Bau case (Case C-470/99, 12 December 2002, EU:C:2002:746, para. 74), considered that the very objective of procurement remedies is to allow for timely appeals which correct any infringement as they occur: *"In that regard, it is appropriate to recall that, as is apparent from*

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

It follows then, from the ECJ's judgment in the Universale-Bau case (para. 75), that tenderers cannot be allowed to bring untimely claims with respect to alleged infringement, which if proven true, could have been corrected at an earlier stage of the procurement procedure: *"The full implementation of the objective sought by Directive 89/665 would be undermined if candidates and tenderers were allowed to invoke. at any stage of the award procedure, infringement of the rules of public procurement, thus obliging the contracting authority to restart the entire procedure in order to correct such infringements."*

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

In the present case, any grievance which the Appellant could have had regarding reliance on third parties should have been raised in the first appeal period post-PQQ stage. It cannot, now, appeal on points which have been closed at a previous stage of the procurement procedure.

h) **Second Grievance - Eighth Plea: the Appellant's second grievance is also inadmissible since it is unclear and since it seemingly requests this Board to exercise administrative discretion itself -**

Reg. 270 of the Public Procurement Regulations expressly requires that an appeal application *"shall contain in a very clear manner the reasons for their complaints"*. Rather than raising any complaint or grievance with respect to the recommended bidder's reliance on third parties, the present appeal application simply restates some PQQ conditions and sort of invites this Board to verify the compliance of the recommended bid. Since the appeal application raises no discernible complaint with respect to the recommended bidder's reliance on third parties its second grievance is inadmissible.

i) **Second Grievance - Ninth Plea (being raised without prejudice to the Seventh and Eighth Pleas): the Appellant's second grievance is unfounded -**

The recommended bid is compliant with all PQQ requirements as this Board may verify from the procurement file. Saving the pleas of inadmissibility, considering the Appellant's grievance regarding the recommended tenderer's reliance on third parties in substance, it must be dismissed.

j) **Third Grievance - Tenth Plea: the Appellant's third grievance is inadmissible -**

In the present case the recommended bid's price is higher than the estimated contract value. Whereas the estimated procurement price is that of €549,000,000, the global contract value of the

recommended bid is of €599,659,900. If the Appellant claims that the contract at issue cannot be economically sustained and/or performed in compliance with tender requirements at the price of €599,659,900 (the recommend bid), then, it a fortiori claims that the contract cannot be economically sustained and/or performed in compliance with tender requirements at the even lower price of €549,000,000 (the estimated contract value). The estimated contract value was revealed at PQQ stage, therefore, the Appellant should have brought such claim in an action seeking a remedy before closing of the tendering stages under Reg. 262 of the Public Procurement Regulations. Reg. 262(a) specifically provides a ground to challenge any decision or clauses in the procurement documentation "which are proven to be impossible to perform".

k) **Third Grievance - Eleventh Plea (being raised without prejudice to the Tenth Plea: the Appellant's third grievance is unfounded -**

The starting point to any assessment as to whether there exists an abnormally low financial offer must be a comparison with the estimated contract value. In its judgment of X Clean Limited v. Dipartiment ghall-Anzjanità Attiva u Kura fil-Komunità et (appeal no. 126/2021/1, 31 August 2021, para. 14) the Court of Appeal considered that: *"Jinghad qabel xejn illi huwa aktar logiku li 1-prezz tal-offerta jitqabbel mal-prezz stmat mill-awtorità kontraenti milli mal-prezz tal-oghla offerta. Il-prezz stmat huwa bazat fuq ricerka dwar il-kundizzjonijiet tas-suq u ghandu ghalhekk jitqies realistiku. Kif inghad fuq, il-prezz stmat mill-awtorità huwa biss indikattiv u offerta ta' prezz anqas jew oghla ma tfissirx necessarjament illi l-offerta hija gholja jew baxxa wisq"*

The recommended bid's financial offer is higher than the estimated contract value of €549,000,000. This in itself is the best indication that it is not in fact abnormally low. Comparing the recommended bid's financial offer with other offers, there were two other bids placed by shortlisted tenderers at ITT stage which are in the same region as the financial offer submitted by the recommended bidder, one of them being actually lower, though these tenderers failed to submit a final bid at the Best and Final Offer (BAFO) stage. This further indicates that the recommended bid is not abnormally low. According to Reg. 243 of the Public Procurement Regulations a contracting authority should only investigate whether a bid is abnormally low if it *prima facie* appears to be so. In this case, the contrary appears to be true. This alone suffices for the Appellant's grievance to be rejected.

l) **Fourth Grievance - Twelfth Plea: the Appellant's fourth grievance is inadmissible at this stage of the procurement procedure -**

The initial financial offers were opened on the 17th of February 2023. Shortly thereafter, the shortlisted candidates were invited to negotiate their offers with the contracting authority. It was only after the recommendation for award, on 13th of October 2023, that the Appellant decided to contest the fact that the initial offers were opened. Such contestation at this stage is inadmissible

for the following reasons. At no point after the publication of the initial tenders did the Appellant raise any complaint in this regard, either formally or informally, with either the Department of Contracts or with the contracting authority. To (sic) the contrary, not only did the Appellant negotiate its offer with the contracting authority but it also chose to submit its best and final offer. Once it did so, the Appellant has acquiesced to the procurement procedure. Rather than accept the procurement procedure by submitting its best and final offer, the Appellant could have contested the decision to open the initial tenders by recourse to the remedy before closing date of submission of offers provided in Reg. 262 of the Public Procurement Regulations. In particular, Reg. 262(1)(a) enables any tenderer to file an application with this Board *"to set aside or ensure the setting aside of decisions... taken unlawfully at this stage..."*. If the Appellant truly considered the decision to open the initial tender at ITT stage to be unlawful it would have, or at least should have, sought a remedy in terms of Reg. 262 at the appropriate time.

m) **Fourth Grievance - Thirteenth Plea (being raised without prejudice to the Twelfth Plea): the Appellant's Fourth grievance is unfounded -**

The Appellant grounds its fourth grievance on the allegation that the opening of the initial financial offers has distorted competition. The Appellant does not given any indication of what anti-competitive effects the opening of the initial financial offers could have had. In any case, this grievance of the Appellant is unfounded for the following reasons.

Firstly, the Respondent Department of Contracts rebuts that there were any anti-competitive effects. All tenderers were aware that they could choose not to submit a global initial price. The disclosure of the initial financial offers of the tenderers, if they chose to submit any, applied to all tenderers. No one tenderer was prejudiced since these conditions applied equally to all tenderers.

Secondly, not only did the opening of the initial prices not have anti-competitive effects, but it had pro-competitive effects. The disclosure of the initially submitted prices allowed tenderers to be more competitive and price downwards by removing, as far as possible, the economic inefficiencies in each of their bids. If anything, it was the Appellant itself which derived the most advantage from the design of the procurement process since it was by far the least competitive, financially. At the stage of the initial offers, the Appellant offered the highest price of €983,600,000 being more expensive than the second highest price offered by €366,586,600. At BAFO stage the Appellant reduced its price to €781,512,463. It was with this pro-competitive effect in mind that the Electronic Public Procurement System (e-PPS) for this process was designed to automatically open the initial price offers at IT'T stage.

Thirdly, the global initial price is not confidential information and there was, therefore, no restriction on either the Department of Contracts or on the contracting authority not to disclose. The Appellant has argued so itself when it made its request for information for the disclosure of

not only the global prices but also the detailed price breakdown. This means that the competitive procedure with negotiation could be designed in this manner to favour disclosure at ITT stage to attract the pro-competitive effects highlighted.

Fourthly, even if for the sake of the argument the initial prices were to be considered confidential, the Appellant's grievance would still be unfounded. According to Reg. 127(5) of the Public Procurement Regulations, contracting authorities may disclose even confidential information with the agreement of the tenderer. In this case, as has already been submitted in the context of the Twelfth Plea, the Appellant agreed to the disclosure of its initial price when it decided to continue with procurement procedure without raising any complaint, whether formally or informally, and to submit its best and final offer.

This Board also noted the Preferred Bidder's Reasoned Letter of Reply filed on 2nd November 2023 and its verbal submission during the hearings held on 22nd November 2023, 24th November 2023, 14th December 2023, 16th January 2024 and 17th January 2024, in that:

a) **First Grievance: Wrong Evaluation of the Appellant's Bid -**

The Appellant alleges that the technical score awarded to their bid was unjustified. We wish to emphasize the following key points in response to this grievance:

Proportionality Principle: The concept of proportionality cannot be used as an excuse for non-compliance with tender requirements. This principle has been consistently upheld in relevant case law, including the judgment by the Court of Appeal (Superior) delivered on the 22nd June 2022 in the names: NQUAYMT v. Agenzija ghal Infrastruttura Malta et,

Principle of Non-Interference / Technical Expertise: It is an established principle in procurement law that the PCRB should refrain from disturbing the findings of the Technical Evaluation Committee unless compelling evidence of procedural irregularities or manifest errors exists. This principle ensures the independence and expertise of technical evaluators. This principle is underscored in the jurisprudence and case-law of our Courts and of this Board.

b) **Second Grievance: Wrong Evaluation of the Recommended Bid -**

The Appellant raises several concerns regarding the evaluation of the recommended bid. We offer the following responses:

Reliance on Third Parties: - The Appellant's reservations regarding an undue reliance on third-party capacities have been duly addressed by the DoC. The DoC has affirmed that the Recommended Bidder was in full compliance with the stipulated reliance provisions. This affirmation was provided in response to the Appellant's formal inquiry for information. Indeed, it does not seem that the

Appellant queried the DOC's response further. Consequently, this concern or grievance raised by the Appellant is clearly unfounded and can be deemed as frivolous and vexatious.

Technical Solution / Requirements: - Despite the Appellant's attempts to cast aspersions on the financial and economic viability of the Recommended Bidder's proposal, they have failed to furnish any tangible evidence supporting their claims. It remains within the sole prerogative of the Contracting Authority to ascertain whether a bid can be classified as abnormally low and to decide on initiating an investigation into the same. Clearly, the Contracting Authority has expressed satisfaction with the economic soundness of the Recommended Bidder's proposal. The Appellant's mere insinuations or posing of questions does not substantiate doubts, especially in the absence of concrete evidence. Furthermore, the Recommended Bidder's bid is actually higher than the Estimated Procurement Value which value was never contested by the Appellant.

The Appellant's concerns regarding the recommended bid, specifically relating to the undue reliance on third-party capacities and the financial and economic viability of the proposal, are completely unfounded. Moreover, the DoC has confirmed the compliance of the Recommended Bidder with the established provisions, thereby negating the Appellant's grievance on the first matter. Furthermore, the Contracting Authority has expressed confidence in the economic soundness of the Recommended Bidder's proposal, dismissing the Appellant's claims due to lack of concrete evidence. Based on the provided responses, the Appellant's grievances are completely without merit.

It has been stated in several decisions of the PCRB and the Courts that an appeal must clearly state "specific points... to justify any doubts and suspicions on how the evaluation process was carried out or on the technical offer submitted by the preferred bidder" (vide for instance decision in Case 1873, 29th May, 2023). In the absence of specific and well-founded concerns about the eligibility of Recommended Bidder's offer, the Appellant has no right to request a "rerun" of the evaluation process in the vague hope of finding any inconsistency or shortcoming justifying the cancellation of the award. Indeed, this approach in itself confirms that the Appellant has no real grounds to contest the award and that its anticipated "deep dive" is tantamount to the proverbial "fishing expedition".

c) **Third Grievance: Disclosure of "Non-Binding" Financial Offer -**

Regarding the Appellant's grievance concerning the publication of "non-binding" financial offers, we assert the following:

i. Consistency for All Bidders: The procedure for publishing non-binding financial offers was consistent for all bidders, ensuring equal treatment and a level playing field. Any objection raised by the Appellant appears to stem from their subsequent non-selection for the award. The Appellant chose to remain in the game by submitting its BAFO after the publication of "non-binding"

financial offers and cannot now raise issues with this solely because it was not recommended for award. What is vital is that the Contracting Authority ensures that there is no discrimination between the economic operators and the terms of the call for tenders are followed in the same way for every offeror (Pharma-Cos Limited v Central Procurement and Supplies Unit et, Court of Appeal, 29 April, 2016). It is important to highlight that the Appellant does not deem the financial details of the bids as confidential. This is evident from their request for a detailed breakdown of the Recommended Bidder's financial bid, pursuant to their own declaration that the sought-after information is not confidential.

ii. Legal Framework: In view of the Appellant's claims of irregularities pertaining to the publication of non-binding financial offers:

- It is imperative to note that the prevailing law does not explicitly prohibit the publication of such non-binding financial offers.
- Moreover, the law does not stipulate that the dissemination of such offers would render the call irregular.

The sole provision that delineates the boundaries of what information can be published in the case of a negotiate (sic) procedure with prior publication, is enshrined in Subregulation 127(5) of the Public Procurement Regulations. It clearly states: "(5) Pursuant to regulation 40, contracting authorities must not disclose to other participants any confidential information shared by a candidate or a tenderer involved in the negotiations, unless there is explicit consent from the said participant. Such consent should not be a broad waiver; it must be provided explicitly with regards to the intended dissemination of specific information."

Therefore, the procedure for revealing non-binding financial offers was uniformly applied to all bidders, upholding the principle of equal treatment. The appellant's concerns seem to originate from their own non-selection. Pertaining to the legal aspects, the current laws neither explicitly ban the disclosure of non-binding financial offers nor indicate that such disclosure would make the bid irregular. Thus, the procedures adhered to by the Contracting Authority are in complete conformity with the applicable legal framework.

This Board also noted the Interested Party's Reasoned Letter of Reply filed on 2nd November 2023 and its verbal submission during the hearing attended by such, in that:

a) **First Grievance - Technical Evaluation -**

FCC agrees that the technical evaluation of the tenders (not just that of the Appellant) appears to have been carried out in a manner which is not reflective of the requirements of the Tender Document and the PPR. Reference is made to Procurement Policy Note #8 in relation to the

BPQR, which requires each evaluator to awards (sic) each offer a score out of a maximum of 100 points in accordance with the technical criteria and any sub-criteria as outlined. The aggregate final score is arrived at by calculating the arithmetical average of the individual final score of each evaluator. Each evaluator must also list the strengths and weaknesses of each bidder for each criterion. It is inconceivable that all tenderers (in this case three (3)) obtain full marks for almost all the technical criteria set out in the Tender Document and have almost equivalent strengths and weaknesses. In this case, it is evident that the evaluation of the technical offers was, at best, carried out in an extremely superficial manner rendering the decision of the Contracting Authority to opt for the BPOR as opposed to the cheapest technically compliant offer absolutely futile. The evaluation must necessarily involve an element of subjectivity, which would result in the evaluators considering that one or more offers deserve a higher scoring due to its strengths and weaknesses.

b) **Second Grievance - Financial Offer (Abnormally Low) -**

FCC, a reputable player in the waste to energy sector with significant experience in undertaking projects of this nature, considers it impossible that a solution which complies with the stringent requirements of the Tender Document and, even more so, obtains 98% of the technical weight, can be implemented for a price of €599,659,900.00.

In this case: (a) the difference between the price of the Recommended Tenderer and the second lowest price (that is, that of the Appellant) is of €181,852,563 or circa 23.3% lower; (b) the difference between the price of the Recommended Tenderer and the average of the two other tenders is of €206,428,875.4 or circa 25.6% lower; and (c) the difference between the price of the Recommended Tenderer and the average price of all three tenders (including that of the Recommended Tenderer) is of €137,619,250.27 or circa 19% lower.

The Board further considered two grievances raised by Appellant, in the course of the proceedings, consisting in pleas challenging the composition of the Evaluation Committee.

This Board, after having examined the relevant documentation to this appeal and heard submissions made by all the interested parties including the testimony of the witnesses duly summoned, will now consider Appellant's grievances.

a) ***1st grievance - Wrong evaluation of the appellant bid –***

i. Inadmissibility claims – No Utility

The Board initially agrees with arguments brought forward by the Department of Contracts and the Contracting Authority whereby, *prima facie*, the grievance of the appellant is of 'no utility' to them. This since, even if a higher technical score was afforded to the appellant (even a perfect technical score of 100%), such score would not have

changed or impinged on the ranking and / or recommendation as issued in the Notice of Award.

However, the aforementioned should not be seen and considered by this Board in isolation from another substantial and important plea raised by the appellants, since another grievance has also been filed on the financial aspect of the bid of the recommended bidder. This inevitably could potentially alter the financial score obtained by them. That said, in the interest of transparency and full disclosure, this Board will proceed to decide on the merits presented for this grievance.

ii. Merits – Higher Score

- The Board notes that the Contracting Authority has been very meticulous in the way it proceeded in this evaluation. The number of experts which have been appointed to assist it, can be described as being a novelty in the local public procurement arena. This indicates the serious manner in which the Contracting Authority proceeded in dealing with this procurement process.
- Before going into further detail, this Board is somewhat perplexed at the request of the appellant when on the one hand appellant is requesting the Board *"to appoint experts inter alia in accordance with article 90(1) of S.L. 601.03"* (reference to the 1st request in the letter of appeal) on the basis of the fact that there were mistakes in the evaluation process, whereas on the other hand the same appellant, during the final submissions, concludes that: [quoting verbatim] ***"most of the points on which the appellant has been damaged are not technical"***. Needless to say, this line of argumentation is intrinsically a contradiction in terms. It is as if the appellant somehow is trying to use all the arrows available to it in its quiver in the hope that some of the appellant's arguments stick.
- The above runs counter to the interpretation and considerations of the Court of Appeal. To this effect, the Board refers to the judgement in the names **Executive Security Services Ltd v. Agenzija Servizz.Gov et** (Appeal no 205/2021/1, decided on 7th March 2022) whereby it was stated that *"Qabel xejn tajjeb li minn issa issir referenza għall-prinċipju kardinali f'materja simili illi fejn l-evalwazzjoni li jkun għamel kumitat tal-għażla kienet* ***<u>raġonevoli</u>****, allura bord jew tribunal tat-tieni istanza m'għandux jissotitwixxi d-diskrezzjoni tiegħu għal dik tal-kumitat"* (bold & underline emphasis added). Therefore, according to this judgement, what becomes imperative is to establish whether a **manifest error of assessment** was present throughout the process.
- The Board in substantiating its position does hereby refer to the testimony under oath of Mr Jeppe Rasmussen, wherein the contrary clearly appears in his testimony:
  - *"Hitachi's appeal missed the key detail provided in the evaluation report on the raw gas pollutants composition causing concern to the evaluators. The appeal includes misrepresentative information."*

- *"when it was pointed out to the Appellant that there was the need to comply with the waste throughput, Hitachi came back stating that it would be dangerous and would not be possible to operate in the area. When such key detail was missing in Appellant's design it was unjustified to claim a higher technical score."*
- *"There was no actual design for roads and weighbridge. Areas vital to Wasteserv were missed out and needed to be designed again in several instances."*

▪ Moreover, this position was also once again reaffirmed during the cross examination of Mr Markus Reinhard. The Board recalls that Mr Reinhard was repeatedly subjected to clarify the process in relation to the use of SPAVCs. The witness, *ex admissis*, confirmed under oath that there were two (2) missing concerns in the SPAVCs on two (2) specific items. Therefore, as a consequence, the appellants could not be allocated more than eight points in terms of score.

▪ Therefore, this Board opines that considering the evaluation methodology used, combined with the use of numerous experts, such eliminated all subjectivity risks and the appellant failed to prove that there existed a **manifest error of assessment** as highlighted in caselaw. The Board, therefore, finds no legitimate reason to disturb the workings of the evaluation committee.

iii. Merits – Missing Information / Clarifications

▪ From the testimonies produced before this Board, more specifically during the testimony under oath of Mr Yoannis Nousis, it clearly emerged that the appellant did not fully conform with the 'cross referencing instructions' as issued by the Contracting Authority in the tender document.

▪ Once the Board was satisfied that the Contracting Authority afforded the same and equal level of treatment to all economic operators participating in this tender process, to the fullest adherence to the content of the tender document, (reference to clause 44.3 of the BAFO document), the Board rejects the arguments raised by the appellant.

iv. Merits – Parameters which were not part of the tender document

▪ With respect to this argument raised by the appellant, this Board notes that the content of the appeal application (vide paragraph 1.10), the 'quote' provided therein is nothing but a misrepresentation and reformulation of the textual content of the rejection letter aimed to fit a specific purpose. This is clearly and unambiguously illustrated in the COWI presentation (vide page 18) provided by Mr Jeppe Rasmussen.

▪ To the contrary, both Paprec and FCC clearly understood what was duly required in this specific part of the tender and complied with such requirement.

Once this Board has given due consideration to all the above, it cannot but reject the appellant's first grievance.

b) ***2nd grievance - Wrong evaluation of the Recommended Bid - Reliance on capacities of third parties –***

i. The Board notes that with regards to this grievance, apart from arguments on the merits, two further pleas have been raised as to the inadmissibility of such grievance.

ii. 1st inadmissibility claim – Application filed 'late'

As stated under oath by various witnesses who gave their testimony during the hearings, it has been duly ascertained that after the 'short listing' performed at the end of the PQQ stage, in accordance with article 3.5.3 of the PQQ document, the economic operators involved in this tender process, were duly afforded the opportunity to appeal the decision made by the Contracting Authority in terms of regulation 270 of the PPR.

Considering that the 'reliance documents' were a requirement in terms of article 2.3.5 of the PQQ document, and not a new requirement which was imposed at BAFO stage, this Board agrees with the arguments advanced by both the Department of Contacts and the Contracting Authority indicating that any remedy to this effect, should have been sought at the end of PQQ stage.

iii. 2nd inadmissibility claim – grievance is unclear and therefore breaches regulation 270 of the PPR

Reference is made to Regulation 270 of the PPR which clearly states that *"……… shall contain in a very clear manner the reasons for their complaints."*

This Board agrees with the arguments brought forward by both the Department of Contracts and the Contracting Authority. It was argued that the appeal application skims through relevant aspects / sections of the PQQ document and requested the Board to establish the compliance status of the recommended bidder.

Article 2.1.4 of the application states *"In view of the aforesaid, the review before the PCRB must ascertain that the appropriate reliance documentation have been provided, and that the appropriate confirmations and commitments have also been provided by all the third party entities on whose capacities the recommended bidder has been relied [sic];"*

The Board notes that the Contracting Authority effectively forwarded the relevant information requested by the appellant during the standstill period. Therefore, the appellant should have been in a position to clearly state the reasons for their complaints in a very clear manner and in a timely fashion.

This Review Board is certainly not competent and is indeed legally precluded from allowing fishing expeditions of any sort without having true cause for the grievance being filed in terms of Regulation 270 of the PPR.

Even though this Board is hereby upholding these two inadmissibility claims, and therefore such grievance should be rejected at this stage, the Board will nonetheless

proceed with dealing with the merit of such grievance and this in the interest of transparency.

iv. On the merits –

Article 2.3.5 of the PQQ document states the following:

"A candidate may, where appropriate and for a particular contract, rely on the capacities of other entities regardless of the legal nature of the links which it has with them. It must in that case prove to the Contracting Authority ***that it will have at its disposal*** *the resources necessary, for example, by producing an undertaking by those entities to that effect. Where a Candidate relies on the capacities of other entities with regard to criteria relating to economic and financial standing, the other entity/entities shall together with the Candidate and its partners be jointly liable for the execution of the Contract."* (bold & underline emphasis added).

From the testimonies heard and documents presented, this Board is very serene in stating that the evaluation conducted, and the documents submitted by the recommended bidder, met all the requisite requirements of the above-mentioned article.

The emphasis made on *"… that it will have at its disposal…"* clearly shows that the reliance is not required as at present but only if and when the contract is eventually awarded to any given economic operator. The documents submitted by the Recommended Bidder, in the Board's opinion, duly meet said requirement.

This Board will therefore reject this grievance also on its merits.

c) ***3rd grievance – Wrong Evaluation of the Recommended Bid – The Technical Solution (Abnormally Low) –***

i. With regards to this specific grievance, this Board will deal with both the inadmissibility claims as well as the merits since the line of argumentation brought forward by all parties is somewhat similar in nature.

ii. Important numerical facts to establish before moving on to further analysis, are the following:

- Estimated Procurement Value – Eur549,000,000
- Global Contract Value of Recommended Bidder – Eur599,659,900
- Global Contract Value of Appellant – Eur781,512,463
- Global Contract Value of Interested Party – Eur830,665,087

iii. Other important factors to ascertain are that:

- The Estimated Procurement Value was known to all economic operators at the outset of this procedure. Therefore, it was known even at PQQ publication stage when a 'Remedies before closing date of a call for competition' in terms of Regulation 262 of the PPR was readily available to all economic operators participating in this tender procedure.

- No economic operator resorted to the aforementioned Regulation, therefore, all economic operators invariably 'accepted' or 'acquiesced' to the Estimated Procurement Value as published.

iv. It is this Board's opinion that a challenge to the Estimated Procurement Value, if any, could only and exclusively have been challenged and/or raised on the basis of Regulation 262(1)(a) of the Public Procurement Regulations in cases where *"…….. which are proven to be impossible to perform;"*

v. This Board initially agrees with the appellant's arguments that economic operators are under no obligation to contest the estimated procurement value because such is not a mandatory requirement. However, it is also true that once it has not been contested, at the appropriate juncture, no further remedies are from then on available to scrutinize it any further.

vi. This Board also agrees with the appellant's arguments that there is no provision for 'capping', i.e. the Estimated Procurement Value is not a 'top ceiling' whereby any offers higher than it will be discarded, however it is also true that if the appellant felt that the Estimated Procurement Value was on the 'low side', economic operators would then run the risk that the Contracting Authority would reject their respective bids as being too high. It is pretty evident, to this Board, that the appellant arrived at the conclusion that the Estimated Procurement Value is on the 'low side' (Eur549,000,000) on the basis of the fact that with regards to the financial bid of the recommended bidder (Eur599,659,900) the appellant's stated the following: *"cannot sustain such a price with the mandatory technical requirements specified within the tender, alternatively it will sustain the price, but by offering a solution not compliant to the tender specifications"*.

vii. The above mentioned is also crystallised in the judgement of **X Clean Limited v. Dipartiment ghall-Anzjanita` Attiva u Kura fil-Komunita et** (appeal no. 126/2021/1, 31 August 2021, para 14) where it was stated that *"……… <u>Il-prezz stmat huwa bazat fuq ricerka dwar il-kundizzjonijiet tas-suq u ghandu ghalhekk jitqies realistiku</u>."* (underline emphasis added). This Board notes that during this tendering process, it was established that the Contacting Authority engaged experts in the field who assisted it throughout the entire process, including at the PQQ stage when the estimate procurement value was considered and eventually established. Therefore, this Board sees no reason to doubt the reliability of the Estimated Procurement Value in the absence of anything proven to the contrary.

viii. Once the estimated procurement value has not been contested, it should therefore be used as the main yardstick to establish whether any offers 'appear' to be abnormally low or otherwise. This was also stated in the very recent judgement **Star Fuels Limited v. Wasteserv Malta Limited u Ph. Borg Limited** (appeal no. 450/2023/1, 22 January 2024) when it was held that *"Ghidna illi kriterju relevanti ghal dan il-ghan jista' jkun li tqabbel il-*

prezz ma' dak ta' offerti ohra validi ***u, partikolarment, mal-prezz stmat mill-awtorità kontraenti billi dan, ghalkemm biss indikattiv, huwa bazat fuq ricerka dwar il-kondizzjonijiet tas-suq u ghandu ghalhekk jitqies realistiku****; kriterju iehor hu li tqabbel il-prezz offert ma' kemm jiswa l-prodott ghall-oblatur biex tara jekk il-prezz huwiex ekonomikament fattibbli, jekk ihallix telf flok qligh."* (bold & underline emphasis added)

ix. Reference is now made to regulation 243 (1) of the Public Procurement Regulations which states that *"Contracting authorities* ***shall require*** *economic operators to explain the price or costs proposed in the tender* ***where tenders appear*** *to be abnormally low in relation to the works, supplies or services."* (bold & underline emphasis added). Therefore, this Board opines that the 'obligation' to investigate, whilst it is there and the law uses the word 'shall', such obligation is only to be imposed where tenders **appear / are suspect** to be abnormally low. The answer to this will be dealt with in the following paragraph.

x. This Board notes that the financial bid of the recommended bidder is more than Eur50 million (9.2%) over and **above** the Estimated Procurement Value, which firstly was based on market research and secondly as already stated, has not been challenged by **any** economic operator. Once it was also established, during the testimony under oath of Mr Jeppe Rasmussen, that the appellant's showed a higher percentage profit figure (8%) to that of the recommended bidder (5.9%), it is incomprehensible to this Board how one can come to the conclusion that the bid as submitted by the recommended bidder is to 'appear' to be abnormally low. The calculus as deduced by the appellant by making comparison to FCC's bid and stating that FCC's bid was more akin to the appellant's bid, finds no traction at all and is deemed to be immaterial, in the circumstances, when compared to all the aforementioned factors.

xi. This Board deems the report presented by Mr Dimitrius Nektarius of Deloitte as highly nebulose. This for the reason that according to his own testimony, he stated that *"Economies of scale were not taken as factors and that the three (projects) are not representative of the whole market or represent the whole spectrum."* and that *"…. All three Greek projects have no incineration facilities…."* Taking these factors in the Board's considerations serve to reduce the credibility of such report and findings rather than substantiating any form of credibility.

Hence, this Board cannot but reject this grievance of the appellant.

d) ***4th grievance*** **- Irregularities in the procedure -**

i. The Board notes that with regards to this grievance, apart from arguments on the merits, two further pleas have been raised as to the inadmissibility of such grievance.

ii. Inadmissibility claims –

The Board agrees with arguments brought forward by the appellant in that *"if a tender is not submitted it is difficult to show that one has an interest"*. Moreover, it is noted that the appellant is in fact filing this grievance at the first instance according to law.

Hence this Board will now proceed to decide on the merits of such grievance.

iii. On the merits –

Reference is made to article 13(2) of the BAFO document which states that cancellation may occur where *"there have been irregularities in the procedure, **where these have prevented fair competition**"* (bold & underline emphasis added)

In its letter of appeal, filed on 23rd October 2023, the appellant states that *"…. as will be shown throughout the proceedings, the irregularity in rendering public the financial offer value…….. has had a negative impact on the procurement procedure itself….."*

After having heard all the testimonies under oath and thoroughly analysed both written and verbal submissions, this Board is no doubt that what is stated in article 13.4 of the Department of Contracts reasoned letter of reply is the most relevant to the facts at issue - *"Not only did the opening of the initial prices not have anti-competitive effects, but it had pro-competitive effects"*.

In fact, it must be stated that at the initial offers stage, i.e. non-binding financial bids, the appellant's financial offer was clearly and unambiguously much less competitive than its own final and binding offer. The latter was indeed considerably lower, and hence became much more competitive and more realistically in line with the Estimated Procurement Value of the tender.

Moreover, it must be stated that in its 'Request for Information' dated 19th October 2023, the appellant is requesting *"…. a breakdown of the key financial figures, as per the tender financial forms……….. which comprise the total contractual value."* In the same document the appellant states that *"The JV understands that the information requested is not confidential, neither sensitive nor privileged, and thus the JV expects that its request is upheld by the department;"*

Whilst it is true that this request was made post financial negotiations, contrary to the details of the appellant's grievance that is during the tendering process, it must nonetheless be argued that the Contracting Authority has abided by the principle of equal treatment thereby retaining a level playing field and thus it is difficult to understand on what grounds the appellant's grievance is built upon.

Having regard to all aforementioned considerations the Board finds it difficult to fathom the statements made by the appellant's. On the contrary, not only fair competition has not been prevented, but it is perfectly correct that article 13(2) of the BAFO should not have been invoked by the Contracting Authority and / or the Department of Contracts. Hence this grievance of the appellant cannot be upheld and is hereby being rejected.

e) ***5th grievance – Composition of the Evaluation Committee – Ms Stephanie Scicluna Laiviera***

i. The basis of this grievance revolves around regulation 86 of the PPR which states *"The members of the Review Board shall not be precluded from the exercise of their respective **profession**,*

however, during the term of their appointment they shall be precluded from the exercise of their ***<u>profession</u>*** *in cases before the Review Board."* (bold & underline emphasis added)

ii. It must be noted that by participating and being a member of an evaluation committee, one is not automatically deemed nor considered to be the exercising one's 'profession'. Throughout the proceedings, the appellant had the opportunity to examine Ms Stephanie Scicluna Laiviera on this point.

iii. The Board recalls the appellant's counsel asking and requiring information about Ms Scicluna Laiviera's employment details, where she clearly stated under oath that she is (even at the time of the evaluation process of this tender) an employee of the Water Services Corporation on secondment to Wasteserv Malta Limited. Moreover, the witness confirmed that her "salary" is paid by the Water Services Corporation and the salary is subsequently reimbursed by Wasteserv Malta Limited. Being on a payroll of an entity, clearly excludes and militates against any presumption indicating that the witness is, in some shape or form, practising a "profession" within the meaning and within the purview of the Public Procurement Regulations.

iv. The Board interprets this as to mean that members of the Review Board may continue to exercise the profession but shall be precluded from the exercise of the profession in cases before the Review Board. It is in this Board's opinion that Ms Scicluna Laiviera was at no stage and at no point in time exercising a profession within the meaning of this Regulation.

v. The Board also refers to the submissions made by the Contracting Authority's legal counsel when referring to the appellant's plea of *nemo judex in causa propria* where the defence submitted that in the case of Ms Scicluna Laiviera there is (a) no *judex*; and (b) no *causa propria*.

vi. Furthermore, and without prejudice to the aforementioned, it is this Board's due consideration that should the legislator intended to exclude members of the Review Board from sitting on evaluation committees, it would have done so, similarly to what the law is stating in relation to the exercise of one's profession in Regulation 86 and this in line with the Latin maxim *ubi lex voluit dixit, ubi noluit tacuit*. Henceforth, the Board is of the view that any reference to a possible breach of Regulation 86 is unfounded and is hereby being discarded.

vii. Furthermore, and on top of all the above, the Board also notes that the appellant fails to prove that any harm was 'suffered' and as a consequence this grievance also lacks the requisite *causal nexus* (the indispensable juridical link between "cause and effect") which could lead to the grievance to be upheld.

viii. Moreover, all members of the Board have declared their potential conflicts *ab initio* and at the very outset of their respective nomination and appointment to the Board <u>and even before presiding at the very first appeal</u> proceedings in their adjudicating roles.

ix. Likewise and as clearly stated in her testimony under oath, Ms Stephanie Scicluna Laiviera, upon her nomination as a substitute member of the PCRB in November 2021, immediately advised the Board that she would not preside over any cases instituted against Wasteserv and/or Water Services Corporation. In fact, she was not a presiding member of the Review Board during the present appeal. Henceforth, she does not have any influence whatsoever on the decision-making process of this current Board as composed.

x. Finally, this Board refers to paragraphs 14.6 and 14.7 of the Department of Contract's letter of reply to this grievance, dated 23rd November 2023, whereby the Department of Contract referred to a judgement on this point in the names **L-Onor. Imhallef Dottor Anna Felice et v. L-Avukat Dr Mark A. Mifsud Cutajar pro** decided by the First Hall of the Civil Court on the 25th July 2013, whereby in a similar situation a judge was party to a case which case was decided by her peer, another judge.

Hence, this Board rejects the grievance raised by the appellant.

f) ***6th grievance – Composition of the Evaluation Committee – Mr Charlon Buttigieg***

i. The substance of the grievance as filed by the appellant, is being understood as being that Mr Charlon Buttigieg was 'conflicted' as soon as he was appointed to the evaluation committee of this tender procedure.

ii. Initially, this Board notes that Mr Charlon Buttigieg formed part of the evaluation committee and therefore this information was available to the appellant only on the 1st sitting, i.e. the 22nd November, 2023.

iii. This was in fact confirmed under oath by Ms Branica Xuereb, when called to testify by the same appellant. The Board also notes that the details of both the criminal proceedings and civil proceedings referred to by the appellant in substantiating the grievance relating to a conflict of interest by Mr Charlon Buttigieg are in the public domain, and this despite the fact that the appellant's legal counsel tried to portray a situation where knowledge of these facts were available to them "only" on the date of the sitting following a specific question posed to the witness. It was clearly evident to the Board that the Appellant was very well prepared when at the 3rd sitting, held on 14th December 2023, the appellant's legal counsel immediately asked Mr Charlon Buttigieg whether there were any proceedings pertinent to some incident involving an injury to an employee at the site known as 'Tal-Kus'.

iv. Therefore, this Board opines that such grievance should have been filed, at the latest, by 2nd December 2023. Therefore, the grievance raised by the appellant was filed *fuori termine* but this Board, for the sake of transparency and for the sake of reckoning the fullest of details of this appeal, will nonetheless proceed with determining the merits in connection with this grievance.

v. The Board will now proceed with considering and determining the point raised by the appellant's legal counsel in the context of a "conflict of interest" of Mr Charlon Buttigieg claiming that the witness stands accused before the Courts of Magistrates (Gozo) on a matter relating to involuntary bodily harm caused to an employee wherein one of the parties of the joint venture comprising the preferred bidder is allegedly also a defendant/respondent in a civil case stemming from the same facts which case is being entertained by the Italian Courts.

vi. The appellant's defence argued that since there are court proceedings involving both an entity part of the preferred bidder and the Wasteserv employee and such court proceedings are connected, therefore Mr Buttigieg has an inherent interest (even if a mere conflict of interest arises), in such case a declaration should have been made. Given that such a declaration was not made, therefore the appellant's counsel contended that that constitutes a conflict of interest. Quoting: "the moment there is a conflict, the case is made".

vii. Whilst this Board, *prima facie*, concurs with the appellant's contention, nonetheless it is the duty of this Board to determine whether this situation gave rise to any actual or potential conflict of interest.

viii. The witness confirmed as well that he is being charged in the Courts of Malta in its criminal competence whereas a party forming part of the preferred bidder's consortium is being civilly sued in a civil Court in Italy. The academic question that this Board should ask is whether the institution of separate proceedings against the two may in one way or another influence the decision of the evaluation committee by having Mr Charlon Buttigieg forming part of that evaluation assessment and whether such impinges on the concept of independence and impartiality.

ix. It is this Board's opinion that no such conflict is remotely present. First of all, the parties are not even parties to the same judicial proceedings since one party is being sued civilly before the civil Courts in Italy, whereas the other party is being charged criminally before the Courts of Magistrates in Gozo, albeit on the same facts. The resulting effect of a judgement in one case or another would neither have any impact nor be rightfully construed as giving rise to any form of a conflict. The question to be asked by this Board is what could have influenced Mr Charlon Buttigieg in his deliberations during evaluation committee stage which had or could have influenced the outcome via a direct or indirect, financial, economic or personal manner – as defined according to Regulation 2 of the Public Procurement Regulations?

x. The Board although given the impression of such a "remote relationship" sees, however, no connection at all tying in some shape or form the two parties to a conflicting relationship, thereby tainting the integrity and transparency of the decisions of the evaluation committee. At a minimum, the appellant failed to substantiate their claim through concrete evidence. The very fact that there are two judicial processes emanating from one and the same fact does not

in itself and automatically translate itself into proving the requisite elements giving rise to a conflict of interest.

To this effect, the Board is hereby rejecting this ground.

The Board,

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

a) Does not uphold Appellant's Letter of Objection, contentions and subsequent grievances raised;
b) Upholds the Contracting Authority's decision in the recommendation for the award of the tender;
c) Directs that the deposit paid by Appellant not to be reimbursed.

Mr Kenneth Swain	**Dr Charles Cassar**	**Dr Vincent Micallef**
Chairman	**Member**	**Member**