

# **PUBLIC CONTRACTS REVIEW BOARD**

## **Case 2060 – Tender WSC/T/016/2024, “Supplies- Supply and Delivery of Complete Sets of Submersible Pumps and Motors to the Water Services Corporation” – Lot 2**

**3<sup>rd</sup> February 2025**

The Board,

Having noted the letter of objection filed by Dr Jan-Karl Farrugia, on behalf of Farrugia Law Advocates, acting for and on behalf of Magnetic Services Limited (hereinafter referred to as the "Appellant"), filed on the 29<sup>th</sup> of November 2024;

Having also noted the letter of reply filed by Dr John L. Gauci, on behalf of DR JOHN L GAUCI & Associates, acting for and on behalf of Water Services Corporation (WSC) (hereinafter referred to as the "Contracting Authority"), filed on the 9<sup>th</sup> of December 2024;

Having heard and evaluated the testimony of the witness Mr Clayton Pace (Magnetic Services Limited representative) as summoned by Dr Jan-Karl Farrugia, on behalf of Farrugia Law Advocates, acting for and on behalf of Magnetic Services Limited;

Having heard and evaluated the testimony of the witness Ing Ronald Pace (Chairperson of the Evaluation Committee) as summoned by Dr John L. Gauci, on behalf of DR JOHN L GAUCI & Associates, acting for and on behalf of Water Services Corporation (WSC);

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

Having noted and evaluated the minutes of the Board sitting of the 14<sup>th</sup> of January 2025, hereunder reproduced:

### **Minutes**

Tender Lot 2 was issued on the 8<sup>th</sup> of May 2024, and the closing date was the 13<sup>th</sup> of June 2024.

The estimated value of this tender for Lot 2, exclusive of VAT, was € 234,000.

On the 29<sup>th</sup> of November 2024, Magnetic Services Limited filed an appeal against the Water Services Corporation, objecting to their disqualification on the grounds that their tender bid was not technically compliant.

A deposit of € 1,170 was paid.

There were twelve bids for Lot 2.

On the 14<sup>th</sup> of January 2025, the Public Contracts Review Board, composed of Mr. Kenneth Swain as Chairman, Dr Ing. Damien Gatt, and Mr. Lawrence Ancilleri as members, convened a virtual public hearing to consider the appeal.

The attendance of the public hearing was as follows:

**Appellant – Magnetic Services Limited**

Dr Jan Karl Farrugia	Legal Representative
Mr Clayton Pace	Company Representative

**Contracting Authority – Water Services Corporation**

Dr John L. Gauci	Legal Representative
Ing. Ronald Pace	Chairperson Evaluation Board
Ing. Kyle Alamango	Evaluation Board Member
Mr Dominic Sciberras	Evaluation Board Member
Ing. Anthony Muscat	Procurement Office Representative
Ms Catherine Degabriele	Procurement Office Representative
Ms Jacqueline Cassar	Evaluation Board Secretary

**Preferred Bidder for Lots 3,4 and 5– KSB Italia S.p.A**

Mr Domenico Roberto Brucoli	Company Representative (Online)
Ms Ilaria Compagnoni	Company Representative (Online)

**A. Preliminary Matters**

Mr Kenneth Swain, Chairman of the Public Contracts Review Board (PCRB), commenced the meeting by addressing two preliminary matters.

**Matter 1**

Given that tender WSC/T/016/2024 is composed of 5 lots and that the grievances made by the appellant on all the 5 lots are identical, the chairman proposed one session covering the whole 5 lots.

For lots 3, 4, and 5 the preferred bidder is KSB Italia S.p.A.

This proposal was met without objections from the appellants, the Contracting Authority, or the preferred bidder.

Consequently, there will be only one session covering the whole 5 lots.

**Matter 2**

Mr Harry Fenech, was unavailable due to illness and proposed that Ms Amy Borg, an employee within PCRB, assume the role of Acting Secretary for the session.

This proposal was met without objections from the appellants, the Contracting Authority, or the preferred bidder.

Consequently, Ms. Amy Borg was therefore appointed as the Acting Secretary for this Case.

## B. Initial Submissions

### B1. Initial Submissions made by Dr Jan-Karl Farrugia on behalf of the Appellant

Dr Jan-Karl Farrugia opened the submissions by addressing what he described as a misunderstanding regarding *'testing of lots pertaining to this tender'*. He noted that the elimination of Magnetic Services from the tender process is based on an erroneous interpretation of *'one line in a document in Italian, which did not result in actual fact the testing requiring each lot not having been made'*.

According to Dr Farrugia, this *'misunderstanding'* has led to the unwarranted exclusion of Magnetic Services, a decision that is now costing taxpayers approximately €700,000.

Dr Farrugia emphasized that, in order for the goods to be exported from Italy (the country of the supplier for Magnetic Services) and imported into Malta, *'they will actually have to be tested by lots'*. Moreover, he pointed out that the *'submitted figures'* in the bid by Magnetic Services *'included testing for every lot'*.

### B2. Initial Submissions from Dr Gauci on behalf of the Contracting Authority

Dr. Gauci stated that there is no contestation regarding the *'actual prerequisite'* of the tender. The tender document explicitly mandated that each piece of equipment be individually tested.

He referred to Article 25.2 of the Special Conditions, which clearly provides that:

*"All equipment for lots 1-5 shall be individually tested for performance at the successful Contractor's works."*

In addition, Dr. Gauci cited Section 3, Clause 3.6 of the Technical Terms of Reference, which further reinforces this requirement:

- 3.6.1: *"As per Special Conditions Article 25, all sets of complete pumps with motors shall be individually tested for performance at the successful Contractor's works."*
- 3.6.2: *"The performance tests shall be carried out in accordance with ISO 9906:2012 and the relevant hydraulic institute standards. The pumps shall be tested at various test points, including test points away from the specified Duty Point. The acceptable hydraulic performance test shall be in line with Grade 2B requirements or better, ISO 9906:2012."*

Dr. Gauci emphasized that the tender requirements are unequivocal: *'each pump must be individually tested.'*

In response to the tender specifications, the objector (the tenderer at that stage) submitted an objection in English rather than Italian. The objector stated:

*"We have a main testing station in Caprari main plant, in which we will test n.1 pump each type in accordance to standard ISO 9906:2012 2B."*

Dr. Gauci observed that the objector's response effectively proposed a deviation from the tender specification (s), which clearly required that each pump be tested individually. Instead, the objector intended to test one pump per lot.

Dr. Gauci briefly addressed the issue of the difference in bid value. He referred to established World Jurisprudence of the Board and courts, noting that: *"An objector which is not compliant cannot cite*

*the difference in value.*" In other words, the tenderer's claim of being cheaper is irrelevant if they fail to comply with the mandatory testing requirement as specified in the tender documents.

Finally, Dr. Gauci indicated that witnesses would be called to testify on the critical importance of testing each individual pump. He emphasised that this evidence is not being presented because the tender requirements are not clear, but rather to convince the Board of the importance of testing each pump individually.

### B3. Reply by Dr Jan-Karl Farrugia on behalf of the Appellant

Dr Farrugia drew the Board's attention to Article 24.2 of the Special Conditions, which specifically states that *"No equipment / items shall be shipped unless having passed performance tests to the satisfaction of the WSC."* He emphasized that this clause clearly establishes that testing is a requirement prior to the shipment of each pump.

He continued by stating that even if a misunderstanding arose from a translation issue, the requirement remains unchanged. For each pump to be delivered and installed, it must be tested. Furthermore, he stressed that the bid itself incorporated the value of each individual test.

### C. Witness Testimonies

#### C1. Witness summoned by Dr Farrugia on behalf of the Appellant

The sole witness summoned by the Dr Farrugia was Mr Clayton Pace (ID 7190), who testified under oath. Mr Pace, responsible for compiling tenders and involved in the preparation of this tender, described the tender submission process. He stated that he carefully read the specifications and noted the conditions, particularly the Special Conditions, before completing the tender.

While preparing the Technical Offer, Mr Pace recorded that the pumps would be tested according to Grade 2B as specified in clause 3.6.2. Subsequently, a rectification was received from WSC requesting clarification on the tolerance to be used for testing the pumps. Mr Pace confirmed that this tolerance detail had already been stated in the Technical Offer, for example, in Item 8 of lot 1. The response provided was that the testing would be conducted to the required tolerance.

Mr Pace noted that at no time was there any issue raised concerning whether the testing should be per lot or per pump. The appellant was first informed of an alleged error in the submission/offer only upon receiving the award letter. At no point did WSC request clarification on what was being tested in the five lots; their inquiry was limited solely to the tolerance.

#### C1.1 Witness (Mr Clayton Pace) Cross examination by Dr Gauci on behalf of the Contracting Authority

During cross examination, Mr Clayton Pace confirmed that he is not a director of Magnetic Services Limited, noting that Mario Pace holds that position. Mr Pace also stated that he does not represent Caprari Spa, clarifying that Caprari Spa would have acted as the manufacturer had the appellant won the tender.

Furthermore, when Dr Gauci inquired specifically about the rectification/ clarification exercise, Mr Pace acknowledged that the appellant was not aware that he rectified his bid when indicating testing according to ISO 9906 2B.

C1.2 Witness (Mr Clayton Pace) Cross examination by Ms Compagnoni on behalf of the preferred bidder

Ms Compagnoni inquired whether there were any submission documents by the appellant proving that the complete lot was to be tested and not just one pump. She noted that the documents in hand did not demonstrate that the objector had confirmed what he stated in the letter of objection that:

*"Objector nonetheless indicated that all the pumps will be tested as per ISO 9906:2012 Grade 2B in the file/s (lot 1-5) – Technical offer."* (refer to point 12 of the objection letter)

The chairman stated that the technical offer document is a confidential document regulated by Section 40 of the PPR but acknowledged that the Board possesses a copy of the document submitted by the appellant. For completeness, the chairman asked the witness to confirm or otherwise point 12 of the letter of objection. Mr. Clayton Pace confirmed this point.

C2. Witness summoned by Dr Gauci on behalf of the Contracting Authority

Ing. Ronald Pace (589364), chairperson of the Evaluation Board, was the only witness summoned by the Contracting Authority. Responsible for the RO plants and serving as the chairman of the Board during the tender process, he explained that under Article 25 all pumps are required to be individually tested. He stated that the pumps are of a certain capacity, and it is essential to ensure that the end user receives the requested and expected performance in terms of flow, pressure, and efficiency. Testing one pump does not guarantee that the others will perform identically.

He further explained that in the objector's bid there was a discrepancy between the technical questionnaire and the accompanying literature. This mismatch prompted the need for a clarification. When the evaluation committee doubts that the literature exactly reflects what was stated in the offer, a clarification is requested.

In this instance, item number 8 of the questionnaire asked what the testing grade would be, with the answer provided as Grade 2B. However, item 8 did not specify whether all pumps would be tested. In contrast, the literature submitted by the objector indicated a testing grade of Grade 3B, meaning that there was an inconsistency between the literature and the questionnaire. The Board clarified this discrepancy, and it was accepted that the testing would be conducted to Grade 3B.

The witness pinpointed that question number 8 of the questionnaire required the testing grade to be Grade 2B, while the literature referred to a tolerance in accordance with ISO 9906 at Grade 3B. Following the clarification, the Board accepted the Grade 3B standard.

Furthermore, the tenderer responded to the clarification request by stating, *"We have a main testing station in Caprari main plant, in which we will test n.1 pump each type in accordance with ISO 9906:2012 2B."* According to the witness, this was clearly stated in the bid and did not require further clarification.

Regarding grievance 12, the appellant alleges that the objector indicated in the Technical Offer for lots 1-5 that all pumps would be tested as per ISO 9906:2012 Grade 2B. The witness confirmed that none of the documents submitted during the tendering stage contained such a statement; the only reference was that the pumps would be tested in accordance with ISO 9906.

The witness also explained why each pump needs to be individually tested. When pumps are of a certain capacity, it is necessary to ensure that each pump delivers the required efficiency for power and energy savings, and that each pump provides the requested flow. Failing to test every pump could

result in installing pumps that do not perform to the required standard, leaving no opportunity for rectification after installation.

When summoned by Dr. Gauci regarding Article 24.2 of the Special Conditions "*No equipment / items shall be shipped unless having passed performance tests to the satisfaction of the WSC*", the witness explained that only one pump would have been tested if the bid was accepted. The pumps would have been delivered with only a single test having been conducted. Consequently, it would have been too late for the Contracting Authority to ask for each pump to be tested, as the bidders' submittals would have clearly documented—in black and white—that only one pump per lot was to be tested.

C2.1 Witness (Ing. Ronald Pace) cross-examination by Dr Farrugia on behalf of the appellant

Dr. Farrugia asked Ing. Ronald Pace to explain the difference between the ISO test 2B and 3B, specifically whether the difference was in the number of tests or in the type of test. Ing. Ronald Pace responded that it is a tolerance inefficiency of testing—Grade 3B allows a larger tolerance, which WSC did not want.

Ing. Ronald Pace also confirmed that with respect to the clarification reply by the appellant regarding the confirmation that the tolerance testing is in accordance with ISO 9906:2012 2B, when taken on its own, the reply was to the satisfaction of WSC.

Dr. Farrugia referred to DOC M7, attached to the objection. On the first page, Caprari Spa states, "*We, Caprari Spa ... will perform performance tests in accordance with ISO 9906:2012 2B.*" On the second page, it is mentioned, "*We have a main testing station in Caprari main plant, in which we will test n.1 pump each type in accordance with ISO 9906:2012 2B.*" He asked the witness whether the WSC was considering only the second page, without referring to the plural "*tests*" provided on the first page of DOC M7. The witness replied that the document clearly states that one pump per type will be tested, and that it was signed by a Caprari representative.

Dr. Farrugia again referred to Article 24.2 of the Special Conditions, which states, "*No equipment / items shall be shipped unless having passed performance tests to the satisfaction of the WSC.*" Ing. Pace explained that certification would be required prior to shipment and that the WSC reserves the right to send a representative to witness the tests if necessary. He confirmed that if Magnetic Services had won the tender, it would not have been physically possible for the pumps to be received without these tests; by that point, it would have been too late to address the issue. Ing. Pace stressed that the testing for each pump individually was not going to be performed.

Note: Ms Compagnoni, acting on behalf of the preferred bidder, did not submit any questions cross examine the witness.

D. Final Submissions

D1. Final Submissions by Dr Farrugia on behalf of the Appellant

Dr Farrugia identified that two main issues had been addressed. The first issue pertained to the rectification regarding ISO 9906:2012 Grade 2B versus Grade 3B. Ing. Pace explained that the clarification on tolerance testing was accepted to the satisfaction of the WSC, and this matter concerned the type of tolerance testing rather than the quantity of tests required.

The second ana main issue involved the "*test n.1 pump each type*" issue. Dr Farrugia emphasized that there was no indication in Magnetic Services' submission that they would breach such an important requirement, as stated twice in Article 24.2 and again in Article 25.2 of the Special Conditions. He questioned whether every batch received by Water Services would require the corresponding testing

results, and Ing. Pace confirmed in the affirmative. Dr Farrugia stressed that this was not merely a matter of test tolerance differences—the tests are a physical requirement. For the pumps to be accepted, they must be individually tested. He further noted that there was a questionable interpretation between the first and second pages of document M7. The first page referred to plural "tests", while the second page mentioned "n.1 pump" per type. Dr Farrugia suggested that perhaps Mr Pace, handling Magnetic Services' submissions, did not interpret this restrictively as Water Services did, or that the document was merely a rectification regarding the type of testing and not whether one test per lot or all tests were to be carried out.

In any event, after all documents were submitted and his clients were satisfied with the tender, WSC's interpretation of the "n.1" as a breach of the tender requirements is, in his view, untenable. His humble submission is that a misinterpretation in a rectification document—addressing the tolerance rather than the number of tests—should never have led to Magnetic Services' elimination. If the number of tests had been a requirement, there would have been a clear question regarding it in the list of technical requirements.

## D2. Final Submissions by Dr Gauci on behalf of the Contracting Authority

Dr Gauci submitted that the objector's response to the clarification/rectification request mentioned "tests" and then specified "one test per lot." He argued that these statements are not mutually exclusive, as there is more than one lot; if each lot is to be tested, the answer should be in the plural, indicating multiple tests. He further noted that the objector was clear in stating that they would conduct tests, but only one per lot.

On an economic note, Dr Gauci pointed out that the sum of €700,000, when spread across all lots, could easily account for this difference. Beyond the legal arguments—such as those in the NQuay-MT judgment where a difference of €18 million led to exclusion over one particular piece of information on a document—the issue in this case was not administrative. Instead, the objector was proposing to deliver significantly less than what was required.

Regarding the translation issue, Dr Gauci observed that on three lots the recommended bidder was Italian. They had no difficulty understanding the requisites of the tender; their response was clear and in conformity with the requirements.

In these circumstances, he concluded that the rejection of the objector should be confirmed, and the tender awarded as proposed by the Contracting Authority.

With no further objections or discussions, the Chairman declared the meeting adjourned.

## End of Minutes

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**Hereby resolves:**

The Board refers to the minutes of the Board sitting of the 14<sup>th</sup> of January 2025.

Having noted the objection filed by Magnetic Services Limited (hereinafter referred to as the "Appellant") on the 29<sup>th</sup> of November 2024 and refers to the claims made by the same Appellant with regards to the tender of reference WSC/T/016/2024 – Lot 2 listed as case No. 2060 in the records of the Public Contracts Review Board.

Appearing for the Appellant: Dr Jan-Karl Farrugia

Appearing for the Contracting Authority: Dr John L. Gauci

Whereby, the Appellant contends with respect to:

**a) The Evaluation Process**

In the evaluation rectification request of the 06/08/2024 (DOC M6), **WSC only requested to clearly highlight / indicate that the testing tolerance is according to standard ISO 9906:2012 2B, WITHOUT any clarification request concerning the NUMBER of tests to be conducted.**

**b) Technical Non-Compliance Arising from "n.1 pump each type" (Translation/Interpretation Issue)**

Water Services Corporation requested that all the pumps should be tested as per special conditions (Article 25) however after receiving the requested technical literature, WSC must have interpreted the following sentence in the sense that only one pump will be tested and not all pumps as per special conditions (Article 25), without considering that this is a translated document from Italian and without requesting a clarification on whether the sentence below actually meant that objector was blatantly breaching the tender conditions:

***“We have a main testing station in Caprari main plant, in which we will test n.1 pump each type in accordance to standard ISO 9906:2012 2B.”***

Note: The evaluation rectification was sent to the technical team of objector's supplier Caprari SPA in Italy. This literature is in fact a standard technical document which is used in relation to the supply and procurement offers made by Caprari SPA and/or their agents including objector

Magnetic Services Limited, therefore the file (reproduced) consisted of a template normally used for such purposes;

Objector nonetheless indicated that all the pumps will be tested as per ISO 9906:2012 Grade 2B in the file/s (lot 1-5) – Technical offer.

The Board also noted Contracting Authority's Reasoned Letter of Reply filed on 9<sup>th</sup> of December 2024 and its verbal submission during the hearing held on 14<sup>th</sup> January 2025, in that:

**a) The Evaluation Process and Findings**

The tender specifications for Lot 1 were unequivocal in their requirements. Clause 3.6.1 explicitly stipulates that all pumps proposed must undergo performance testing in accordance with ISO 9906:2012 Grade 2B. This obligation was not an arbitrary condition but a necessary technical criterion designed to ensure compliance with performance and quality standards critical to the Contracting Authority's operational needs.

During the evaluation phase, a clarification request was issued to Magnetic Services Ltd. in relation to its technical submission. The Objector responded by stating: *'we will test n.1 pump each type in accordance with ISO 9906:2012 Grade 2B.'* This statement, which was unambiguous, indicated that only one pump per type would be tested. Such a position directly contravenes the tender requirements that all pumps be tested.

**b) The Alleged Translational Error and Responsibility of the Bidder**

The Objector argues that its statement regarding testing was the result of a translation error from Italian to English. However, this claim cannot absolve the Objector of its responsibility to ensure that its submission was clear, accurate, and fully compliant with the tender specifications. Reference was made to the judgment of the Court of Appeal (Superior) in *Steelshape Limited v. Direttur tal-Kuntratti et (Appell Civili Numru. 175/2013/1)*.

The burden of clarity and compliance rests entirely with the bidder. The Contracting Authority is not obliged to seek further clarifications beyond what was reasonably requested, especially when the alleged ambiguity or deficiency arises from the bidder's own submissions. Reference was made to the judgment of the Court of Appeal in *Rockcut Ltd v. Malta Industrial Parks Ltd et*, delivered on the 31<sup>st</sup> May 2019.

### c) Non-Compliance and Technical Requirements

The evaluation committee reviewed the Objector's bid and documentation in detail. No evidence was provided, either initially or during the clarification phase, to demonstrate that all pumps would be tested in accordance with ISO 9906:2012 Grade 2B. The Objector's reliance on subsequent explanations or alleged errors does not remedy the initial deficiency.

The Contracting Authority's decision to disqualify the Objector's bid was based on this non-compliance, which is material and not subject to rectification post-submission. Any attempt to relax this requirement would not only compromise the integrity of the procurement process but also violate the principles of equal treatment and transparency, as enshrined in public procurement regulations.

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.

#### Grievance 1: The Evaluation Process

- The Appellant contends that in the Evaluation Rectification Request of 6<sup>th</sup> August 2024 (DOC M6), the Water Services Corporation (WSC) only sought confirmation that the testing tolerance would be in accordance with ISO 9906:2012 Grade 2B and not on the number of pumps per lot to be tested.
- The Board notes that whilst the Contracting Authority only sought clarification/ rectification on the test standard (i.e., ISO 9906:2012 Grade 2B), the statement referring to "*we will test n.1 pump each type,*" was included in the appellant's own clarification/rectification response.
- There is consensus by all parties that the Contracting Authority was clear in its tender requirements that '*all pumps*' proposed under the tender must be tested individually for performance. This requirement is explicitly stated in Article 25.2 of the Special Conditions, reiterated in Clause 3.6.1 Terms of Reference.
- The Appellant's statement about testing "*n.1 pump each type*" clearly conflicts with the explicit mandatory requirement in the tender for *each* pump to be tested.
- According to the Appellant, if the Contracting Authority had any doubts as to whether the "*n.1 pump each type*" statement truly meant only one pump per lot would be tested, it should have issued a further clarification/rectification request.
- The Board notes jurisprudence (reference for example to Court of Appeal (Superior) in *Steelshape Limited v. Drettur tal-Kuntratti et* (Appell Civili Numru. 175/2013/1)) repeatedly affirms that it is the bidder's responsibility to ensure full clarity and compliance in its submissions. The Board

opines that a Contracting Authority is not obliged to seek further clarifications where non-compliance appears evident and when ambiguity or deficiency arises from the bidder's own submissions.

- It is the opinion of this Board that the Evaluation Committee acted in a diligent, fair and proportionate manner and in no way transgressed the principle of self-limitation.
- Therefore, the Board does not uphold the Appellant's grievance on this point.

### **Grievance 2: Technical Non-Compliance Arising from "n.1 pump each type" (Translation/Interpretation Issue)**

- The Appellant insists that the phrase "*we will test n.1 pump each type in accordance with ISO 9906:2012 Grade 2B*" was a misinterpretation or translation oversight from Italian to English.
- The Appellant further highlights that Article 24.2 of the Special Conditions makes it impossible for any pump to be shipped to Malta unless it has passed the performance test to the satisfaction of WSC.
- The Appellant also stresses that on the first page of Document M7, the plural word "*tests*" is mentioned, which indicates that all pumps (per lot) will be tested. The second page's mention of "*n.1 pump each type*" was only a misinterpretation or translation oversight from Italian to English.
- The Board notes that the burden of clear and compliant wording in a tender submission rests with the bidder. The possibility of a translation slip cannot shift that burden to the Contracting Authority. Once again, the Board notes jurisprudence (reference for example to Court of Appeal (Superior) in *Steelshape Limited v. Direttur tal-Kuntratti et (Appell Civili Numru. 175/2013/1)*) repeatedly affirms that it is the bidder's responsibility to ensure full clarity and compliance in its submissions. The Board opines that a Contracting Authority is not obliged to seek further clarifications where non-compliance appears evident and when ambiguity or deficiency arises from the bidder's own submissions.
- Reference to Document M7, the Board agrees with the Contracting Authority that the word '*tests*' on page 1 and "*one test per lot.*" on page 2 are not mutually exclusive, as there is more than one lot; if each lot is to be tested, the answer should be in the plural, indicating multiple tests.
- There is consensus by all parties that the Contracting Authority was clear in its tender requirements that '*all pumps*' proposed under the tender must be tested individually for performance. This requirement is explicitly stated in Article 25.2 of the Special Conditions, reiterated in Clauses 3.6.1 Terms of Reference.
- The Appellant's statement about testing "*n.1 pump each type*" clearly conflicts with the explicit mandatory requirement in the tender for *each* pump to be tested.

- The Board agrees with the Contracting Authority that Article 24.2 of the Special Conditions does not guarantee that the bidder will be compliant with the tender document regarding individual testing of all pumps in each lot, given that the clarification/rectification reply is an official contractual document.
- With respect to item 12 of the objection letter '*Objector nonetheless indicated that all the pumps will be tested as per ISO 9906:2012 Grade 2B in the file/s (lot 1-5) – Technical offer.*' the evaluation committee confirmed that none of the documents submitted during the tendering stage contained such a statement; the only reference was that the pumps would be tested in accordance with ISO 9906:2012.
- It is the opinion of this Board that the Evaluation Committee acted in a diligent, fair and proportionate manner and in no way transgressed the principle of self-limitation.
- Therefore, the Board does not uphold the Appellant's grievance on this point.

Furthermore, the Evaluation Committee agrees with the Contracting Authority that a tenderer's claim of being cheaper is irrelevant if it is not compliant with the tender requirement.

**The Board,**

Having evaluated all the above and based on the above considerations, concludes and decides in relation to Lot 2:

- a) Does not uphold Appellant's Letter of Objection and contentions,
- 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**  
**Chairman**

**Dr Ing. Damien Gatt**  
**Member**

**Mr Lawrence Ancilleri**  
**Member**