PUBLIC CONTRACTS REVIEW BOARD

Case 2143 – CT3026/2024 – Works Tender for the Design and Build of Two Utility Scale Battery Energy Storage System (Bess) at the A-Station Tunnel in Marsa and at Delimara Power Station in an Environmentally Friendly Manner

1st September, 2025

The Board,

Having noted the Letter of Objection filed by Dr Ryan Christopher Pace acting for and on behalf of **BESSUI JV**, (hereinafter referred to as the appellant) filed on the 23rd June, 2025;

Having also noted the Reasoned Letter of Reply filed by Dr Steve Decesare acting for and on behalf **Interconnect Malta** (hereinafter referred to as the Contracting Authority) and Dr Audrey Marlene Buttigieg on behalf of the **Department of Contracts**, filed on the 3rd July, 2025;

Having also noted the Reasoned Letter of Reply filed by Dr Adrian Mallia acting for an on behalf of **Jiangxi Ganfeng Battery Technology Company Limited**, (hereinafter referred to as the Recommended Bidder) filed on the 3rd July, 2025.

Having heard and evaluated the testimony of the witness Ing. Jonathan Scerri (Representative of BESSUI JV) as summoned by Dr Ryan Christopher Pace acting for BESSUI JV;

Having heard and evaluated the testimony of the witness Ing. Dr Joseph Vassallo (Chairperson of the Technical Evaluation Committee [TEC]) as summoned by Dr Ryan Christopher Pace;

Having heard and evaluated the testimony of the witness Ing. Noel Darmanin (Member of the Technical Evaluation Committee [TEC]) as summoned by Dr Ryan Christopher Pace;

Having heard and evaluated the testimony of the witness Ing. Christian Spiteri (Member of the Technical Evaluation Committee [TEC]) as summoned by Dr Ryan Christopher Pace;

Having heard and evaluated the testimony of the witness Ing. Christina Bonnet (Member of the Technical Evaluation Committee [TEC]) as summoned by Dr Ryan Christopher Pace;

Having heard and evaluated the testimony of the witness Mr Brandon Borg (Company Representative) as summoned by Dr Ryan Christopher Pace;

Having heard and evaluated the testimony of the witness Mr Xiaofeng Ciu (Corporate Law Expert) as summoned by Dr Adrian Mallia;

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 sitting of the 25th August, 2025 hereunder-reproduced.

Minutes

Case 2143 Objection – Works Tender for the Design and Build of Two Utility Scale Battery Energy Storage Systems (Bess) at the A-Station Tunnel in Marsa and at Delimara Power Station in an Environmentally Friendly Manner.

The tender was issued on the 27th of November 2024, and the closing date was the 11th of February 2025.

The estimated value of the tender, excluding VAT, was €47,000,000

On 23rd June 2025, Bessui JV. lodged an appeal against Interconnect Malta – the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant objected since the tender was not successful since the criteria for award was the cheapest priced offer satisfying the administrative and technical criteria.

A deposit of €50,000 was paid.

There were sixteen Bids.

On the 25th of August 2025, the Public Contracts Review Board (PCRB), composed of Dr Vincent Micallef as Chairman, Dr Ana Thomas and Mr. Lawrence Ancilleri, as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant – Bessui JV.

Dr Ryan Christopher Pace – Legal Representative.
Mr Gilbert Bonnici – Company Representative.
Mr Brendan Borg – Company Representative.
Ms. Rita Borg – Company Representative.

Contracting Authority – Interconnect Malta.

Dr Stefan Cutajar – Legal Representative.
Dr Alexander Vassallo Cesareo – Legal Representative.
Dr. Ing. Joseph Vassallo – Chairperson Evaluation Committee.
Ing. Alex Azzopardi – Secretary.
Ing. Christian Spiteri – Evaluator.
Ing. Christina Bonet – Evaluator.
Ing, Noel Darmanin – Evaluator/ Persons with major contributions to specs.
Perti Reuben Sammut -- Persons with major contributions to specs.
Ing Ismail D'Amato -- Head of Contracting Authority.

Recommended Bidder – Jiangxi Ganfeng Battery Technology Company Ltd.(91360500576129026E)

Dr Clement Mifsud Bonnici – Legal Representative.
Dr Antoine Cremona – Legal Representative.
Dr Calvin Calleja – Legal Representative.
Dr Adrian Mallia – Legal Representative.
Dr Ciara Kennedy-Loest – Legal Representative. Online.
Mr Shan Liang – Company Representative.
Mr Tony K. Mou – Company Representative.

Participating Bidder 1 -- PowerFix JV (TID 222026)

Ing. Alexander Tranter – Company Representative.

Contracting Authority.

Dr Audrey Marlene Buttigieg Vella – Legal Representative.

Opening Statements

Dr Vincent Micallef, Chairman of the Public Contracts Review Board, welcomed the parties present: The Appellant, Bessui JV; the Contracting Authority, InterConnect Malta and the representative of the Recommended Bidder, Jiangxi Ganfeng Battery Technology Company Limited.

Before the initial submissions, Dr Ryan Christopher Pace for the appellant, enquired about a clarification. They had submitted with their appeal a request for information to the Department of Contracts on June 19th, 2025. To date, no information was brought forward.

The Chairman Dr Vincent Micallef stated that no information was received in the acts of these proceedings.

Dr Audrey Marlene Buttigieg Vella for the Department of Contracts confirmed that a request with the reply was sent, however, the Department of Contracts received a non-deliverable receipt. No other replies were sent as the appeal was filed. She agreed to go for the information required at her office.

Dr Clement Mifsud Bonnici representing Jiangxi Ganfeng Battery Technology Company Limited, the recommended bidder, insisted that the appellant should have proceeded with an application for this

closure before the hearing. The remedies framework is meant to be rapid and any attempts for certain information or a postponement would be objected from his side.

Dr Pace remarked that the Department of Contracts should have tried again after an undeliverable answer as the correspondence remained unanswered. They will not be deprived of information requested and they had no intention of a postponement.

At this stage, Chairman Mr. Micallef invited Dr Pace to start with the initial proceedings.

Initial Submissions

Initial Submissions by the Appellant

Dr Ryan Christopher Pace was moving to call the first witness. He hoped that there will not be duplications and that once he had the information needed his proceedings might change.

Dr Mifsud Bonnici, intervened that if the appellant were aggrieved that the Department of Contracts did not reply to its request for information, the law requires him to raise a ground of appeal on the issue. Dr Mifsud Bonnici referred to **Klaipėdos regiono atliekų tvarkymo centras' v UAB** by ECJ confirming that if one is aggrieved by the Government, refusal or omission to provide requested information, prior to the process, one should raise a specific grievance within a ten-day period. In this case the time limit has surpassed.

Dr Stefan Cutajar for InterConnect Malta asked for a clarification, on which part on the objection was it made clear that they were aggrieved by the lack of the information.

Dr Ryan Pace insisted that the other party are requesting the Board to dismiss their second grievance, as it is nebulous and vague. Prior to filing the appeal, under regulation 40 of the PPR, we requested the Department of Contracts to provide us with the information. The Contracting Authority and the Recommended Bidder and the Department of Contracts were in a position to address the grievance. It is not fair for the other parties to allude that the procedure was not in a proper manner, since they did not know that the information had been actually sent. Due to an undeliverable notice, no one proceeded with sharing the information. Effectively it was the Department of Contracts, which did not proceed correctively, as the information was needed and was never received.

Dr Stefan Cutajar insisted that despite the second grievance as being nebulous and vague, Dr Mallia still alluded issues about specifications. They had to reply to the interference in the objection as it would have been a disservice to their clients.

Initial Submissions by the Contracting Authority

Dr Stefan Cutajar, representing the Contracting Authority, thanked the Board for hearing the preliminary plea in a short time frame. This project is a main fundamental aspect of Malta strategy for the energy sector in the coming years, and an EU funded project. He insisted that it is unfortunate for a project of this importance to be delayed by an objection with frivolities and based on a lot of suppositions.

The Contracting Authority conducted a thorough and legally compliant evaluation process that recommended Jianngxi Ganfeng Battery Technology Company as the successful tenderer. The objection of the appellant process and its remit and the legal framework supporting the evaluation criteria consistently and the Recommendation Bidder demonstrated full compliance. The Tender Evaluation Committee was composed of professionals who knew the responsibilities in terms of the law.

The Recommended Bidder strongly objects to how the objection was framed, as it was unclear what the grievances were. The law imposes higher standards on how the objections should be written and the second grievance is far too nebulous for the board to ever consider it.

Initial Submissions by the Recommended Bidder.

Dr Adrian Mallia for the preferred bidder, clarified that the applicant filed his documents on Friday and the preferred bidder submitted his document a day later. They had no objections, provided that all documents are accepted into evidence, a point to minute in the acts of the proceedings. First point: The Preferred Bidder was referred to as a cowboy, however the preferred bidder forms part of a group of Companies listed in the stock exchange with a market capitalisation of 28 billion US dollars and one of the world's largest Lithium Compound Producers in the world.

Second point: It is also evident that there is a three million euros difference in the bid selected as the preferred tender and the offer made by the appellant.

Third point: The Board has repeatedly said that it will not allow objectors to file an appeal and then hopefully find some shred of evidence which will give support to their objection. Referring to case 2112 and case 2076 where the board said that:

'Generic statements and intentions to elaborate during a hearing do not satisfy the requirements of regulation 270 of the PPR's which require grievances to be drafted and submitted in a manner that is very clear',

When an objection is filed, it is incumbent upon them to be clear, what the ground of the objection is.

Fourth point: In the wording of the appeal, there are hints at some kind of nefarious forces working under hand to keep the appellant out of the process. In the first page of the appeal, there are insinuations, allusions and perhaps threats and the board is invited to proceed this appeal disregarding this excess verbosity.

At this stage Dr Audrey Marlene Buttigieg Vella presented the documents:

DOC AVB1 showing that the delivery of the documents requested by Dr Ryan Pace to be disclosed had been sent but the system replied back, *'Delivery has failed to these recipients or groups.'*

DOC AVB2 containing the disclosure information to the questions raised therein by Dr Ryan Pace.

Witness.

Ing. Jonathan Scerri (ID No. 176075M), Summoned by Dr Ryan Pace.

Ing Scerri identified himself as an electrical engineer, warranted for 27 years. His field of expertise is mainly in energy generation and distribution and in the process and plant control. He assisted Bessui joint venture to prepare their submission from a technical perspective. Ing Scerri was about to refer to a document attached with his email to the Contracting Authority when Dr Cutajar noted that they had no copy of such document. Dr Pace insisted that the letter of objection, the whole annual report of 2024, the certifications referred to the requested for information and the proof of the payment were sent together with the application. The other parties confirmed that they received only the proof of the payment by BOV.

Dr Ana Thomas, member of the Board asked Dr Buttigieg Vella to reforward the missing items, and a copy was circulated to all the parties. Dr Thomas enquired about a document of four hundred pages and Dr Pace stated that an extract in the fourth page of the appeal regarding the first grievance was taken from the annual report. The whole annual report was sent for transparency's sake.

Dr Pace asked Ing. Scerri to guide them through the highlighted, marked, standards and what they translate too and their relevance in this particular tender. Ing. Scerri stated that he would categorize them in three main categories. Several are intended for safety and risk medication, and the Contracting Authority ensured themselves that the product that they will be procuring are of sufficiently high standards to reduce risks and ensure site safety. The next category is related to the technical performance and reliability including energy efficiency and how the product would perform in the long term and

reliability in its operation. The Contracting Authority has put in such standards, as the Battery Energy Storage System in a small grid, has to perform well and by highly reliable.

The third category of standards are more related to regulatory compliance such as Cmarking, transport requirements as during transportation batteries could be pollutant, mechanical testing and explosives atmosphere in relation to EU directives. This project is particular because the Marsa component is an indoor project within an indoor context and the Delimara component is within a power station complex which is also a very rare situation.

Referring to a question by Dr Pace about the different standards, Ing. Scerri stated that several standards were by the IEC, International Electro technical commission, which is an international body of which Malta is a signatory. Their standards are universal and not easily replaceable. Other standards are by UL driven by insurance bodies, who check that the product insured is safe. EU and US standards are very close and in some aspects the US standards are more stringent. Other standards are European No arms, the EN standards, and they govern member states.

Other standards are BSCN which are British standards that have been adopted by the European norms. Most highlighted standards are IEC which are international standards that should be abided with.

In the offer submitted by the appellant, there was a rigorous exercise to check that the submission was compliant with all standards. Ing. Scerri admitted that he had never seen so much foreign interest by companies who wanted to submit their product. Most suppliers offered an off the shelf product which was not applicable for this particular situation. It had to be a tailored offer to meet all the requirements requested by the Contracting Authority.

Cross-Examination by Dr Stefan Cutajar.

Ing. Scerri is a consultant to the consortium bidder. He is self-employed and does consultancy to several contractors. He has worked with one of the members of this consortium, and with bidders of this project on other projects.

Dr Cutajar quoted a reference to clause 3.7 on page 54 of the tender document:

'Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority. In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS, and HD.'

Ing. Scerri was aware of the clause where the Contracting Authority had the full discretion to accept equivalent standards, if the bidder, whatever bidder, produced proof or evidence of this equivalency. Ing. Scerri could not confirm in detail if it was possible for any bidder to produce equivalence for the Europeans norms and standards mentioned.

Witness.

Ing. Joseph Vassallo (ID No. 471767M), Summoned by Dr Ryan Pace.

Ing. Vassallo is an electrical engineer specialising in power electronics. He was an internal reviewer in InterConnect Malta, checking that the tender written document was factual with what the market provides and generally accuracy.

Dr Pace asked Ing Vassallo how he came to conclude that the standards requested by the Contracting Authority were the ones requested by future bidders.

Dr Mallia objected by asking if they were questioning the specifications of the tender, because that process had a totally different iteration. The specs could not be challenged, and if the bidder had any interest to challenge the specs, he had to do that a long time ago.

The Chairman stated that he could not infer where this line of questioning was going.

Dr Pace insisted that he was enquiring a reviewer of the tender document how they came about to the specifications.

Ing. Vassallo replied that InterConnect Malta had sought the services of consultants before issuing the tender, with internal checks of what the market offers. Ing. Vassallo was the chairman of the Tender Evaluation Committee. The Committee was comprised of five people, the Chairman, Three Evaluators and the Secretary. The evaluators had the vote.

Once the offers were sent to Department of Contracts, each evaluator started reviewing documents and built an excel sheet with requirements and inputs by bidders. Basically, it was divided into three. Technical, Administrative and Financial. They were a total of sixteen offers, each offer was checked and studied. The first stage was the administrative, checking for selection and award criteria. Clarifications needed were made as per General Rules Governing Tenders (GRGT). The compliant bidders then assessed from a technical perspective in detail. After the financial bid was considered and an award was decided by the committee. In total twenty-two (22) evaluation meetings were held to evaluate all bids. Apart from meetings, each evaluator studied each bid separately. No technical experts or consultants were engaged.

Although the evaluations were done separately, during the meetings, they would then go through the process of ePPs to follow each criterion. Since one of the grievances by the appellant is in relation to the administrative assessment of the recommended bidder's bid, Ing. Vassallo insisted that the bids were evaluated according to the requirements and were checked one by one to ensure compliance.
Dr Pace quoted from page 10 of the tender document:

'Exclusion (including Blacklisting) and Selection Criteria – information to be submitted through the European Single Procurement Document (ESPD) in the tender response format.
The Exclusion (including Blacklisting) criteria are to be completed by the Economic Operator in the ESPD (Tender response format) under Part 3 titled 'Exclusion Grounds' which includes the following:

A. *Ground related to Criminal Convictions.*
B. *Grounds relating to payment of taxes or social security contributions.*
C. *Grounds relating to insolvency, conflicts of interests or professional misconduct*
D. *Purely national exclusion grounds*

Kindly note that the ESPD tender response format is pre-populated by the system. It is the Economic Operator's responsibility to ensure that the correct information is reflected in the ESPD tender response format for the above criteria.

Ing. Vassallo insisted that all issues mentioned were checked on the response format of the ePPs so the tenderer would fill in if it was ok or not.
Dr Cutajar objected to a question by Dr Pace about other checks that the evaluation committee does. Dr Cutajar thought that the question was very leading, and that everyone was overlooking the role of an evaluation committee.
The Chairman invited Dr Pace to proceed with his questions as this dealt directly with his preliminary grounds.

Ing. Vassallo responded that this was a self-declaration and the tender evaluation committee abided by the self-limitation principles and limited to what was said in the bid by the economic operator. In this case, there was nothing where one could have suspected that there was something wrong, so the Tender Evaluation Committee stopped there, since the self-declaration said that there were no grounds related to convictions. Flags could have been raised if a bidder replied yes, in which case the bidder would be asked if it was a mistake. No further assessments, investigations or evaluations were made by the technical evaluation committee after the reply of the bidder. This was a normal approach. Ing. Vassallo confirmed that the two nominated sub-contractors were Mekkanika and Spagnol Construction.

Dr Pace enquired if the sub-contractors relied for any capacity and Ing. Vassallo replied that the civil works contractor relied for eligibility.

Dr Mallia objected for the question and Dr Cutajar insisted that there was nothing in the letter of objection that challenges the administrative compliance with regard to subcontractors.
Dr Pace insisted that their appeal was based on two grievances, the administrative part and on the technical compliance of the offer.

The Chairman asked Dr Pace to re-phrase the question, however he had to agree that the line of questioning was not based.

Dr Pace stated that regarding the standards by the Department of Contracts, the preferred bidder ticked compliance with the clauses which have the standards. He quotes Page 54 of the tender document:
'Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the contracting Authority.'

Dr Pace asked what was provided regarding standards whether they were equivalent, superior, or the same standards requested.

Ing. Vassallo answered that in the technical offer form provided they made reference to one standard not listed, that was later changed to an EU standard.

Dr Pace asked what effectively was provided for example for IEC62619?

Dr Cremona objected by noting that Ing. Vassallo has already given all the answers, mostly that if there were an equivalent standard, the bidders would ask for proof in line with interpretation of 3.7

Ing. Vassallo continued by explaining the check the box exercise is guaranteeing compliance with article 3.7. The technical offer includes several documents, with standards that are highlighted, if they are different. This is a literature list which provides generic information on the project and various equipment to be provided.

Cross-Examination by Dr Stefan Vassallo

The criteria for award, in this tender was compliance with all administrative, technical and financial bid and the cheapest offer. The recommender bidder was compliant and the cheapest. There was no doubt of the veracity of the self-declaration by the Recommended Bidder.

Ing. Noel Darmanin (ID No. 21193M), Summoned by Dr Ryan Pace.

Ing. Darmanin was involved in drafting the tender document, and an evaluator. He is an Electrical Engineer specializing in power and control since 2014. The members had the time to familiarise themselves with the tender document with the GRGT. The assessment was performed, sequentially, matters were discussed, and rectifications and clarifications were drafted to all respective bidders. From an administrative point of view, the committee based on what was declared by the bidder on the ePPs. They also reviewed the entries on SPDs of all subcontractors. From a technical perspective, the standards were there to guarantee a product of quality and together with a consultant, appointed by tender procedure, we came up with the standards required. From an elevation point of view, there is the technical offer form which refers to clause 3.7. The ticked boxes must be corroborated with literature. The evaluators go through the literature. The literature was related to batteries, mainly data sheets on batteries and on the solution of batteries.

Dr Pace quotes page 54:

'Other internationally acceptable standards that ensuire equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.'

Ing. Darmanin stated that if the literature does not mention any alternative standard, then the bidder has confirmed compliance with section 3.7.

Dr Pace quotes from page 54:

'*In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS, and HD.'*

Ing. Darmanin answered that regarding battery, UL9540, the literature provided related to the item requested. Since this battery was not ISO, IEC, EN, BS, and HD copies should have been supplied of the relevant standard specifications.

Dr Pace intervened by stating that no supporting documentation was given about UL9540. He stated that the battery satisfied the requirements there was no need for documentation.

Dr Ana Thomas clarified with Ing. Darmanin, that regarding UL9540, it was mentioned, as the paragraph starts with 'Others', and the clause would apply, with no need of relevant copies.

Dr Pace stated that if it is not 'Other' than one would not request the relevant copies.

Ing. Darmanin specified that if it is 'Other' one requests a copy. A standard request by the Authority does not need providing of a copy in the English language. Ing. Darmanin did not recall if this matter was discussed at Technical Evaluation Committee.

Cross-Examination by Dr Antoine Cremona.

Ing. Darmanin said that the selection criteria was the cheapest compliant offer. The offer of the Recommended Bidder was administratively, technically and financially compliant. There were no doubts, in the information provided, in the technical offer form and the literature list. The evaluation committee was aware of the principle of self-limitation, and it was applied by familiarizing with the tender document and applying rules and regulations during the evaluating stage. The evaluating cannot investigate things which are not submitted clearly in the tender offer. Referring to the third paragraph of 3.7, the first line:

'All safety, design, fabrication and installation of the system and facilities shall comply with the codes.'

The codes are the ones laid down on the table, as there is '*as set forth in this clause.' a*nd 'Other international acceptable standards, refer to what is in that table.

Ing. Christian Spiteri (ID No. 330089M), Summoned by Dr Ryan Pace.

Ing. Spiteri is a mechanical engineer working with the company for seven years. He evaluated all that was submitted on ePPs. The committee depended on what was submitted. He was not involved in the drafting, but he reviewed the document before it was issued. Referring to UL9540, there was no indication that the bidder was offering something else.

Dr Pace quotes page 54:

'Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the

standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority.'

The Preferred Bidder declared that he agreed with the clause, and he did not have to submit anything else even on UL9540. Dr Pace quotes:

'*In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS, and HD.*

The Preferred Bidder submitted the self-declaration. Ing. Spiteri stressed that one must read the whole paragraph, were in case there are other standards which are not mentioned in the offer. The technical evaluation committee needs to know, if it agrees with the standards written down in the document, then there is no need to submit anything else. The Committee made sure that the interpretation was aligned throughout the document.

Cross-Examination by Dr Stefan Vassallo

Ing. Spiteri agreed that 3.7 must be read in conjunction with the table within the same clause. In 3.7 the part which specifies the codes, makes a reference to this table. Ing. Spiteri confirmed that both the technical offer form and the literature list were compliant with the requirements.

Of the tender. The criteria were the cheapest compliant offer. There were no doubts within the offer the recommended bidder on the compliance or noncompliance of the bid. There were no clarifications sought pre-submission on the interpretation of 3.7 to any bidder.

Cross-Examination by Dr Antoine Cremona.

Ing. Spiteri stated that they applied the interpretation to all bidders equally.

Ing. Christina Bonnet (ID No. 360495M), Summoned by Dr Ryan Pace.

Ing. Bonnet is an Electrical Engineer in the power industry for six years. She was not involved in the drafting of the tender; however, she was a member in the evaluation committee. For the preferred bidder, she relied on the declarations on the SPD and for the subcontractors she checked the SPD's.

Regarding the UL9540, there was no reason to believe that the economic operator would not comply. There were no rectifications or clarifications for the UL.

Dr Pace quoted Page 54:

''*In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications.'*

Ing. Bonnet did not remember what literature was provided for UL9540.

Cross-Examination by Dr Stefan Vassallo

The offer of the recommender bidder was administratively, technically and financially and the cheapest offer. There was no reason to believe that the recommended bidder would not be compliant. None of the bidders asked for clarifications on the interpretation of section 3.7. She agreed that section 3.7 had to be seen in its totality and including the table with this section. As an evaluator, she was satisfied by the submissions made by the recommended bidder.

Dr Pace intervened by reminding Ing. Bonnet that she did not recall what literature was presented for the UL9540, yet she was satisfied with the documentation submitted.

Ing. Bonnet answered that since there was no rectification the product submitted was compliant. It was in the table as 'other internationally acceptable standards,' over and above the standards in the same clause.

Mr. Brendan Borg (ID No. 171488M), Summoned by Dr Ryan Pace.

Mr Borg represents ISD Company Ltd. The company focuses on renewable energy, mainly solar panels, energy storage with a 40% market share of energy storage in Malta. They do renewable energy both in Malta and overseas, mainly in Italy. Mr Borg asked a local collaborator to be one of the suppliers to participate for an Italian project and this collaborator forwarded an email stating that the recommended bidder did not have the UL9540. This UL9540 was also required for Italy, since it is a safety standard, and they confirmed that they do not have it. This was a month ago.

Dr Cutajar objected, stating that this was not part of the letter of objection, and there was not an exhibit to this end within the time periods.

Dr Pace insisted that the email transpired very recently, actually on the 19th of August 2025.

The Chairman upheld the objection.

Mr. Cui Xiaofeng Hankun (ID. 310115199009108610), Summoned by Dr Calvin Calleja.

This witness was assisted by an interpreter Ms. Deng je Jessica, who had been sworn in. Mr Hancun had handed in his CV. He had passed the traditional professional test in 2013 and practised law in China

since 2015 and his expertise covers security laws, corporate laws and any other business that has to do with company listing.

According to China's corporate law, article 3 and article 13 every company has a separate juridical personality, which means they take responsibilities, even between subsidiary and parent company. (Refer to exhibit. JBT3)

A subsidiary company is different from its parent company, shouldering its own legal obligations and liabilities.

This is a report issued by the Government administrative authorities responsible for business registration and every company registers and publicises it. This report will include for the public a Company name, time of establishment and business scope of the company. Every company will have the registration information of their own.

These two companies are related as Parent and Subsidiary Companies, and have separate juridical personalities according to corporate law in China.

Every Company will have a separate report and information is different. Parent and subsidiary companies have unique codes and different unified social credit codes.

Mr Hancun is familiar with the Company Jiangxi Ganfeng Battery technology Company Ltd. and with the Company Ganfeng Lithium group Company Ltd. They are Parent and Subsidiary Companies. The Companies have separate juridical personalities according to corporate law in China.

Referring to reports issued by government authorities, by the state for market regulation (exhibit JBT – 6) the report issued for Jiangxi and (exhibit JBT -8) for Ganfeng, Mr. Hancun said that every company has a different report and information. Every Company have a unique code and a unified social credit code. There are different codes for the Parent and Subsidiary Company.

There seems to be various iterations for the company of the Recommended Bidder, example: Jiangxi Ganfeng Battery Technology, Jiangxi Ganfeng Lithium Technology and Jiangxi Ganfeng Battery Lithium Technology. The reason for different names for the same company, is that in Chinese Law, there is no specific requirement on an English name, so each company is entitled to select a name, and it is a legitimate right for any Chines Company.

Cross-Examination by Dr Ryan Pace.

Dr Ryan Pace asked if he knew the shareholding ratio of Ganfeng Lithium Company Ltd in Jiangxi Ganfeng Battery technology Company Ltd.

Mr Hancun answer that the Company contribution is 1.3 billion accounting for 60.67%.

Final Submissions

Final Submissions by Dr Ryan Pace (Appellant)

The appeal is self-explanatory. The Evaluation of this Tender and the Evaluation of the Preferred Bidders bid leaves much to be desired. The Evaluation Committee was dealing with such a big project, it makes little sense to rely on a self-declaration in a situation when we are dealing with foreign companies which have been very interested in the project.

It is not a case of departing from the principle of self-limitation. The Technical Evaluation Committee had to be 100% sure that the preferred bidder is going to undertake the project in the most ethical manner, the self-declaration is not sufficient. What we are suggesting is that the Contracting Authority just as the appellant was able to get this information from the internet, and the annual report would have come up, the Contracting Authority at the minimum should have done the same. Had it researched the parent company, it would have been in a position to know about the occurrence and clarify this occurrence.

Even though they are distinct, we cannot argue that there is no relationship between the two. The whole characteristic about parent-sub is substantial dominant control over the subsidiary in terms of voting rights, a dominant control in terms of the strategic outlook of the Company, and a dominant control in terms of the operations of the Company.

The Preferred Bidder in his reply mentions 66%, document 2 mentions 68.21% and another document goes to the extent so as to state that it was wholly owned. Now we have clear percentage which still indicates a considerable control over the subsidiary. Simply saying superficially that the subsidiary company is a different entity, but the Parent Company has sufficient control over its Subsidiary. Ganfeng Lithium Company Ltd has a 60% shareholding of Jiangxi Ganfeng Lithium Battery Technology Ltd. The appellant cannot simply discard that. They would not have departed from the principle of self-limitation by clarifying further. The Technical Evaluation Committee should have sought clarification.

I do not agree that Article 57(4)(c) of the Directive is not found within our PPR. At no point in time did I request this Board to substitute its discretion at law, with either the Technical Evaluation Committee or the Department of Contracts. If we had to refer to Article 57(4) of the Directive, this article refers *"l-awtoritajiet kontraenti jistghu jeskludu jew jistghu jigu obligati minn stati membri li jeskludu mill-partecipazzjoni fi procedura ta l-akkwist kwalunkwe operator ekonomiku fi kwalunkwe wahda mis sittwazzjonijiet li gejjin".*

I do not agree with my colleagues that the Contracting Authority could not have done anything, this exclusion is not a mandatory exclusion, but it is a possibility. A particular occurrence may not be considered as mandatory it does not mean that the Contracting Authority is entirely in the clear and if something that does not sit well with it it cannot take action or seek clarification. By saying that what is prospected in Article 57(4) does not find place in the Maltese PPR, the appellant begs to differ.

It does not mean that we can let is pass by. It is included so much so that Regulation 199 stipulates that the Director may blacklist if there is professional misconduct. I do not expect the PCRB to take this action, it is reserved to the Director of Contracts. If the Director of Contracts did not realise, the appellant must make them aware, not for this Board to blacklist but to ensure that attention is drawn to this point. The Preferred Bidder referred to the fact that this was settled administratively, this transpires from the annual report itself.

This does not diminish the fact that this occurrence, the insider trading, is considered as a criminal offence under Maltese law. Being factual means that the parent company who has significant control on the preferred bidder was found guilty of a criminal offence – insider trading. Such an occurrence is indicative of professional misconduct. I referred to Volpostra judgment.

Even though the tender document refers to the fact that the economic operator was duty bound to provide correct information, we cannot close a blind eye to those who list partial versions of the truth. The Technical Economic Committee was duty bound to see further to this and check what was being declared. Even if the Contracting Authority and the Department of Contracts were not aware of these circumstances, the minute the appellant filed his appeal, it was up to them to verify.

In terms of technical compliance of the offer, if the Contracting Authority really believes that the principle of self-limitation is a *sine qua non* it would have transpired that their interpretation of Section 3.7. is not one which respects self-limitation. It is creative as to how one interprets "in all cases". In all cases except those 5 codes, the provision of the relative documentation should have been provided.

The Appellant refers to Clarification Note 6 dated 27.12.2024, the Contracting Authority specifically referred to Article 3.26. which refers to the literature list, it refers to literature relation to batteries etc. the documentation required was the table in Clause 3.7. and in the Clarification Note 6, in terms of Article 3.26 the answer was this and quotes:

"The documents referenced in the article below shall be submitted at the respective stages as follow, article 3.26 which is the literature list to be submitted at the bidding stage. The documents mentioned in this article corresponds to requirements outlined in the literature list attached to the tender document".

The Tender Document says in all cases. Over and above there was a clarification note, referring to the bidding stage. The minute that the documentation was not submitting, there we have a problem. Even if they thought the bid should be admitted, at the technical evaluation then they had a problem, and he would no longer be technically compliant. Notwithstanding the financial advantage of the bid, the administrative and technical compliance remains imperative. So, on both fronts the preferred bidder should not have succeeded. Any decision to the contrary is in breach of the PPR. The principle of self-limitation is only breached when that tender document is not adhered.

Final Submissions by Dr Stephan Cutajar (Contracting Authority)

My colleague argued that the Contracting Authority should have been more careful because there was a doubt on whether the recommended bidder shall be the one to implement the project. We cannot allow Company A to bid without relying on anyone for parts of the performance of the contract and then find that Company B or C are the masterminds of the project.

The first grievance relating to the administrative criteria which the appellant says the Preferred Bidder is not compliant. The burden of proof was on the appellant to prove this. The witnesses testified that the answers to the ESPD were correct, and the Technical Evaluation Committee determined conformity with the law. Dr Cutajar made reference to the ESPD document itself. The instructions to the Economic Operators and he quotes:

'The SPD replaces the requirements for economic operators to provide upfront evidence certificates or by allowing them to self-declare that they

1. *Do not fall within a ground for exclusion and blacklisting as established under part 6 of the PPRs or if they do, they can demonstrate that they have taken self-cleaning measures.*
2. *That they meet their selection criteria.'*

The first grievance is fatally defective because it rests on a non-transposed article and not a mandatory exclusion criterion in the PPR. Here there is no doubt that there is some defect in the transposition of the directive in our PPR's and given there is no challenge of this we have to rely on the wording of the law.

The Technical Evaluation Committee was correct in assessing the ESPD as being in compliance with the administrative criteria. The blacklisting has not occurred. Even if, there are still remedies available to the parent company and it is not a black or white procedure. There is redress and there are self-cleaning exercises mentioned in the ESPD itself. If it is not clear-cut, everything else is subject to the direction of the Director of Contracts.

We are speaking of two different entities and at it is clear from the Chinese legal expert that the legal juridical personality of the companies in China is treated equivalently to how we treat them in Malta. It is unfair to say that the Technical Evaluation Committee should have investigated a third party not involved in the tender. In this case, the reliance was on sub-contractors, so the SPDs were requested for them. There was nothing wrong with those submissions. The first grievance cannot stand as it is directed against the wrong entity.

The fundamental description of the evaluation committee itself is in regulation 2 of the law of the PPRs and says that the evaluation committee shall evaluate and make recommendations on the tenders received. It cannot be an investigative entity. In public procurement, we focus on the acts and omissions of the economic operators participating in the tender only. It is useless to say that the parent company was involved in any jurisdiction.

The form of the grievance was deficient and should be thrown out as not sufficiently clear. This is an attempt to a fishing expedition. There has been no shred of evidence to convince that the technical evaluation was technically deficient. The interpretation of Clause 3.7. was correct and unanimous and it was interpreted in a uniform manner by all economic operators.

It is incorrect to equate clarification note 3.26 with 3.7. They are two different clauses with different requirements. 3.7 is self-explanatory. The Technical Evaluation Committee seeks proof for things that fall outside specifications mentioned in the table. UL9540 was clearly within the table in section 3.7 regulations. The Technical Evaluation Committee had made the right assessments over all aspects.

Final Submissions by Dr Clement Mifsud Bonnici (Recommended Bidder)

The Appellant made some threats in his appeal. That is what the Appellant is trying to do, by putting fear to you to uphold his appeal. It is for Government to decide how to draft the tender and to determine what tools are used. Sometimes one relies on self-declarations, sometimes at bidding stage they are required to present documents. The time to object to the tool selected by the Government has passed. The ground of appeal was clarified during the course of this hearing. If something is important, I hound the Department of Contracts until I get a reply and then I would raise the matter within the appeal to this Board.

The tender *dossier* is being misinterpreted, and you are being misled so that the narrative fits. It was clear how government wanted to determine the bids. It is evident from the Technical Offer Form. In certain forms another column may need to reference to documents. Government was happy to rely on a self-declaration. Technical literature list refers to a completely different Clause. With respect to 3.7. a self-declaration was more than enough.

The Technical Evaluation Committee was consistent, the final paragraph only applied if a different standard which was not quoted in the tender was provided. There is a reference to contractors, i.e. a performance condition. With respect to the third paragraph, that is something to be verified as a self-declaration. Ing. Vassallo and Ing. Darmanin confirmed involvement in the drafting of the tender.
There is really nothing wrong with self-declarations. The Court of Appeal in the appeal 625/2023/1 decided on 14th March 2024:

'La darba l'oblatur iffirma d-dikjarazzjoni opportuna, allura l-awtorita kontraenti m'ghandiex ghalfejn verifiki ulterjuri. Kemm il-darba li jirrizulta, waqt l-ezekuzzjoni tal-kuntratt, li l-kuntrattur ma jkunx jonora l-obligi tieghu, iva l-awtorita ghandha l-obligu li tizgura li l-obligazzjonijiet jigu onorati'.

Once you tick the box, you are in the clear. The Court of Appeal says that you should not do independent research, or else you will not maintain impartiality.

First ground of appeal. The first point the preferred bidder has to make, that verification is enough. You need not corroborate the submission. Prior to 2014 you had to provide certificates. Some documents are required at contract stage. Regulation 226(1) of our law.

'The ESPD shall consist of a formal statement by the economic operator that the relevant ground for exclusion does not apply'.

God forbid that the Technical Evaluation Committee has to do independent research for each and every one. Let us assume that Article 574 applies, it could not exclude for 6 reasons:

a) The appellant never proved its case. You should have submitted a decision. We are simply relying on an extract from a report which tries to summarise a decision. That is not the best evidence. The other side did not prove its case.
b) The article speaks of the economic operator, not the group, but the economic operator submitting the tender and Jiangxi is not an addressee of that decision.
c) The two companies are separate. The appellant is putting forward a submission that the parent controls the subsidiary. In actual fact the record shows that the boards are different. There is no concept of a single economic unit in procurement, you still have to nominate them as a sub-contractor or as a joint venture partner.
d) Government can decide, it is discretionary. Three million is a lot of money and it is a reason for the Government to use its discretion.
e) Even if Technical Evaluation Committee considered excluding, it could not do so outright but should have given the opportunity to Jiangxi to explain itself. It is reflected in the last paragraph of Recital 101 of the Directive.
f) If article 57 applies directory one needs an opportunity to self-clean, which gives the bidder the chance to explain.

Replica by Dr Ryan Pace

The fact that the interpretation of the last paragraph of section 3.7 was unanimous, and in a uniform manner, does not mean that it is a correct interpretation.
We did not provide a copy of the decision, but we relied on the statement in an annual report of the parent company. A project of this magnitude estimated at forty-seven million should not just be evaluated on a thick box.

Conclusion of the Hearing

With no further submissions, Dr Vincent Micallef thanked all parties and formally concluded the session.

Hereby resolves:

The Board refers to the minutes of the Board sitting of the 25th August, 2025.

Having noted the objection filed by Dr Ryan Christopher Pace for and on behalf of BESSUI JV (hereinafter referred to as the Appellant) on 23rd June, 2025, refers to the claims made by the same Appellant with regard to the tender of reference CT3026/2025 listed as case No. 2143 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Ryan Christopher Pace
Appearing for the Contracting Authority and DoC:	Dr Stefan Cutajar, and Dr Audrey Marlene Vella Buttigieg
Appearing for the Recommended Bidder	Dr Adrian Mallia, Dr Antoine Cremona, Dr Clement Mifsud Bonnici and Dr Calvin Calleja

Whereby, the Appellant contends that:

"L-oggezzjoni dwar id-decizjoni tad-Direttur Generali (Kuntratti), datata 13 ta' Gunju 2025 u permezz ta' liema l-appellant gie mgharraf illi *"the tender submitted by your company was not successful since the criteria for award of this tender was the cheapest priced offer satisfying the administrative and technical criteria."*

Id-decizjoni hawn fuq citata tkompli billi tfisser illi *"the tender was recommended for award to TID 000222015 Jiangxi Ganfeng Battery Technology Company Limited for the amount of € 24,470,535.02 excluding VAT, this being the cheapest priced tender satisfying the administrative and technical criteria."*

Illi l-appellant hassu aggravat b'din id-decizjoni u ghalhekk gieghed jinterponi din l-umli oggezzjoni u appell minnha.

Din id-decizioni tad-Direttur Generali (Kuntratti), bhal kull decizjoni ohra, trid tittiehed fil-kuntest socjali li tokkorri fih. Hu fatt mhux kontestat illi llum, ftit elementi mis-socjetà Maltija, ghal ragunijiet li mhumiex imnissla mis-sewwa, holqu klima t'ostilità kwantu dak kollu li ghandu x'jaqsam mal-akkwist pubbliku.

Dak li essenzjalment hu bzonn (l-akkwist pubbliku) ghal socjetà li trid tkompli tevolvi u tavvanza, uhud religjozament jipprovaw ipenguh bhala tberbieq zejjed jew, jekk tridx, ghodda ta' abbuz u fil-process, jittentaw joskuraw l-integrità ta' dawk kollha li b'xi mod huma partecipi fil-process ta' akkwist pubbliku.

Id-decizjoni mertu ta' din l-oggezzioni hija r-rizultat sfortunat ta' din il-klima; fejn it-tajjeb u l-gust jispicca jigi sagrifikat ghas-*safe* u l-anqas kontroversjali bit-tama li min hu partecipi fid-decizjoni, kbir kemm hu kbir u zghir kemm hu zghir l-involviment tieghu jew taghha, ma jkunx espost ghal xi attakk mill-artefici ta' din il-klima ostili.

Naturalment, dan l-approcc, kundizzjonat biss minn sens ta' biza', iwassal biss ghal decizjonijiet (bhal din odjerna) li huma manifestament zbaljati.

Dan ghaliex filwaqt li huwa minnu li l-unika kriterju tal-ghazla f'din is-sejha ghall-offerti kien il-prezz, dak il-kriterju tal-ghazla, skont dak li jrid u ighid id-dokument tas-sejha relattiv, kellu jidhol fis-sehh biss wara li jigi accertat li l-offerti sottomessi jissodisfaw b'mod shih u assolut il-kriterji amministrattivi u teknici tas-sejha. Issa dwar dan, u fost affarijiet ohra, id-dokument tas-sejha, f' sezzjoni 5 tal-istruzzjonijiet lill-oblaturi, ighid testwalment kif gej:

5. Selection and Award Requirements

In order to be considered eligible for the award of the contract, economic operators must provide evidence that they meet or exceed certain minimum criteria described hereunder.

(B) Exclusion (including Blacklisting) and Selection Criteria - information to be submitted through the European Single Procurement Document (ESPD) in the tender response format

The Exclusion (including Blacklisting) criteria are to be completed by the Economic Operator in the ESPD (Tender response format) under Part Ill titled 'Exclusion Grounds' which includes the following:

1. *Grounds relating to Criminal Convictions*
2. *Grounds relating to the payment of taxes or social security contributions*
3. *Grounds relating to insolvency, conflicts of interests or professional misconduct*
4. *Purely national exclusion grounds*

Kindly note that the ESPD tender response format is pre-populated by the system. It is the Economic Operator's responsibility to ensure that the correct information is reflected in the ESPD tender response format for the above criteria.

Tajjeb li jinghad illi dak mitlub *ad validitatem* fid-dokument tas-sejha (riprodott hawn fuq ghal riferenza facli) huwa riflessjoni tal-provvedimenti tad-Direttiva 2014/24/UE tal-Parlament Ewropew u tal-Kunsill tas-26 ta' Frar 2014 dwar l-akkwist pubbliku u li thassar id-Direttiva 2004/18/KE, senjatament tal-Artikolu 57.

Awtorità kontraenti jehtieg, qabel kull haga ohra, tistharreg l-ammissibilità tal-offerta.

Hi kemm hi finanzjarjament vantaggjuza l-offerta u hi kemm hi konformi mil-lat tekniku, xejn ma jkun jiswa' jekk tali ma tkunx *ab initio* ammissibbli. U offerta titqies bhala wahda ammissibbli jekk kemm-il darba din tigi sottomessa minn offerent li ma jkunx eskluz skont xi wahda mic-cirkostanzi li jahseb ghaliha I-Artikolu 57 tad-Direttiva 2014/24/UE. Artikolu 57 (4), jipprospetta fost ohrajn is-segwenti:

4. L-awtoritajiet kontraenti jistghu jeskludu jew jistghu jigu obbligati minn Stati Membri li jeskludu mill-partecipazzioni fi procedura tal-akkwist kwalunkwe operatur ekonomiku fi kwalunkwe wahda mis-sitwazzionijiet li gejjin:

(c) fejn l-awtorità kontraenti tista' turi b'mezz adegwat li l-operatur ekonomiku huwa hati ta' kondotta professjonali hazina serja, li trendi l-integrità tieghu dubjuza;

Ghad li definizzioni ta' x'jikkostitwixxi "kondotta professjonali hazina" ma tinstabx fid-Direttiva, il-Qorti tal-Gustizzja tal-Unjoni Ewropea, fis-sentenza taghha tat-13 ta' Dicembru 2012 fil-procedura *Forposta SA* (C-465/11), fissret illi:

... il-kuncett ta' "kondotta professjonali hazina" ikopri kull agir hazin li ghandu rilevanza fug il-kredibbiltà professjonali tal-operatur inkwisitoni u mhux biss il-ksur ta' regoli ta' deontologija fis-sens strett tal-professjoni li jappartieni ghaliha dan l-operatur, li huma kkonstatati mill-korp ta' dixxiplina stabbilit fil-kuntest ta' din il-professjoni jew minn decizjoni gudizzjarja li hija awtorità ta' res judicata.

[...]

il-kuncett ta' "kondotta professjonali hazina" ghandu jinftiehem bhala li jirreferi normalment ghal agir tal-operatur ekonomiku inkwistioni li jindika intenzjoni ta' kondotta hazina jew negligenza ta' certa gravità min-naha tieghu. B'hekk kull ezekuzzjoni inkorretta, impreciza jew nuqqas ta' kuntratt jew parti minn dan tal-ahhar tista' eventwalment turi kompetenza professjonali limitata tal-operatur ekonomiku inkwistioni, izda ma tammontax awtomatikament ghal kondotta hazina ta' certa gravità.

Naturalment, dan kollu jrid jitpogga fil-kuntest tas-sejha ghall-offerti in kwistjoni u, aktar minn hekk, tad-decizjoni tad-Direttur Generali (Kuntratti) tat-13 ta' Gunju 2025 (mertu ta' din l-oggezzjoni) li permezz taghha rakkomanda l-ghoti tal-kuntratt lil *Jiangxi Ganfeng Battery Technology Company Limited*. Mir-ricerka li ghamel il-konsorzju appellant, jirrizulta illi *Jiangxi Ganfeng Battery Technology Company Limited* hija sussidjarja ta' *Ganfeng Lithium Company Limited* li, fir-rapport annwali taghha (verzjoni shiha annessa ghal riferenza facli) ghas-sena 2024 (f'pagna 90 tieghu), iddikjarat u stgarret dan li gej:

"On July 5. 2024, the Company received the Written Decision on Administrative Penalty (2024) No 2 …
(the "Written Decision) issued by the Jiangxi Supervision Bureau (the "Supervision Bureau) of the China Securities Regulatory Commission (the 'CSRC").

Further to the issue of the Notice on December 6. 2022, at the request of Mr U, a hearing had been held on January 4, 2023 to hear from the relevant parties and their respective representatives to state and defend the case. Subsequent to the hearing, the Supervision Bureau conducted additional investigations and invited the parties to re-examine the papers. The parties submitted additional defense. Thereafter, the Supervision Bureau concluded the investigation and the hearing.

As stated in the Written Decision, the Supervision Bureau is of the opinion that the Company is suspected of violating the provisions of Article 53(1) of the Securities Law and the relevant acts constitute insider trading as described in Article 191(1) of the Securities Law. Based on the facts, nature, circumstances, degree of social harm of the illegal acts of the parties involved, and in accordance with Article 191(1) of the Securities Law, the Supervision Bureau decided to issue a warning to Mr. U, and impose a fine of RMB600,000

Mr Li confirmed to the Company that save as disclosed above, there is no other information relating to him that is required to be disclosed pursuant to Rule 13.51(2)(h) to 13.51(2)(v) of the Listing Rules, and Mr Li is not aware of any other matters that need to be brought to the attention of the Shareholders.

Save as disclosed above, as far as known to the Company, during. the Reporting Period, there were no changes ta information that were required to be disclosed by the Director, Supervisors and Chief Executives pursuant to Rule 13.61B(1) of the Listing Rules".

Thares minn fejn thares lejha, u timposta kif timposta l-argumenti kollha li jista' jkollha l-awtorità kontraenti b'difiza ghal din l-oggezzjoni nterposta mill-appellant, fil-final, jifdal biss illi d-Direttur Generali (Kuntratti) qieghed jirrakkomanda illi l-ghotja ta' kuntratt dwar progett importanti hafna nazzjonali, li jammonta l-ghexieren tal-miljuni, jinghata lil kumpannija estera li l-parent company taghha nstabet hatja li kkommettiet *"acts which constitutes* ***insider trading***".

Ghall-kuntest, u biex dan l-Onorabbli Bord tabilhaqq jifhem is-severità ta' dak li dwaru nstabet hatja *Ganfeng Lithium Company Limited*, taht il-ligi Maltija, *insider dealing* huwa regolat fl-Att dwar il-Prevenzjoni ta' Abbuz fis-Swieq Finanzjarji (Kap. 476 tal-Ligijiet ta' Malta) u huwa meqjus (naturalment fkaz ta' htija) bhala reat kriminali.

In vista tas-suespost, mhi xejn ghajr deduzzioni logika illi l-offerta tal-offerent rakkomandat ma messha qatt giet mistharrga la mil-lat tekniku u wisq anqas mil-lat finanzjarju! L-offerta ta' *Jiangxi Ganfeng Battery Technology Company Limited* lanqas biss messha rat id-dawl tax-xemx ahseb u ara ntaghzlet ghall-ghoti ta-

kuntratt! B'mod mill-aktar oggettiv, kif jista' qatt id-Direttur Generali (Kuntratti) ihossu komdu jirrakkomanda l-ghoti ta' kuntratt li, skont il-*market research* tieghu jammonta ghall-valur astronomiku ta €47,000,000 (VAT eskluza), lil kumpannija li l-*parent company* taghha nstabet hatja, u sahansitra nizzlitha fir-rapport annwali taghha, ta' atti li taht il-ligi Maltija jammontaw ghal **reat kriminali**?!

Issa biex jigi anticipat l-argument tan-naha l-ohra, huwa totalment minnu illi l-eskluzjoni li tahseb ghaliha d-Direttiva taht l-Artikolu 57(4)(c) hija wahda diskrezzjonali u mhux mandatorja. Biss però, hija l-umili fehma tal-appellant illi ebda offerta finanzjarjament vantaggjuza li, f'kull kaz, tammonta l-ghexieren tal-miljuni, ma tista' qatt tiggustifika illi l-kuntratt jinghata lil min ftit tax-xhur ilu nstab hati ta' att/i li, taht il-ligi Maltija, jammontaw ghal reat kriminali. L-anqas ma jinnewtralizza l-gravità tal-agir li tieghu nstabet hatja, fil-kuntest ta' progett nazzjonali ta' din il-portata, il-hlas ta' xi penali amministrattiva.

Jekk dan ma jikkostitwixxix "agir hazin li ghandu rilevanza fug il-kredibbiltà professjonali tal-operatur", I-appellant qajla jifhem x'jista' tabilhaga jikkostitwixxi "kondotta professjonali hazina". Bizzejjed jinghad li taht ir-Regolamenti dwar l-Akkwist Pubbliku (Regolament 199), tali okkorrenza tista' twassal ukoll ghal ordni ta' *black listing*.

Bl-applikazzioni korretta tal-ligi u, aktar minn hekk, bl-applikazzioni tal-buon sens, l-offerta ta' *Jiangxi Ganfeng Battery Technology Company Limited* kellha, fil-minimu, tigi eskluza u mhux premjata b'rakkomandazzioni ta' ghotja. Dak li d-Direttur Generali (Kuntratti), u presumibbilment il-Kumitat Evalwattiv gablu, dehrlu li kienet ir-rakkomandazzjoni *safe* u l-anqas kontroversjali, bil-pretest ta' prezz vantaggjuz, jirrizulta li hi l-aktar rakkomandazzioni zbaljata u perikoluza ghaliex kjarament, l-offerent rakkomandat ihaddan kultura tax-xejn mhu xejn, kultura tal-*cowboys* li posthom mhumiex fit-tmun ta' progetti kbar ta' mportanza nazzjonali.

Zgur ma jistax jigi traskurat il-fatt illi l-obbligu ta' stharrig dwar offerenti prospettivi jaqa' strettament fil-parametri tal-kompetenza tal-awtoritajiet kontraenti. L-appellant ma ghandu ebda mezz biex, f'dan l-istadju jkun jaf jekk dan li ged jaghmel riferenza ghalih f'dan l-aggravju tieghu rrizultax lill-awtorità kontraenti jew le. Kull kif, id-Direttiva tipprospetta l-eskluzjoni u r-Regolamenti jipprospettaw il-*black listing*.

Ghaliex jekk, biex jinghata l-beneficiju tad-dubju, irrizulta u l-awtorità kontraenti talbet lill-offerent rakkomandat jikkjarifika l-pozizzioni tieghu izda dan tal-ahhar zamm l-informazzioni mistura, mela japplika I-Artikolu 57(4)(h) tad-Direttiva/ir-Regolament 199(e) tar-Regolamenti. Jekk mill-banda l-ohra dan kollu ma rizultax lill-awtorità kontraenti, ghad li dan ikun sintomatiku ta' process ta' evalwazzioni mill-aktar fjakk, illum l-awtorità kontraenti hi konoxxenti ta' dan l-agir u ghalhekk huwa dmirha, u ghadha fic-cans li twettqu, li tagixxu u tezercita s-setghat li taghtiha l-ligi.

Illi minghajr assolutament ebda hsara ghall-aggravju mqanqal hawn fuq kwantu l-eskluzjoni/*black listing* tal-offerent rakkomandat, l-appellant jidhirlu illi fl-eventwalità, u dan gieghed jinghad biss ghall-grazzja tal-argument, li dan l-Onorabbli Bord jikkonkludi illi l-imsemmi aggravju ma fih ebda siwi, dan l-istess Bord ghandu jghaddi sabiex jistharreg l-evalwazzioni teknika li ghamlet l-awtorità kontraenti tal-offerta ta' *Jiangxi Ganfeng Battery Technology Company Limited*, mhux sabiex juzurpa s- setghat tieghu bil-ligi, jissostitwixxi ruhu mieghu u jistharreg hu l-offerta teknika izda biss sabiex jaccerta ruhu li l-imsemmija awtorità kontraenti - naturalment tramite l-Kumitat Evalwattiv - applikat b'mod shih il-principju tas-self-limitation u stharrget l-offerta mil-lat tekniku skont it-termini u l-kundizzjonijiet formanti parti d-dokument tas-sejha relattiv.

Billi l-appellant, ghal ragunijiet ovvji, ma ghandux f'idejh id-dokumentazzjoni teknika li ssottometta l-offerent rakkomandat flimkien mal-offerta tieghu, u billi wkoll it-talba tal-istess appellant ghall-informazzjoni (datata 19 ta' Gunju 2025) mressqa lid-Direttur Generali (Kuntratti) ai termini ta' Regolament 40 tar-Regolamenti dwar I-Akkwist Pubbliku (annessa ghal riferenza facli) ghadha, sal-hin li qieghda tigi ntavolata din l-oggezzioni, mhix imwiegba, l-appellant ma jistax jikkonferma (b'mod assolut) jekk is-soluzzioni li offra l-offerent rakkomandat tissodisfax il-kriterji teknici kollha kif imfassla fid-dokument tas-sejha.

Biss però, fid-dawl tal-preparamenti kollha li huwa ghamel bi theijijja ghas-sottomissjoni tieghu, u ghaliex huwa familjari mas-suq Ciniz sa fejn ghandhom x'jaqsmu soluzzjonijiet ta' din ix-xorta, hija ipotesi tassew plawsibbli illi l-offerta ta' *Jiangxi Ganfeng Battery Technology Company Limited* ma tissodisfax il-kriterji kollha elenkati fid-dokument tas-sejha, partikolarment I-i*"standards specifications"*. Dan aktar u aktar fid-dawl tal-fatt illi:

> *"It will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority. In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS and HD."*

Dan ghalhekk ifisser illi fl-istadju tas-sottomissjoni tal-offerta, ma kienx bizzejjed illi offerent prospettiv jissottometti xi dikjarazzjoni li permezz taghha jobbliga ruhu li sal-kuntratt, u allura post-award, jipprovdi soluzzioni li hi konformi mal-i"standards specifications" kollha elenkati fid-dokument tas-sejha. Id-dokument tas-sejha specifikatament talab illi f'dan l-istadju, u allura pre-award, offerent prospettiv jiddikjara li s-soluzzioni offerta hi konformi mal-i"standards specifications" kollha elenkati fid-dokument tas-sejha u jipprovdi, minn issa, kopja tal-istess. Fin-nuqqas, hu minn ewl id-dinja li I-offerta titqies bhala teknikament mhux konformi.

This Board also noted the **Contracting Authority's Reasoned Letter of Reply** filed on the 3rd July 2025 and its verbal submission during the hearing held on the 25th August 2025, in that:

Preliminary Request - request for Objection to be heard with urgency

The Tender Procedure relates to a project of strategic national importance. The Government of Malta has prioritized the development of Battery Energy Storage Systems ("BESS"), since the BESS constitutes an important contribution for Malta to achieve its EU decarbonisation commitment and features in the Malta Low Carbon Development Strategy ' and Malta's 2030 National Energy and Climate Plan.

The Government of Malta included that part of the project relating to the Marsa A-Station in Malta's Recovery and Resilience Plan ("RRP") and the European Union (the "EU") agreed to include the full financing of the development of the BESS in the Marsa A-Station in the 'REPowerE measures for Malta, as part of the wider RRP for Malta.

Given that a substantial part of the costs of the project are being funded by the EU RRP funds, the Contracting Authority is subject to strict time constraints that impose a short and peremptory deadline that expires in 2026, which coincides with the formal end of the commitment of these funds.

Failure to meet these deadlines shall jeopardise not only the RRP funds allocated to the project in the A-Station Tunnel of the Marsa Power Station, but also other national projects funded by the EU in terms of the same RRP.

We are therefore hereby requesting that the hearing for this Objection be scheduled urgently so as not to delay then implementation phase of this crucial project and, as a consequence, prejudice the RRP funds.

Preliminary Plea

It is submitted that the second grievance (as set out in Section 7 below) ought to be rejected since the Objection does not set out, in a very clear manner, the reasons for this grievance as required in terms of Regulation 270 of the PPR. This preliminary plea is elaborated on in Section 7A below.

Facts

The tender document governing the Tender Procedure (the "Tender Document") was published on 27 November 2024.

The Tender Document, in Section 1 - Instructions to Tenderers, Clause 5 (Selection and Award Requirements), under Heading (B) entitled 'Exclusion (including Blacklisting) and Selection Criteria - information to be submitted through the European Single Procurement (ESPD) in the tender response format' - listed the exclusion grounds as follows:

"A. Grounds relating to Criminal Convictions

1. Grounds relating to the payment of taxes or social security contributions
2. Grounds relating to insolvency, conflicts of interest or professional misconduct
3. Purely national exclusion grounds"

In the notes underneath the high-level list of exclusion criteria that were to be completed by the respective bidder, the Tender Document stipulates in clear terms that:

> *"... the ESPD tender response format is pre-populated by the system. It is the Economic Operator's responsibility to ensure that the correct information is reflected in the ESPD tender response format for the above criterion"."*

Jiangxi Ganfeng Battery Technology Company Limited (the "Recommended Bidder"), in Section C of the ESPD ("Grounds relating to insolvency, conflicts of interest and professional misconduct), answered "No" to the question under the heading "Guilty of grave professional misconduct" which asked the following: "Is the economic operator guilty of grave professional misconduct? Where applicable, see definitions in national law, the relevant notice or the procurement documents."

On 13 June 2025, the Complainant was notified that the "tender was recommended for award to TID 000222015 Jiangxi Ganfeng Battery Technology Company Limited for the amount of €24,470,535.02 excluding VAT, this being the cheapest priced tender satisfying the administrative and technical criteria'."

The Complainant felt aggrieved by the decision of the Contracting Authority and filed the Objection on 23 June 2025.

Introduction

Preliminary points raised by the Complainant

In paragraphs 4 - 6 of page 1, paragraph 1 of page 2 and paragraph 2 of page 5, the Complainant makes certain vague and unsupported claims relating to some fear allegedly felt by the DoC, and that the DoC and evaluation committee chose to award the tender to the Recommended Bidder since they felt it was the safest and least controversial.

The Complainant, in terms of regulation 270 of the PPR, has a right to object to a proposed award. The Complainant however has an obligation, in the same regulation, to ensure that the objection contains: *"in a very clear manner the reasons for their complaints."*

The Complainant's claims in these first paragraphs are categorically rejected in their entirety and are nothing more than unsubstantiated vague claims which serve no purpose other than to attempt to raise doubts about the genuineness of the evaluation and decision adopted.

The award to the Recommended Bidder was based on one fact - the Recommended Bidder submitted the cheapest administratively and technically compliant offer.

Therefore, any insinuations as to other motives are rejected, in their entirety.

Grievances

The Objection filed by the Complainant does not list the grievances, however it would appear that there are two (2) grievances:

1. First grievance is that the parent company of the Recommended Bidder is guilty of grave professional misconduct;
2. Second grievance is that the Recommended Bidder's offer is technically non-compliant since it could not comply with the requirement in the Tender Document relating to standards requested.

These shall be taken in turn.

The First Grievance: the alleged professional misconduct of the Recommended Bidder's parent company

A. Introduction

The Complainant argues, in relation to this grievance, that although the sole award criterion for this tender was the price, the contract must be awarded to the tenderer submitting the offer with the cheapest price but also satisfying the administrative and technical criteria.

This statement (which is clearly set out in section 6.1 of the Tender Document), is not contested or disputed. The award can only be made if the relevant cheapest priced offer is deemed administratively, technically and financially compliant.

The Complainant then refers to article 57(4) of the Directive 2014/24/EU (the "Directive") which provides that:

> *"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: ….."*

At the outset, it is pertinent to note that this article 57(4) of the Directive is not found in the PPR.

Malta, as a Member State of the EU, had the choice of including in the PPR one or more of the optional grounds under article 57(4) of the Directive as mandatory exclusion criteria. This is not the case for the other exclusion criteria, such as those listed in articles 57(1) and (2) of the Directive, where the Directive imposes a positive obligation to exclude tenderers (and therefore Member States had an obligation to impose those obligations on contracting authorities).

Regulation 194 of the PPR imposes a positive obligation to exclude economic operators which are bankrupt or subject of insolvency or winding-up proceedings, the subject of conflicts of interest or if they were involved in the preparation of the procurement procedure (unless such an exclusion cannot be remedied by other, less intrusive measures). These are the optional exclusion criteria in article 57(4)(a), (e) and (f) of the Directive which Malta, as a Member State, exercised its discretion to make mandatory.

Malta elected not to exercise that discretion to make the other grounds mandatory, namely those found in article 57(4), (b), (c), (d), (g) and (i) of the Directive.

B. Grave professional misconduct

The Complainant's first grievance relies on article 57(4)(c) of the Directive.
This sub-article provides:

> *"(c) where the contracting authority can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders its integrity questionable."*

This article is not applicable since:

1. Malta did not include, as a mandatory exclusion criterion, this ground in the PPR; and
2. in any case, it would only have been applicable to the economic operator/group of economic operators submitting a tender.

In terms of Regulation 2 of the PPR, 'economic operator' means:

> *"any natural or legal person or public entity or group of such persons and/or entities, including any temporary association of undertakings, which offers the execution of works and/or a work, the supply of products or the provision of services on the market."*

The case-law referred to by the Complainant (Case C-465/11) defines grave professional misconduct and, in the excerpts quoted by the Complainant (page 3 of its Objection) itself, it is evident that it deals with issues applicable to the tenderer (that is, the economic operator submitting the tender). The case deals with an issue involving the companies which submitted the tender.
The terms economic operator, or group of economic operators are references to the tenderer for a particular contract. In fact, each economic operator / group of economic operators must set up an account on the e-PPS and obtain a tender ID (similar to the electronic-ID of a natural person), to participate in a tender process.

The economic operator in this case was the Recommended Bidder, having TID 000222015.

The Complainant is not claiming that the Recommended Bidder is subject to any exclusion criteria.

A fundamental principle in law is that the party making an assertion or claim, has the obligation to provide evidence to support such assertion or claim (the burden of proof). This is no different in public procurement. The Board and the Court of Appeal have reiterated this fundamental principle numerous times.

In order for the disqualification of the Recommended Bidder to be justified, the Complainant has to prove that:

1. the Recommended Bidder was found guilty of grave professional misconduct
2. the Recommended Bidder's integrity is questionable
3. the Contracting Authority had an obligation to disqualify the Recommended Bidder (which will be dealt with hereunder) if (a) and (b) are proved

The Complainant proved none of the criteria and therefore its first grievance ought to be rejected.

It is submitted that all these were in fact impossible to prove, since the (a) PPR do not impose such an obligation (neither does the Directive, which grants a contracting authority a right), (b) alleged grave professional misconduct relates to a person(s) (legal or natural) other than the Recommended Bidder, and (c) the Recommended Bidder's Integrity has not even been brought into question.

C. Discretionary / Optional Exclusion Ground

Without prejudice to the above, even if, for the sake of the argument, the Complainant proved grave professional misconduct by the Recommended Bidder, that such grave professional misconduct makes its integrity questionable, and that the PPR contained a provision similar to that found in article 57(4)(c) of the Directive (all of which have not, and cannot, be proved as explained above), this would not be sufficient to succeed in its Objection.
In fact, even if all those elements subsist, it is the prerogative of the Contracting Authority to exclude the Recommended Bidder since Malta did not elect to render such exclusive grounds mandatory, contrary to what it did for the grounds in article 57(4)(a), (e) and (f).

This alone should be sufficient for the Objection to be rejected by the Board, without the need to consider any other matters.

We therefore respectfully request this Board to reject the Objection since, even if all the elements referred to in paragraph 6.17 subsist (which they don't), the Contracting Authority has absolute discretion to decide whether or not to disqualify the tenderer.

D. Entity that allegedly committed misconduct is not the Recommended Bidder

Without prejudice to the above, we will now consider the alleged grave professional misconduct raised by the Complainant.

The Complainant claims that Ganfeng Lithium Company Limited ("GLCL"), has been directly or indirectly found guilty of grave professional misconduct.

The Complainant claims that GLCL is the parent company of the Recommended Bidder. The Complainant has not proved or provided any evidence showing that this is the case. On the contrary, publicly available information appears to suggest that GLCL is not the Recommended Bidder's (at least not direct) parent.

It is submitted that the Complainant's own admission, that the alleged grave professional misconduct relates to GLCL and not the Recommended Bidder, is sufficient for this grievance to be discarded.

The Complainant then refers to a statement in the financial statements of GLCL, relating to a decision on an administrative penalty imposed by the Jiangxi Supervision Bureau. The decision was as follows:

> *"Based on the facts, nature, circumstances, degree of social harm of the illegal acts of the parties involved, and in accordance with article 191(1) of the Securities Law, the Supervision Bureau decided to issue a warning to Mr. Li, and impose a fine of RMB600,000.*
>
> *Mr. Li confirmed to the Company that save as disclosed above, there is no other information relating to him that is required to be disclosed pursuant to Rule 13.51(2)(h) to 13.51(2)(v) of the Listing Rules, and Mr. Li is not aware of any other matters that need to be brought to the attention of the Shareholders."*

The Complainant's statement that, no matter how you look at it, the Recommended Bidder ought to have been disqualified, is entirely unfounded both in fact and at law.

In addition to the reasons outlined above, the alleged misconduct relates to separate persons, natural or legal, from the Recommended Bidder and is therefore not imputable to the Recommended Bidder.

It is also pertinent to note that, even if a crime is committed by an officer of the tenderer (which is not the case here), exclusion is only permitted in very limited express circumstances in the PPR.

We submit that the statements from the Complainant cannot be further from a proper interpretation of the law governing the nature and remit of a tender evaluation committee (the "TEC").

The TEC's role in any tender procedure is circumscribed by law, the General Rules Governing Tenders, the Tender Document, the fundamental principles underlying public procurement legislation (including the principle of self-limitation) and relevant case-law.

The TEC is not an investigative body, nor can it be expected to conduct a quasi-regulatory function within the confines of the Tender Procedure itself by performing complex find-outs about the acts and omissions of third-party entities which are not even involved in the tender submitted by the Recommended Bidder.

What the Complainant is inferring, in its Objection - namely that the TEC ought to disregard the declarations made in the ESPD by the tenderers, and base itself on its own investigations over the conduct of persons (separate and autonomous persons not involved in the tender itself) in foreign jurisdictions - is something which TEC simply cannot do due to the principle of self-limitation.

The principles of self-limitation and proportionality impose clear limitations on the activities that may be carried out by the TEC in the course of a Tender Procedure. Primarily, the Contracting Authority contends that the definition of "Evaluation Committee" in the PPR itself provides a rather clear picture of what is expected from such a body, since the Regulations stipulate that:

> *"Evaluation Committee" means boards or committees appointed by contracting authorities with the purpose of evaluating tenders received and for making recommendations thereon'."*

The Complainant has failed to provide any evidence of any grave professional misconduct, let alone grave professional misconduct, by the Recommended Bidder, which renders its integrity questionable.

Therefore, without prejudice to the above, the first grievance should be rejected.

E. Blacklisting

The Complainant, since it could not find any reference in the PPR to exclusion criteria requiring (or even granting the right to) the Contracting Authority to disqualify a tenderer found guilty of grave professional misconduct which brings into question its integrity, referred to Regulation 199.

Regulation 199 grants the Director General of Contracts (the "Director"), the right to blacklist an economic operator from participating in a procurement procedure, including as follows:

> *"The Director is empowered to black list an economic operator from participating in a procurement procedure where:*
>
> *(b) the economic operator has been convicted of an offence concerning his professional conduct by a judgment which has the force of res judicata in accordance with the laws of Malta, which renders its integrity questionable. "*

Therefore, for this to apply, several elements need to subsist:

(a) the relevant misconduct must relate to the economic operator - in this case, this is not so. The argument therefore falls on the first element, without the need to go through the rest.
(b) there must be a conviction of an offence concerning professional conduct - it is unclear, although it would not appear so from the wording in the financial statements quoted by the Complainant, whether there was a conviction (since it simply refers to a warning). This element would therefore

also appear to not be met in this case (even if, for the sake of the argument, we assumed the first element was met).

(c) there must be a judgment which is a *res judicata* in accordance with Maltese law - this element would also not appear to be met.

(d) such conviction renders the economic operator's integrity questionable - this would also not appear to be met.

None of these elements appear to subsist in this case (most definitely, the first critical element does not).

In any case, black listing is not something which can be imputed to the TEC, which is only responsible for evaluating the documentation submitted in line with the Tender Document, the law and case-law.
We therefore respectfully request this Board to reject any claims that the criteria for blacklisting are present. In addition, even if they were present (which is not the case), this Board is requested to reject the claim on the basis that the decision to award the contract to the Recommended Bidder would not be unlawful even if the Director had the right to blacklist the Recommended Bidder.

Even if all the above were met - which is clearly not the case here - the Director is empowered to take certain action.

The Director is under absolutely no obligation to blacklist an economic operator (let alone an allegedly related company of a company allegedly guilty of professional misconduct), even if those elements subsist.

The Complainant cannot dictate how the Director exercises his discretion and cannot request this Board or the Court of Appeal to order the Director to do what the Complainant requests, unless it can prove that the Director is under a legal obligation to do so.

We therefore respectfully request this Board to reject the Objection since, even if all the elements referred te in paragraph 6.41 subsist (which they do not), the Director has absolute discretion to decide whether or not to disqualify the tenderer.

In any event, and without prejudice to the above, even if the Director decided to blacklist a company, he would need to follow the procedure set out in Regulation 200 of the PPR and the relevant economic operator would have the right to object to such blacklisting and prove self-cleaning (as per Regulation 202 of the PPR).

Furthermore, as expressly provided in Regulation 203(2) of the PPR, it is only once the economic operator has been blacklisted, that the same economic operator is excluded from the award of any public contract, for the period of his blacklisting.

Neither the Recommended Bidder, nor GLCL (which is not part of the economic operator and does not even appear to be its parent), are blacklisted.

We therefore respectfully request this Board to reiect the Objection since the Recommended Bidder is not blacklisted (and, for what it's worth, neither is GLCL).

Case-law:

The Contracting Authority and the DoC are bound by the principle of self-limitation, as explained above and repeated by the Board, the Court of Appeal and the Court of Justice of the European Union ("CJEU") time and time again.

This principle was outlined in the CJEU's decision in *Nexans France V. European Joint Undertaking for ITER and Development of Fusion Energy* wherein the CJEU held:

> *"It must be borne in mind at the outset that where, in the context of a call for tenders, the contracting authority defines the conditions which it intends to impose on tenderers, it places a limit on the exercise of Its discretion and, moreover, cannot depart from the conditions which it has thus defined in regard to any of the tenderers without being in breach of the principle of equal treatment of candidates. It is therefore by reference to the principles of self-limitation and respect for equal treatment of candidates that the Court must interpret the tender specifications, for the purpose of establishing whether, as the applicant maintains, those specifications could permit the Joint Undertaking to accept the deviations."*

This principle has been confirmed in various judgements of the Maltese Court of Appeal, including (a) *Projekte Global Limited v. Kunsill Lokali Marsaskala*, (b) *Cherubino Limited v. 1. Ministeru ghall-Ambjent, -Energija u I-Intraprizo; 2. The Organic Kid; u 3. Direttur Generali tal-Kuntratti ghan-nom u in rappretentanza tad-Dipartiment tal-Kuntratti.*

The Contracting Authority confirms that the Recommend Bidder was not subject to any exclusion grounds set out under Part VI of the PPR. It therefore could not, in accordance with the principle of self-limitation, disqualify the tenderer.

The Second Grievance: the technical non-compllance of the Recommended Bidder

A. Preliminary Plea relating to this grievance.

The Complainant in its Objection, after having exhausted its claims in the first grievance, dedicates a few paragraphs to attack the technical evaluation of the TEC.

The Contracting Authority respectfully submits that this second grievance is nebulous and vague given that the Complainant did not sufficiently explain the basis of his challenge, nor did it make any arguments which would allow a person to pinpoint any alleged deficiencies in the evaluation of the Recommended Bidder's offer by the TEC.

This Board has discarded objections on this basis in previous decisions. Reference is made to Case 18481 decided on 1 March 2023 where the Board rejected the objection and stated:

> *"After the Board considered the arguments and documentation from both parties, on this preliminary point, the Board's view was that the Appellant's claim was not sustainable in terms of Regulation 270 of the Public Procurement Regulations as it had given no clear reason for its appeal and the preliminary plea made was justified. It was not the remit of the PCRB to investigate the award of tenders."*

We therefore request that this grievance is rejected, since It does not meet the requirements of Regulation 270 (which requires the grievances to be set out in a very clear manner).

Merits:

Given the vague nature of this grievance, it is reasonable to assume that this is more of a fishing expedition rather than a proper ground for filing the Objection.

In substance, the Complainant is inviting the Board to confirm whether the copies of the relevant "standard specifications" were provided by the Recommended Bidder. It is essentially asking the Board to perform a fresh technical evaluation, replacing the discretion of the TEC with its own, which is flagrantly in breach of public procurement legislation and significant jurisprudence on the matter.

The Complainant, rather vaguely, states that based on the preparatory work leading up to the submission of the Objection and its familiarity with the "Chinese market" it cannot discard the "truly plausible hypothesis" that the Recommended Bidder is not technically compliant with all the criteria listed in the Tender Document.

After having made these ambiguous and unclear suppositions, the Complainant fails to substantiate its claims further in the Objection.

The Contracting Authority, for the avoidance of doubt, submits that the evaluation carried out by its TEC was thorough, correct, and did not 'cut any corners', including when it comes to the "standards specifications" cited in the Complainant's Objection.

The Specifications / Terms of Reference set out various acceptable standards.

If a tenderer was offering something which was not compliant with such standards, it had to prove equivalency of the relevant standard it was offering.
The Complainant refers to the last paragraph of section 3.7 on page 54 of the Tender Document, which provides as follows:

> *"Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards, brands or labels they quoted are equivalent to the standards requested by the Contracting Authority, In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS and HD.*15

The Recommended Bidder complied with this requirement.

The Contracting Authority therefore submits that its evaluation was in full conformity with the Tender Document, the General Rules Governing Tenders and applicable public procurement legislation, as well as the principle of self-limitation.

The Contracting Authority therefore respectfully request the Board to reject this grievance.

This Board also noted the **Recommended Bidder's Reasoned Letter of Reply** filed on the 3rd July 2025 and its verbal submission during the hearing held on the 25th August 2025, in that:

In essence, the Appellant raises two grounds of appeal:

1. Firstly, that JBT ought to have been excluded from the procurement process on the basis of Article 57(4) of Directive 2014/24/EU (the "Directive") and/or Regulation 199 of the Public Procurement Regulations (the "PPRs");
2. Secondly, a generic allegation that the bid submitted by JBT was not technically compliant.

Neither of these grounds has any merit.

1. The Appellant's First Ground of Appeal

The Appellant's first ground of appeal is founded on reasoning which is at best stretched and at worst contorted.

The part of the reply by JBT will address the following issues sequentially:

Firstly, it will explain why Article 57(4) of the Directive cannot be relied on by the Appellant;
Secondly, it will explain why Regulation 199 of the PPRs cannot be relied on by the Appellant;

Lastly, it will articulate why - even on the merits - the claims made by the Appellant should fail.

Misapprehension of relationship between EU and Maltese Law

The Appellant's first ground of appeal is based, in the main, on the provisions of Article 57(4) of the Directive. However, the Appellant's appeal is fatally undermined by an unfortunate misapprehension of the relationship between EU and Maltese Law.

The Appellant quotes freely from, and relies entirely on, the provisions of Article 57(4) of Directive 2014/24/EU ("the Directive"), without properly examining the manner in which this Article has been transposed into Maltese law. This is a mistake, in so far as Article 57(4) clearly does not have, nor was it intended to have, direct effect, and therefore the Appellant cannot place direct reliance on that provision of EU law.

The Board will be aware that, under EU law, when a provision of EU law has direct effect, this means that that provision can be directly invoked by individuals in national courts to claim rights, against their own governments or other private parties. This means that individuals do not always need national laws to implement or enforce EU law; EU law itself can be directly applicable and binding.

However, in order for a provision of EU law to have direct effect, it is now a settled principle of EU law that that provision must be clear, precise, and unconditional, and must be intended to confer rights upon individuals. This allows individuals to invoke that provision in their national courts or tribunals, either against their own state (vertical direct effect) or against another individual (horizontal direct effect). In other words, three cumulative criteria must be satisfied in order for a provision of EU law to be directly effective:

(a) **Clarity and Precision**: The meaning and scope of the provision must be unambiguous and easily understood;

(b) **Unconditionality**: The application of the provision must not be subject to any further implementing measures by the EU or national authorities.

(c) **Intention to Confer Rights**: The provision must be intended to create rights that individuals can rely upon.

Does Article 57(4) of the Directive meet these three tests? The answer to that question is very clear: no.

A reading of Article 57(4) of the Directive, on which the Appellant relies in his arguments, will immediately reveal that this provision does not, and was not intended, to have direct effect:

> *"Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations:*

It is clear this provision provides Member States with an option that they may or may not select, when transposing the Directive into national law; it allows them to exclude, or to require their Contracting Authorities to exclude, economic operators from procurement procedures on the grounds that are quoted in the remaining of Article 57(4). It does not require them to provide for an exclusion on the basis of the listed grounds. It is clear, therefore, that the requirement of unconditionality, for this provision to have direct effect, is unmet.

To be clear, the above is not merely JBT's view; the above has been confirmed unambiguously in a judgement of the European Court of 20 December 2017, in the names *Impresa di Costruzioni Ing. E. Mantovani and Guerrato* where the court stated as follows:

> *"31. In accordance with settled case-law, Article 45(2) of Directive 2004/18 does not provide for uniform application at EU level of the grounds of exclusion it mentions, since the Member States may choose not to apply those grounds of exclusion, or to incorporate them into national law with varying degrees of rigour according to legal, economic or social considerations prevailing at national level. In that*

context, Member States have the power to make the criteria laid down in Article 45(2) less onerous or more flexible (judgment of 14 December 2016, Connexxion Taxi Services, C-171/15, EU:C:2016:948, paragraph 29 and the case-law cited)." (emphasis added)

In sum, and in conclusion on this point, in so far as the Appellant's appeal is based on the provisions of Article 57(4) of the Directive, it ought to be rejected as this provision is absent of direct effect and does not bestow on the Appellant the right that the Appellant now seeks to enforce.

Regulation 199 of the Public Procurement Regulations ("PPRs")

In its appeal, the Appellant makes reference to Regulation 199 of the PPRs, and implies that this Regulation is applicable in the present context.

For the benefit of the Board, it should be highlighted that Regulation 199 of the PPRs is, in effect, the Regulation by means of which Malta, as a Member State of the EU, sought to transpose the provisions of Article 57(4) of the Directive, on which much has been already stated above.

By way of bolstering further what has been argued above, the Board is invited to consider the many differences between the wording of Article 57(4) of the Directive and Regulation 199 of the PPRs - further evidence (if any were needed) that Article 57(4) grants Member States a wide margin of discretion in its transposition and that, therefore, this provision does not have direct effect. Most importantly, the provision that Appellant relies on to sustain its arguments, i.e. Article 57(4) (c) of the Directive, has not even been transposed into Maltese law by the legislator and does not form part of the PPRs.
There is, however, a further important observation to be made in relation to Regulation 199 of the PPRs, i.e. that in the exercise of its discretion in transposing Article 57(4), Malta has elected to carefully construct a mechanism which provides for the safeguarding of the rights of economic operators prior to a declaration of black listing becoming final. Mindful of the potentially ruinous consequences that a declaration of blacklisting may have on an economic operator, the Maltese legislator sought to ensure that certain procedural safeguards were embedded in the law to ensure a high degree of procedural fairness prior to any declaration of blacklisting coming into effect.

Indeed, Regulation 199 and the Regulations that follow it, in brief provide as follows:

(a) It is the Director of Contracts - and only the Director of Contracts - who can make a declaration blacklisting an economic operator

(b) The blacklisted economic operator must be informed of the Director's decision by means of a registered letter or a judicial letter "detailing the appropriate grounds."

(c) A black listed economic operator has a right to object to its blacklisted by filing an objection before the Commercial Sanctions Tribunal. If there is an objection, the decision to blacklist only becomes final from the date when the objection has been finally decided by the Commercial Sanctions Tribunal or (in the event of an appeal from this decision) the Court of Appeal, as the case may be.

(d) Economic Operators may raise 'self-cleaning' as a defence against a black-listing decision.

The Appellant's appeal seems to be intended to obtain from this Board some form of declaration of blacklisting with no regard to what is provided for in the PPRs, and in particular the carefully thought out and crafted safeguards contained therein. It should be evident that in so far as the Appellant's appeal is making this request it must be refused by this Board, not least since blacklisting does not fall within the jurisdiction of this Board, but within that of the Commercial Sanctions Tribunal, a separate tribunal also established by the PPRs.

Accordingly, in so far as the Appellant's appeal is based on Regulation 199 of the PPRs, it must be refused.

A rebuttal on the merits

The Appellant contends that since a fine was imposed on a Company named Ganfeng Lithium Group Co., Ltd. ("Ganfeng") and/or on its Chairman Mr Li, then this ought to result in the disqualification of JBT from the current procurement process.

There are a number of reasons why this is not so.

A. Separate Legal Entity; Separate Management

JBT is a separate entity from Ganfeng; they are separate and distinct legal persons. JBT has a separate and distinct Board of Directors (on which Mr Li does not sit); it has separate and distinct management. The shareholders of JBT and Ganfeng are not identical, in so far as Ganfeng holds 66% per cent of the shares in issue of JBT.

The administrative fine imposed on Ganfeng has no connection with JBT or its operations.

If there was any wrong-doing by Ganfeng and/or its chairman Mr Li, it would be unjust and indeed legally incorrect for JBT to be excluded on that basis.

B. Administrative, not Criminal, Sanction

The sanction imposed on Ganfeng and/or its chairman Mr Li was administrative in nature, not criminal. Ganfeng and/or its chairman Mr Li have not been convicted of a criminal offence. In so far, therefore, as the Appellant contends that a criminal offence has been committed and consequences ought to flow as a result thereof, the Appellant's appeal must be rejected.

Additionally, the Appellant contends that the sanction imposed upon Ganfeng and/or Mr Li is tantamount to a criminal sanction. The Appellant seeks to bolster this argument by stating that insider trading is, in terms of Chapter 476 of the Laws of Malta (Prevention of Financial Markets Abuse Act), a criminal offence.

The Appellant, however, omits to mention that Article 22(1A) of Chapter 476 provides that any infringement of the same Chapter 476 can be punished by means of an administrative sanction imposed by the Malta Financial Services Authority, rather than by means of a criminal sanction.

Administrative sanctions are an established feature of Malta's - and indeed the international - legal landscape. Administrative sanctions can be imposed to sanction vast varieties of conduct which, though perhaps regrettable, are not quite deserving of a criminal punishment. Indeed, in Malta, administrative sanctions can be imposed (to name but a few) for delays in filing tax returns, breaches in planning permissions, health and safety breaches, and breaches of many, many other legislative instruments. On one interpretation, parking tickets are administrative sanctions - should every economic operator that has incurred a parking fine be excluded from tendering from public tendering processes?

It would be no exaggeration to state that, were the Board to establish a principle to the effect that persons or companies having suffered an administrative sanction are not allowed to participate in public procurement processes, this would have the effect of eliminating the participation of a vast number of persons and companies with serious adverse effects on the ability of public entities to run competitive procurement processes. This would be contrary to the most fundamental aim underlying the PPRs which is, as outlined the first Recital of the Directive:

> *"The award of public contracts by or on behalf of Member States' authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency. However, for public contracts above a certain value, provisions should be drawn up coordinating national procurement procedures so as to ensure that those principles are given practical effect and public procurement is opened up to competition."*

C. The wording of Regulation 199 and Article 57(4)

As mentioned above, neither Article 57(4) of the Directive nor Regulation 199 of the PPRs can be relied on by the Appellant, for the reasons set forth above. However, there is an additional reason why these provisions cannot be invoked by the Appellant to sustain his demands to this Board.

A close reading of these provisions will reveal that they are intended to allow the exclusion of an economic operator as a result of an action committed by that economic operator, be that action a conviction for a criminal offence, misrepresentation by the economic operator, or so forth. In the current context, the action which was punished by means of the administrative fine was carried out by a company which is distinct and separate from the economic operator which submitted the bid in this current tender process, i.e. JBT.

In paragraph 17 above it has already been shown that Article 57(4) (c) does not form part of our law since the Maltese legislator has elected not to transpose that provision into the PPRs. However, for the sake of completeness it is stated that even if the legislator had elected to include that provision in the PPRs, it would still not provide the Appellant with a sound foundation for its appeal: firstly, as the conduct complained of is not conduct carried out by JBT, but by a separate and distinct legal person; secondly, as the conduct at issue is not " grave professional misconduct" in so far as it has no relation or bearing on the fulfilment of JBT's contractual, professional duties.

Accordingly, even if - for the sake of the argument - Article 57(4) and/or Regulation 199 could be invoked in this context by the Appellant they would still not serve as a legitimate basis upon which to take action against JBT, in so far as any of the behaviour complained of was not committed by JBT but by a separate company.

On the basis of all of the arguments made above, JBT therefore submits that the Appellant's first ground of appeal is unfounded and therefore should not be accepted by the Board.

2. The Appellant's Second Ground of Appeal

The Appellant makes a second ground of Appeal which consists, in effect, of a generic invitation to this Board to re-evaluate the bid submitted by JBT to determine whether it is technically compliant.

This ground of appeal ought to be rejected by the Board for at least two reasons:

(a) Firstly, it an established legal principle that it is not the role of this Board to carry out a re-assessment of the bids submitted by tenderers. The evaluation of bids is carried out by the

Evaluation Committee. The role of this Board is not to substitute its discretion for that of the Evaluation Committee. The role of this Board is to determine whether the Evaluation Committee utilised the discretion afforded to it reasonably and without manifest error, not to re-assess bids;

(b) Secondly, the PPRs provide that when lodging an appeal, appellants must accordance with Regulation 270 of the PPRs present an appeal "which shall contain in a very clear manner the reasons for their complaints." (emphasis added) This rule is fundamental in so far as it is necessary to ensure that the respondents on an appeal - both the contracting authority and the interested party - are afforded sufficient opportunity to cogently reply to the appeal. In other words, the strict adherence to this rule is necessary to ensure that proceedings before the Board are fair, and that fundamental rights to a fair hearing are upheld.

JBT will object in the most strenuous terms to any attempts by the Appellant to embark on a fishing expedition in the vain hope of finding a shred of proof to sustain its case.

On this basis, the Appellant's second ground of appeal should be rejected by the Board.

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 as follows in their entirety.

Background and Urgency of Proceedings

The present objection arises within the framework of a tender procedure of undeniable strategic significance for Malta. The Government of Malta has, as a matter of policy and priority, committed itself to the development of Battery Energy Storage Systems ("BESS"), recognising that such systems constitute a critical instrument in achieving the decarbonisation obligations assumed under European Union law. The BESS development is embedded within the Malta Low Carbon Development Strategy and the National Energy and Climate Plan 2030, and is therefore central not only to the national energy transition but also to Malta's standing in its fulfilment of European commitments.

Particular importance attaches to the component of the project situated at the Marsa A-Station, which has been incorporated within Malta's Recovery and Resilience Plan ("RRP"). The European Union, by decision, has endorsed the full financing of this development under the REPowerEU measures, as an integral part of Malta's broader RRP framework. The inclusion of the Marsa BESS project within this mechanism

signifies both the Union's trust in Malta's capacity to deliver and the high expectations placed on the successful and timely completion of the works.

It follows that the Contracting Authority, as beneficiary of Union support, is bound by strict temporal and administrative constraints. The allocation of the RRP funds is circumscribed by a peremptory deadline expiring in 2026, coinciding with the formal conclusion of the Union's financial commitments under the RRP. Any slippage or undue delay would not only jeopardise the disbursement of the RRP funds earmarked for the Marsa A-Station BESS, but could also undermine the financing of other national projects reliant on the same programme. The consequences of delay would therefore extend beyond the project at hand, imperilling Malta's credibility in the prudent absorption of Union funds.

Against this background, the Contracting Authority has urged that the present proceedings be determined expeditiously, so as not to interrupt the implementation phase of the project or endanger the financing arrangements. The Board has taken cognisance of this request, fully appreciating the national and European stakes involved, and has accordingly resolved to hear this objection as a matter of urgency. The hearing was therefore scheduled for the 25th of August, 2025, at 10:00 hours.

Preliminary Issue: Disclosure of Information

At the outset, it is to be observed that the Appellant had initially sought the Board's intervention to secure disclosure of certain information which, despite a prior application, had not been made available by the Contracting Authority. Specifically, the Appellant requested (i) the identification of all nominated sub-contractors; (ii) the names of the manufacturers of the battery pack, battery container, PCS, and transformer; and (iii) the precise models of the items offered. The Board upheld this request, whereupon the Contracting Authority and the Department of Contracts furnished the information during the pendency of these proceedings.

The Contracting Authority, the Department of Contracts and the Recommended Bidder has accordingly urged that the Appellant's claims are ill-defined, unsubstantiated, and devoid of the motivation required under Regulation 270 of the Public Procurement Regulations.

Insider Trading

The substantive appeal now before the Board is, in its first grievance, being founded upon the allegation that the Recommended Bidder ought to have been excluded from the tender process on account of the fact that its [Recommended Bidder's] parent company was subjected to an administrative penalty in the sum of RMB 600,000 by the Jiangxi Supervision Bureau of the China Securities Regulatory Commission (CSRC). The sanction was imposed for conduct characterised as **insider trading** within the meaning of

Article 191(1) of the Securities Law, thereby infringing Article 53(1) thereof. Accordingly, the Appellant contends that insider trading, according to Maltese law, constitutes, also a criminal offence.

The Appellant contends that such a breach, attributable to the parent company, taints the standing and suitability of the Recommended Bidder itself. Conversely, both the Recommended Bidder, the Department of Contracts and the Contracting Authority submit that the infraction in question is not imputable to the bidding entity, Jiangxi Ganfeng Battery Technology Company Limited, notwithstanding that the latter is majority-owned by the sanctioned parent company, which holds a 60.67% shareholding. They further rely upon the provisions of the tender document, particularly Section 1, Clause 5, which enumerates the exclusion grounds, namely: (i) criminal convictions; (ii) non-compliance with tax or social security obligations; (iii) insolvency, conflicts of interest or grave professional misconduct; and (iv) such exclusion grounds as may be prescribed under national law. It is undisputed that the Recommended Bidder responded in the negative to the query under the heading **"Guilty of grave professional misconduct".**

As stated above, the Appellant's principal grievance rests on the assertion that the Recommended Bidder ought to have been disqualified by reason of professional misconduct, arising indirectly from the sanction imposed upon its parent company for insider trading.

The Appellant submits that, under Maltese law, insider trading constitutes a criminal offence, and it is therefore unfathomable that the Recommended Bidder's tender was permitted to proceed to technical and financial evaluation when market research revealed such infraction. The Appellant further contends that the Director of Contracts and the Tender Evaluation Committee ("TEC") erred in relying exclusively on the bidder's self-declaration in circumstances involving foreign entities of significant international standing, where greater scrutiny was warranted.

In particular, the Appellant avers that:

(i) A self-declaration alone cannot suffice to demonstrate integrity and compliance in the context of a project of such magnitude. The Contracting Authority, like the Appellant, could have accessed public information through the annual reports of the parent company, which would have revealed the infraction.

(ii) The relationship between the parent company and the bidding subsidiary is one of substantial dominance, evidenced by shareholding figures allegedly ranging between 60.67% and 68.21%, with certain documentation even suggesting full ownership. Such control, the Appellant argues, renders the misconduct of the parent inseparable from the conduct of the subsidiary.

(iii) The TEC ought not to have relied solely upon the principle of self-limitation, but should have sought clarification, at the very least, so as to ensure ethical compliance of the Recommended Bidder.

The Appellant disputes the proposition that Article 57(4)(c) of Directive 2014/24/EU is absent from the Maltese Public Procurement Regulations ("PPRs"). Whilst recognising that the exclusion ground is not mandatory, the Appellant maintains that the Contracting Authority retains a discretion to act where circumstances justify exclusion. The Appellant further refers to Article 199 of the PPRs, which empowers the Director of Contracts to blacklist an operator for professional misconduct. In this regard, the Appellant emphasises that it does not request the Board to substitute the powers of the Director, but rather to draw attention to a matter of significant concern that ought not to be ignored.

The Appellant also challenges the reliance placed by the Recommended Bidder on the argument that the penalty in question was settled "administratively". That characterisation, it is argued, does not detract from the fact that the misconduct amounts, under Maltese law, to a criminal offence. The Appellant contends that the parent company's conduct, being one of insider trading, constitutes grave professional misconduct sufficient to taint the Recommended Bidder, having regard to the substantial control exercised by the parent.

Technical Compliance

In addition to the issues of integrity, the Appellant raises further grounds concerning the technical compliance of the Recommended Bidder's offer. It is argued that the Tender Document, specifically Section 3.7, required submission of documentation **"in all cases"**, save for expressly exempted items. Section 3.7 stipulates the following:

> *"All equipment shall be designed, manufactured, erected, tested according to recognized codes, standards and regulations and in conformity with the Do No Significant Harm (DNSH) Criteria listed in Article 73 of the Special Conditions.*
>
> *The Contractor has the obligation to look after and to verify that the applicable European laws and regulations, and laws and regulations of Malta with respect to the health and safety of persons and with respect to the technical requirements by regulations are followed.*
> *All safety, design, fabrication and installation of the system and facilities shall comply with the codes and standards as set forth in this Clause or their equivalent international standards, and with good and current engineering practice applicable for this task.*
>
> *All necessary precautions, including warning signs, must be undertaken and adopted to ensure the safety of personnel directly engaged on this Contract, or of those persons who, in the normal course of their occupation, are required to utilise temporary works erected by the Contractor, or who frequent the working area in the normal course of their duties. Such precautions and temporary works are subject to*

approval by the local Occupational Health and Safety Authority (OHSA). The OHSA shall reserve the right to inspect the works and issue rectification instructions to the Contractor as necessary.

Other internationally acceptable standards that ensure equivalent, or higher, quality may be considered. It will be the responsibility of the respective Economic Operators to prove that the standards brands or labels they quoted are equivalent to the standards requested by the Contracting Authority. In all cases [emphasis of the Appellant] the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS and HD".

The Appellant refers to Clarification Note 6 of the 27th December 2024, which reiterated this obligation under Article 3.26. Notwithstanding this, the Recommended Bidder failed to provide the requisite documentation.

The Appellant asserts that such failure ought to have rendered the bid technically non-compliant. It follows, in the Appellant's submission, that the Recommended Bidder should have been disqualified both on grounds of integrity and on grounds of technical compliance. To admit the bid despite these deficiencies, the Appellant concludes, constitutes a breach of the PPRs.

The Contracting Authority and the Preferred Bidder's Rebuttal

The Contracting Authority, in reply, submits that the first grievance of the Appellant is fatally flawed. It argues that the burden of proof rested squarely upon the Appellant, who failed to adduce sufficient evidence to substantiate the allegations.

The Authority maintains that the European Single Procurement Document ("ESPD") submitted by the Recommended Bidder was properly completed, that the answers provided were correct, and that the Tender Evaluation Committee ("TEC") duly assessed conformity with the applicable law. Reliance is placed on the testimony of witnesses, as well as upon the ESPD itself.

The Authority contends that the Appellant's argument is founded upon a non-transposed provision of the Directive, namely Article 57(4)(c), which does not find expression within the Maltese Public Procurement Regulations. In the absence of such a mandatory criterion in domestic law, the Authority submits that it was bound to rely upon the wording of the Regulations as enacted.

It is further argued that the issue of blacklisting has not arisen in the present case, and in any event, the procedure for blacklisting is neither binary nor automatic, but rather subject to remedies, redress, and self-

cleaning measures envisaged within the ESPD. Accordingly, it is said, the matter lies within the exclusive competence of the Director of Contracts, not the Board.

The Contracting Authority further stresses that the Recommended Bidder and its parent company are distinct legal entities, and that to require the TEC to investigate a third party not directly participating in the tender would be both unwarranted and unfair. The first grievance, it argues, is thus directed against the wrong entity and must necessarily fail.

Finally, the Authority submits that the Appellant's challenge amounts to no more than a fishing expedition, lacking clarity, precision, and substantiation. It asserts that there is no evidence that the technical evaluation was deficient, and that the interpretation of Clause 3.7 of the tender was both correct and unanimous.

Furthermore, the Contracting Authority argued that the Appellant's case rests upon a mischaracterisation of the tender dossier and upon threats directed at the Board. He submits that it is not for the Appellant to dictate the methodology of government procurement, but rather for the government to determine, including whether reliance is placed upon self-declarations or upon documentary evidence at bidding stage.

It is contended that the tender dossier was clear as to how the government intended to evaluate the bids, and that the TEC correctly relied upon self-declarations where prescribed. Reference is made to the Technical Offer Form, and to the evidence of Ing. Vassallo and Ing. Darmanin, who both confirmed the drafting and structure of the tender.

The Recommended Bidder submits that there is "nothing wrong" with self-declarations, citing the judgment of the Court of Appeal (Appeal No. 625/2023/1, decided on 14 March 2024), *Medbiologix Company Limited (C-76516) vs. Ultramap Ltd (08349784), Enemalta plc (C-65836) u Direttur Ġenerali tal-Kuntratti* which emphasised that once a bidder has submitted a self-declaration, "verifiki ulterjuri" of its obligations will follow at the appropriate stage, and that contracting authorities are not under a duty to conduct independent research into matters not declared.

With respect to the Appellant's reliance on Article 57(4)(c) of the Directive, the Recommended Bidder raises six points in rebuttal:

a)

(a) The Appellant never proved its case by producing the best evidence, such as a final judicial decision;

(b) Article 57(4)(c) refers to the "economic operator" submitting the tender, not to the wider corporate group;

(c) The parent and subsidiary are separate entities, with distinct boards, and there is no concept of a single economic unit in public procurement unless the parent is nominated as a subcontractor;

(d) Even if the provision were applicable, its application is discretionary, not mandatory;
(e) Were the TEC minded to exclude, it could not have done so outright but was required first to afford the operator the opportunity to explain itself, in line with Recital 101 of the Directive;
(f) For all these reasons, the Recommended Bidder contends that the ground of appeal is misconceived and unsustainable, in that, if article 57 applies directory one needs an opportunity to self-clean, which gives the bidder the chance to explain.

Considerations of the Board

The Board has given careful consideration to the submissions advanced by both parties, together with the evidence adduced in the course of these proceedings. The Board shall address, in turn, the two principal issues raised in the appeal:
(i) the integrity of the Recommended Bidder in light of the sanction imposed upon its parent company; and
(ii) the technical compliance of the Recommended Bidder's offer.

On Integrity and Professional Misconduct

The Appellant argues that insider trading, as established against the parent company of the Recommended Bidder, constitutes a criminal offence under Maltese law and amounts to grave professional misconduct. The Appellant submits that the control exercised by the parent company over the subsidiary renders the latter inseparable from the taint of misconduct, and that reliance upon a mere self-declaration was insufficient.

The Contracting Authority and the Recommended Bidder counter that the entities are juridically distinct, that the exclusion grounds under the Maltese Public Procurement Regulations ("PPRs") do not expressly provide for exclusion on account of the misconduct of a parent company, and that Article 57(4)(c) of Directive 2014/24/EU has not been transposed into national law. It is further argued that blacklisting is a discretionary measure vested solely in the Director of Contracts, and that self-declarations are an accepted mechanism in public procurement, endorsed by case law.

The Board accepts that the principle of separate legal personality must be respected. It is not the function of this Board to collapse corporate structures without due cause. As a matter of fact, the Board recognises the force of both positions.

It is a fundamental tenet of company law that each entity enjoys separate legal personality. However, EU procurement law and the PPRs permit exclusion not only for criminal convictions but also for ***"grave***

professional misconduct" casting doubt upon the probity of the bidder. EU jurisprudence confirms that such assessment may extend to misconduct of related undertakings where the link is such as to compromise the reliability of the bidder itself.

It is settled EU case law (e.g. *C-531/16 Ecoservice*, *C-124/17 Vossloh Laeis*), albeit the content of which speaks of 'collusion', that such exclusion grounds may extend beyond the strict legal person signing the tender where the facts demonstrate that the misconduct of related undertakings casts doubt on the probity of the bidder itself.

The European Commission - *Notice on tools to fight collusion in public procurement and on guidance on how to apply the related exclusion ground (2021/C 91/01)* - dealt with the notion of 'sufficiently plausible indications', i.e. facts that may be considered as indications, what constitutes 'indications' as opposed to 'evidence' and how to handle leniency applicants.

It therein provides that:

> *"The right of a contracting authority to assess the risk of collusion in the participation in a pending award procedure of a tenderer that in the past applied for leniency or settled a previous case of collusion is properly balanced* ***with the obligation to assess****, [emphasis of the Board] in a proportionate manner, the proof that the operator may put forward under Article 57(6), as regards the measures it took to restore its reliability. If the contracting authority decides to exclude the tenderer, despite the 'self-cleaning' measures brought to its attention, the contracting authority must justify of why those measures were considered insufficient for maintaining the tenderer in the award procedure".*

In the *Forposta SA and ABC Direct Contact sp. z o.o. v Poczta Polska SA,* the Polish postal service incumbent Poczta Polska had excluded Forposta from a public procurement procedure because it had previously terminated an agreement with Forposta for breach of contract and because the Polish public procurement rules provide for mandatory exclusion when the contracting authority has terminated a contract with the undertaking concerned in the last three years on grounds of breach of contract in relation to at least 5% of the contract value concerned.

Further to a preliminary reference from the Polish Court, the ECJ holds that the concepts of "grave", "professional" and "misconduct" can be can be specified and explained in national law, provided that it has regard for EU law. *According to the ECJ, said concepts encompass any wrongful conduct which has an impact on the professional credibility of the operator at issue and not only the violations of professional ethical standards established by a disciplinary body or by a judgment which has the force of res judicata*.

It can be inferred from this judgment that contracting authorities have a relatively large margin of appreciation when assessing which type of behaviour amounts to grave professional misconduct, including relatively grave breaches of contract, but that they must do so on a case by case basis, in light of the proportionality principle.

In this case, the parent company holds more than 60% of the Recommended Bidder's shares, and its sanction was a matter of public record. While the Board does not consider that the Recommended Bidder was automatically disqualified, the TEC was, **at a minimum**, duty bound to seek clarification embracing its obligation ***to assess***. The self-cleaning mechanism exists precisely to allow bidders to explain remedial measures and demonstrate restored integrity. The TEC's failure to do so reflects insufficient vigilance.

The Board cannot disregard the reality of substantial control. The evidence before the Board demonstrates that the parent company holds in excess of 60% of the shares of the Recommended Bidder, with figures ranging between 60.67% and 68.21%, and references even suggesting full ownership. Such shareholding is not nominal but it rather denotes effective and dominant control over the subsidiary's decision-making.

The Board further accepts the Appellant's submission that insider trading, being an offence under Maltese law, constitutes conduct of a criminal and professional nature. In the opinion of the Board, that the sanction was imposed administratively in China does not detract from its character as conduct falling within the category of ***"grave professional misconduct"*** under European and Maltese standards.

While the Contracting Authority and the parties to the appeal has argued that Article 57(4)(c) of the Directive was not transposed into the PPRs, the Board notes that Article 199 of the PPRs expressly empowers the Director of Contracts to exclude or blacklist operators for grave professional misconduct. The fact that such discretion lies with the Director does not absolve the TEC from its duty to exercise vigilance and oversight where material circumstances arise. In the present case, the existence of a sanction against the parent company was a matter readily verifiable through public sources. The Appellant clearly demonstrated that such information was accessible via annual reports and market disclosures. The Board considers that the TEC was duty bound, at a minimum, ***to seek clarification***.

For the avoidance of doubt, the Board wishes to emphasise a particular point. It is not suggested that the TEC ought to have assumed responsibilities which, by their very nature, fall within the exclusive remit of the Director of Contracts, thereby usurping the latter's prerogatives. Rather, the Board underlines that the TEC was nevertheless obliged to discharge its proper duties as a Tender Evaluation Committee, and that such duties necessarily include the exercise of due diligence where relevant and material circumstances arise.

In EU public procurement law, the concept of vigilance, i.e. that pro-active watchfulness by contracting authorities over material circumstances, has, indeed, been crystallised in jurisprudence.

Interplay Between the Doctrine of Self-Limitation and the Duty of Vigilance

The doctrine of self-limitation is indeed well-established. Evaluation committees must restrict themselves to the four corners of the tender dossier and to the documents submitted by the bidders, refraining from extraneous investigation or discretionary reinterpretation of the criteria. This principle safeguards objectivity, legal certainty, and equal treatment.

Yet, self-limitation does not exist in a vacuum. It must be read in harmony with the parallel and equally weighty obligation of vigilance. The evaluators are not automatons, mechanically ticking boxes, but public authorities entrusted with the stewardship of public funds. The duty of vigilance obliges them to exercise reasonable care and attention when confronted with material circumstances that cast doubt upon the probity, eligibility, or compliance of a bidder.

The two concepts therefore intertwine rather than collide in that on the one hand self-limitation ensures that evaluators do not exceed their remit by importing new criteria or applying standards alien to the tender. On the other hand, vigilance ensures that evaluators do not abdicate their remit by ignoring circumstances that clearly fall within the criteria already laid down.

- **Instances of Abnormally Low Tenders**

By way of example, the Board recalls this duty of vigilance and oversight in matters relating to *abnormally low tenders*. The CJEU, for instance, held that contracting authorities are under a clear obligation to: (i) identify any tenders that may be abnormally low; (ii) request explanations from the relevant tenderers; (iii) evaluate the responses and decide whether to accept or reject the tender based on the merits of the explanation. Failing to undertake this process, even if the authority concludes no tenders appear suspect, can open the decision to judicial review. In succinct, vigilance is therefore not optional but rather mandatory.

- **Instances of Conflicts of Interests of Bias**

Another illustration thereto is that relating to instances of conflicts of interests or bias. In such cases the Court even went further, as in, Authorities must actively determine whether *conflicts of interest* or *bias* exist. They cannot demand that complainants prove any bias but once objective evidence is presented; the authority must investigate. They may need to request information or explanations from parties when such concerns arise.

In return, the doctrine of self-limitation isn't named explicitly in every judgment, but it's the lifeblood behind them. Authorities, by virtue of EU law, must self-impose constraints, they must inquire, investigate,

request clarification, act impartially, and document decisions, yet you can't claim ignorance when the evidence is staring you in the face.

In the grand scheme, these principles are all one breath, i.e. the TEC, or any Contracting Authority, cannot delegate away its duty to stay alert. Public procurement isn't a passive exercise. In the opinion of this Board, the committee must monitor, question, and act when circumstances warrant, even if ultimate action (like exclusion) lies with another body, such as the Director of Contracts.

In the present case, the insider trading sanction was not an extraneous matter; it was, in the opinion of this Board, directly relevant to the exclusion ground of *"grave professional misconduct"*, which was expressly provided in the ESPD. Nor was vigilance tantamount to "independent research". The information was publicly disclosed in annual reports and filings of the parent company, documents ordinarily reviewed in due diligence and accessible through routine verification. In other words, the insider trading sanction against the parent company was not a peripheral or collateral matter. It was directly pertinent to the ground of grave professional misconduct, expressly captured in the exclusion regime of the ESPD.

It is once and again the opinion of this Board that to invoke self-limitation so as to preclude even the most elementary enquiry is to misapply the doctrine. Self-limitation protects against overreach, but it cannot justify under-reach. Where serious, readily verifiable doubts arise within the scope of the exclusion grounds, vigilance demands at the very least a request for clarification from the bidder.

Thus, the TEC was not being asked to go beyond the dossier or invent new criteria. It was rather being asked to apply existing criteria with the diligence required by law. The failure to do so is not an excess of discretion but an abdication of responsibility.

Both EU and Maltese case law recognise that self-limitation does not equate to blindness. Authorities must ensure the truthfulness of self-declarations, otherwise the mechanism of exclusion grounds under Article 57 (and Article 199 PPR) becomes hollow.

The reliance on a bare self-declaration, in circumstances where significant red flags existed, does not satisfy the standard of due diligence expected of a Contracting Authority in a procurement of this magnitude. Accordingly, the Board finds that the Contracting Authority erred in failing to verify the declarations and in failing to require further clarification.

On Technical Compliance

The Appellant also challenges the technical compliance of the Recommended Bidder's offer, pointing to Section 3.7 of the tender, which required submission of documentation "in all cases", save for specific exceptions. Clarification Note 6 of the 27th December, 2024 reiterated this requirement.

The evidence shows that the Recommended Bidder did not submit the requisite documentation at bidding stage. The Appellant contends that, by the plain wording of the tender, the absence of such documentation should have resulted in disqualification at the technical evaluation stage, irrespective of the financial advantages of the bid.

To this effect, the Board has carefully examined the tender dossier, in particular Section 3.7, and the evidence given by the members of the Technical Evaluation Committee. The final paragraph of Section 3.7 provides in unequivocal terms:

> *"In all cases the Economic Operator shall state at offer stage the standards to which the BESS Plants shall conform and shall supply copies of these relevant standards specifications in the English language, except in the case of ISO, IEC, EN, BS and HD."*

The use of the word *"shall"* denotes a mandatory obligation rather than a discretionary or optional requirement. This Board cannot accept the proposition that such an express obligation can be diluted into a mere self-declaration. The clause imposes, indeed, a dual requirement, i.e. first, a statement of the standards, and second, the submission of the relevant specifications (save where the standard is ISO, IEC, EN, BS or HD).

The evidence tendered before this Board shows that the Recommended Bidder did not provide the relevant documentation at bidding stage. This is confirmed even by the members of the TEC themselves whilst testifying under oath, who, while unanimous in their interpretation, nonetheless, admitted that they read the last paragraph in conjunction with the rest of Section 3.7 and chose to accept a self-declaration.

With respect, such an approach amounts to a re-drafting of the tender requirement. The TEC cannot disregard clear and unequivocal wording in favour of an interpretation more convenient to the Recommended Bidder. Self-limitation requires that the Contracting Authority applies the tender rules as written, not as it would wish them to be. The fact that the tender expressly required supporting specifications, and only created an exception for certain international standards, removes any possible ambiguity.

The Board considers that the failure of the Recommended Bidder to submit the required documentation at bidding stage was not a mere technicality but a material deficiency. To allow such a bid to proceed would undermine the level playing field among operators and would constitute a departure from the mandatory requirements of the tender.

The Board further observes that the obligation under Section 3.7 was neither obscure nor buried within the tender dossier; rather, it stood as a clear and deliberate safeguard to ensure comparability, transparency, and technical certainty at the very outset of the evaluation process. To interpret such provision as permitting

compliance at a later stage or through a mere self-declaration would strip the requirement of all substantive effect and reduce it to a hollow formality.

The principle of equal treatment dictates that all economic operators must submit their offers on a common footing. Where an idea is shed that one bidder is excused from providing mandatory supporting specifications at the bidding stage, whilst others were obliged to incur the effort and expense of compliance, the playing field is distorted to the detriment of fair competition. This Board cannot lend its imprimatur to an interpretation which undermines that foundational principle.

Nor is it of any consequence that the Recommended Bidder's omission might be rectified *ex post facto*, or that its offer may ultimately prove technologically sound. The procurement process does not operate on assurances of eventual performance but on demonstrable compliance with the rules as set out in the tender at the time of submission. To permit otherwise would convert the mandatory criteria into negotiable terms and confer upon evaluators a discretion which the law expressly withholds from them.

Moreover, Clarification Note 6, issued on the 27th December, 2024, underscores the centrality of the requirement. Far from relaxing the obligation, it reaffirmed the necessity of submitting the specifications ***"in all cases,"*** thereby, indeed, eliminating any residual doubt. The Board considers that the TEC's decision to interpret the clause "in conjunction" with the remainder of Section 3.7, so as to allow reliance on a self-declaration, amounted in substance to a derogation from the plain wording of the tender, a derogation which only the Director of Contracts or the legislator could authorise.

The Board is fortified in its view by the broader principles governing public procurement law, i.e. transparency, predictability, and strict adherence to the published rules. These principles are not mere ornaments of the law but its operative guarantees. A tender procedure which admits of shifting interpretations depending on the preferences of evaluators is one that invites arbitrariness and legal uncertainty.

For these reasons, the Board concludes that the Recommended Bidder's failure to submit the requisite technical documentation at bidding stage was a substantive non-compliance with Section 3.7, incapable of cure, and sufficient on its own to warrant disqualification.

Decision

For the reasons set out above, the Board concludes as follows:

(i) The Appellant's grievance relating to integrity and professional misconduct is upheld. The sanction imposed upon the parent company, being for insider trading, constitutes conduct amounting to grave professional misconduct. In view of the substantial control exercised by the parent over the subsidiary, the

Contracting Authority was not entitled simply to rely upon the self-declaration, but was duty bound ***to seek clarification*** and ***to assess the suitability*** of the Recommended Bidder in light of the circumstances.

(ii) The Appellant's grievance relating to technical compliance is likewise upheld. The failure of the Recommended Bidder to submit the requisite documentation under the relevant sections of the tender documents rendered its offer non-compliant. The TEC erred in admitting the bid notwithstanding this deficiency.

The Board,

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

a. To uphold Appellant's Letter of Objection, grievances and requests in their entirety;
b. To cancel the 'Notice of Award' letter dated the 13th June, 2025, sent to *Jiangxi Ganfeng Battery Technology Company Limited*;
c. To cancel the 'Letter of Rejection' dated the 13th June, 2025, sent to *BESSUI JV*;
d. To order the Contracting Authority and the Department of Contracts to re-instate the offer of the Appellant and to re-evaluate the bids through a newly constituted Technical Evaluation Committee, whilst also taking into consideration this Board's findings; and
e. Directs that the deposit paid by Appellant to be reimbursed in full.

Dr Vincent Micallef **Chairperson**	**Mr Lawrence Ancilleri** **Member**	**Dr Ana Thomas** **Member**