PUBLIC CONTRACTS REVIEW BOARD

Case 2134 – CT2227/2024 – Tender for the Supply of Mesalazine 400mg MR/EC Tablets

21st October 2025

The Board,

Having noted the letter of objection filed by Dr Matthew Paris and Dr Zack Esmail on behalf of Dalli Paris Advocates acting for Cherubino Limited, (hereinafter referred to as the Appellant) filed on the 7th April 2025;

Having also noted the letter of reply filed by Dr Alexia J Farrugia Zrinzo, Dr Leon Camilleri and Dr Audrey Marlene Buttigieg Vella acting for Central Procurement and Supplies Unit and Department of Contracts (hereinafter referred to as the Contracting Authority and DOC respectively) filed on the 16th April 2025;

Having also noted the letter of reply filed by Dr Norval Desira on behalf of Thake Desira Advocates acting for JV Healthcare Limited (hereinafter referred to as the Recommended Bidder) filed on the 17th April 2025;

Having heard and evaluated the testimony of the witness Mr Adrian Spiteri (Member of the Evaluation Committee) as summoned by Dr Matthew Paris acting for the Appellant.

Having heard and evaluated the testimony of the witness Dr. Francis Cherubino (Representative of Cherubino Limited) as summoned by Dr Matthew Paris acting for the Appellant.

Having heard and evaluated the testimony of the witness Mr Adrian Spiteri (Member of the Evaluation Committee) as summoned by Dr Leon Camilleri acting for the Contracting Authority.

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

Having noted and evaluated the minutes of the Board sittings of the 14th July 2025 and 16th September 2025 hereunder-reproduced.

Minutes

Case 2134 CT 2227/2024 – Tender for the Supply of Mesalazine 400mg MR/EC. Tablets

The tender was issued on the 8th of September 2024, and the closing date was the 10th of October 2024.

The estimated value of the tender, excluding VAT, was €1,282,760.00

On 7th April 2025, Cherubino Limited. (C3677) lodged an appeal against Central Procurement and Supplies Unit (CPSU)– the Contracting Authority, in accordance with Regulation 270 of the Public Procurement Regulations. The appellant's bid was deemed technically non-compliant.

A deposit of €6,414.00 was paid.

There were four bids.

On the 14th of July 2025, the Public Contracts Review Board (PCRB), composed of Mr. Kenneth Swain as Chairman, Mr Lawrence Ancilleri, and Mr. Keith Victor Grech as members, convened a public hearing to consider the appeal.

The attendance for this public hearing was as follows:

Appellant: Cherubino Limited. (C3677)

- Dr Matthew Paris – Legal Representative
- Dr Zack Esmail – Legal Representative
- Dr Kayleigh Borg – Legal Representative
- Dr Francis Cherubino – Company Representative
- Dr David Cherubino – Company Representative
- Ms. Lara Attard – Company Representative

Contracting Authority: Central Procurement and Supplies Limited. (CPSU)

- Dr Alexia J Farrugia Zrinzo – Legal Representative.
- Dr Leon Camilleri – Legal Representative.
- Mr. Hristo Ivanov Hristov – CPSU
- Mr. Adrian Spiteri -CPSU

Department of Contracts.

Dr Audrey Marlene Buttigieg Vella – Legal Representative

Recommended Bidder: J V Healthcare Ltd. (C42953)

- Dr Norval Desira Cachia – Legal Representative
- Dr Nicholas Grima – Company Representative

Opening Statements

Mr Kenneth Swain, Chairman of the Public Contracts Review Board, welcomed the parties present, namely the appellant Cherubino Ltd, the Contracting Authority—the Central Procurement and Supplies Unit (CPSU)—and the representative of the recommended bidder, JV Healthcare Ltd. Mr. Swain then invited the appellant's legal representative, Dr Matthew Paris, to deliver his initial submissions.

Initial Submissions:

Initial Submissions by the Appellant

Dr Paris opted by calling a witness from the Evaluation Committee.

Witness
Mr. Adrian Spiteri (ID: 139581M) – Summoned by Dr Matthew Paris.

Mr. Spiteri testified that the Evaluation Committee was composed of himself as the sole evaluator, with Mr. Hristo Ivanov Hristov serving as Chairperson and Ms. Romina Debono as Secretary. A total of six offers were evaluated. In the case of the offer submitted by Cherubino Ltd, the product brand and model offered were Pentacol 400mg. The offer was evaluated based on the Summary of Product Characteristics (SPC) and the Technical Offer Form (TOF).

Referring to page 2, part 1—"Item Name and Description"—Mr. Spiteri stated that submission of the SPC was mandatory, along with a confirmation sheet providing additional information. The confirmation sheet, dated 2 October 2024 and signed by Mr. Enrico Cerruti, confirmed that the Mesalazine delayed-release tablets complied with the USP monograph, requiring a release at a pH level above 7.0. The confirmation letter, on the official letterhead of SOFAR S.p.A., was considered in the evaluation process.

Cross-Examination by Dr Leon Camilleri

During cross-examination, Mr. Spiteri confirmed that he is employed as a pharmacist. He explained that the SPC is a legally binding document that outlines the key characteristics of a medicinal product. No medicine may be distributed without this document. In the SPC submitted for the Cherubino offer, it was indicated that the active ingredient is released at a pH level above 6.5. However, the tender specifications required a release at a pH level above 7.0.

Objection by Dr Paris

Dr Paris objected, arguing that the cross-examination should be limited to the scope of his initial examination-in-chief. He stated that his questions were non-technical and limited to the composition and documentation submitted, and that Dr Camilleri was free to summon Mr. Spiteri as his own witness should he wish to explore technical issues further.

Dr. Camilleri responded that his questions pertained only to the SPC, and the confirmation letter previously cited by Dr Paris.

Chairman Swain upheld Dr Paris's objection, noting that the initial examination had not gone into technical details. He advised that Dr Camilleri may call Mr. Spiteri as his own witness if required.

Additional Grievance Raised by the Appellant

Dr Paris raised a new grievance, highlighting that Mr. Spiteri was the only evaluator involved in the assessment, which he argued contravenes the Standard Operating Procedures (SOPs) of the Department of Contracts. He referred to Case 2086 of 3 March 2025, where it was confirmed that evaluation committees must be composed of at least three members.

Dr Camilleri objected to this new grievance, citing the Public Procurement Regulations (PPR), which allow a period of ten days for the submission of any objections. He argued that Dr Paris should have raised concerns about the composition of the committee within that timeframe. Furthermore, he noted that the SOPs referenced by Dr Paris do not carry the force of law.

Dr Norval Desira, representing the recommended bidder, agreed that all grievances must be filed within the legally prescribed time limit. While acknowledging Dr Paris's right to raise the issue, he requested that if the Board were to consider this additional grievance, an extension be granted to allow him time to prepare a response.

The Chairman gave the following directions:

The appellant is to submit in writing his request to file an additional grievance by Friday 18th July. Replies by the Contracting Authority and Recommended Bidder to be submitted by Friday 25th July.

The Board, after thoroughly reviewing the submissions made will decide on whether to allow the introduction of this new grievance or otherwise.

Conclusion of the Hearing

With no further arguments presented, Chairman Mr. Kenneth Swain thanked all parties and formally concluded the session.

SECOND DAY – September 16, 2025

On September 16, 2025, at 10:30 am, the Public Contracts Review Board (PCRB) reconvened to continue hearing the appeal, following the first sitting held on July 15, 2025.

Composition of the Board

- Mr. Kenneth Swain – Chairman
- Mr. Lawrence Ancilleri – Member
- Mr. Keith Victor Grech – Member

Attendance

Appellant: Cherubino Limited (C3677)

- Dr. Matthew Paris – Legal Representative
- Dr. Zack Esmail – Legal Representative
- Dr. Kayleigh Borg – Legal Representative
- Dr. Francis Cherubino – Company Representative
- Dr. David Cherubino – Company Representative

Contracting Authority: Central Procurement and Supplies Unit (CPSU)

- Dr. Alexia J. Farrugia Zrinzo – Legal Representative
- Dr. Leon Camilleri – Legal Representative
- Mr. Adrian Spiteri – CPSU (online)

Department of Contracts

- Dr. Mark Anthony Debono – Legal Representative

Recommended Bidder: J V Healthcare Ltd. (C42953)

- Dr. Norval Desira Cachia – Legal Representative
- Mr. Damian Stellini – Company Representative

Opening Statements

The session commenced with Dr. Matthew Paris calling his witness.

Witness:

Dr. Francis Cherubino (ID No. 167384M) summoned by Dr Matthew Paris.

Dr. Cherubino, Director of Cherubino Ltd., referred to Part 1, Page 2 of the technical offer form. Cherubino Ltd. submitted Pentacol 400mg gastro-resistant modified-release tablets. Under clause 2.2 of their bid, they declared compliance with the requirement:

"Releasing the active ingredient at pH equal to or above 7."

They confirmed compliance and referred to SPC section 5.2 in the attached confirmation sheet. The confirmation, dated October 2, 2024, concerned Pentacol Mesalazine 400mg modified-release tablets.

The manufacturer's declaration stated:

"We hereby confirm that the concerned medicinal product releases the active ingredient at pH above 7 according to the current USP edition monograph Mesalamine delayed-release tablets."

Cherubino Ltd. submitted both the SPC and this declaration, as well as references to them in the technical offer form. However, it appears the confirmation sheet was disregarded. No clarification was sought—only an exclusion letter was issued. The Contracting Authority's interpretation contradicts the submitted documents and ignores supplementary evidence.

The exclusion was based on the claim that the tablet releases at pH 6.5. Dr. Cherubino explained that neither the manufacturer, the SPC, nor the declaration state this. He insisted the bid was fully compliant.

This medicine acts in the lower digestive tract. Document 4 illustrated the ileum and colon, showing where release occurs. Document 7 described the active ingredient and the S100 coating, which dissolves at a specific pH before release.

He quoted:

"When administered orally, Pentacol gastro-resistant modified-release tablets pass intact through the upper intestine and release the active ingredient in the deceased segments, the distal ileum and colon, where pH exceeds 6.5."

And further:

"Due to their special coating, the gastro-resistant modified-release tablets only disintegrate in an environment where pH exceeds 6.5, in the ileum and colon."

Dr. Cherubino argued that the evaluator ignored the manufacturer's explicit declaration that release occurs *above pH 7*. The tender requested release *"equal to or above 7."* The evaluator conflated "disintegration" with "release" and deemed the product non-compliant.

Dr. Paris referred to Document 8, containing correspondence between Dr. Cherubino and Ms. Helen Vella of the Medicines Authority regarding EP monographs. The Authority explained why the USP monograph was referenced. Dr. Cherubino clarified that every medicine has an associated pharmacopoeia, which may be European, American, or in-house.

He noted that while the active ingredient Mesalazine has a European Pharmacopoeia reference (Document 1):

"The API Mesalazine used in the production of Pentacol 400mg tablets is analysed in accordance with the European Pharmacopoeia monograph, Mesalazine 07/2016:1699."

—no European monograph exists for the finished product.

Dr. Paris cited Cherubino's letter of October 2, 2024, submitted with the original bid:

"Hereby confirmed that the concerned medicinal product releases the active ingredient at pH above 7 according to USP edition monograph."

Thus, the manufacturer's declaration was accurate and consistent with USP standards—the only available reference for testing release. Accordingly, the tablets comply with the requirement of *equal to or above 7*.

Cross-Examinations by Dr. Leon Camilleri (CPSU)

Dr. Cherubino introduced himself as a lawyer with 12 years' experience in tenders, regularly liaising with suppliers.

He confirmed that the SPC contained full product details and was supplemented by a manufacturer's declaration. The tender required release of the active ingredient at *pH equal to or above 7*.

Both he and Dr. Camilleri agreed that release below pH 7 was not permitted. However, Dr. Camilleri argued that the SPC and declaration do not exclude release between 6.5 and 7. Dr. Cherubino disagreed, citing Document 2, where the manufacturer stated solubility begins *at or above 7*.

He referred to Document 5, explaining that the coating is applied as a powder for enteric release above pH 7, and to Document 6, detailing coatings such as Eudragit S100, which dissolves above pH 7 in the ileum and colon.

Dr. Camilleri highlighted that Cherubino's additional declaration states release occurs *"above 7"*, but not *"equal to or above 7."*

Cross Examination by Dr. Norval Desira (Recommended Bidder)

Dr. Desira confirmed that Cherubino's bid was prepared in-house under Dr. Cherubino's supervision and coordinated with the manufacturer, who also reviewed the submission.

He noted the product is designed to act on the ileum and colon. He and Dr. Cherubino agreed that the coating delays release until the tablet reaches those sections.

Witness:

Mr. Adrian Spiteri (ID No. 139581M) summoned by Dr Leon Camilleri.

Mr. Spiteri, Senior Pharmacist and evaluator in the tender, testified that the SPC submitted by Cherubino indicated release at *above 6.5*, not *equal to or above 7*.

Cross-Examination by Dr. Norval Desira.

Mr. Spiteri confirmed that release occurs in the ileum and colon.

Final Submissions:

Final Submissions by Dr. Matthew Paris (Appellant – Cherubino Ltd.)

It is a fact for the sake of transparency, that the evaluators check with each other, as there is a lack of compliance with guidelines. The law gives the right to the Department of Contracts to issue directives and guidelines, and it is referred to in article 12 of PPR number 12.1.D

In a case about the embryo protection act at the constitutional court, the Embryo protection Authority was given the power to issue a guide. It is an interpretation which we should consider. Consequently, at the European Court of Human Rights nobody said that the guidelines are not applicable because they were limited and do not apply to us. Every decision of the Planning Authority is issued in support of policy. Dr Paris insisted that there should be not less than three evaluators and a re -evaluation should be accepted by the Board.

If we do not take consideration of guidelines issued by the Department of Contracts, we can say that from now on, every directive will not be applicable.

Reference to Article 2 of the PPR about Procurement Documents and he quotes:

'Every document issued or is referred to by the Contracting Authority to describe or determine a procurement element or procedure, including the notice about contracts, the notice previously informative is used as a call for competition, technical specifications, descriptive document, the proposed conditions for the contract, the form of presentation for the bidders and candidates' information generally applicable including clarifications.'

The tender document includes any type of information, and documents that gives information about process and procedure.

In the exclusion letter, the words 'disintegrate' and 'release' were treated as having the same meaning. The tender document utilised clearly 'release' however, the document of SPC mentions 'disintegration'. A clarification should have been asked for. Referring to circular 40, it gives this right, and he quotes:

'Where there are circumstances where there is a feeling of ambiguity, one can interfere to address that ambiguity and explain clearly'.

Dr Paris stressed that the additional document submitted with the original bid by Cherubino was not even considered or acknowledged. The document states clearly that the release is above 7.

The SPC submitted was a summary of the product. In the rejection letter, there is no reference to the additional document, it was only referred too, in the answer of the objection letter sent by us. One of the arguments was that the product should have been 'equal to and above' when 2.2-part one page

2 states 'equal to or above 7'. If that was the request, it should have been written clearly. Another argument was that the product satisfies only the USP edition monograph of America. The proof by manufacturer confirms that regarding coating, not the active ingredient, there isn't an existing equivalent in Europe. In part one, page 2 of their submission in clause 2.2 there is SPC and confirmation sheet. We were coherent and these two sheets were to be read consequently. We are not asking for a rectification by a simple clarification to explain. Referring to the decision of Case South lease vs CPSU dated April 2nd, 2025, and he quotes:

'In light of the above, the Board finds that the evaluation committee had before it a document self-declaration – requested by the tender (page 29) which clearly demonstrated compliance with the emissions requirement. Thus, it was incumbent upon the committee to seek clarification rather than dismiss the offer. The Board therefore disagrees with the evaluation committee's interpretation and procedure and upholds the appellant's argument.'

In the circumstance there was an ulterior document, after the self-declaration that confirmed a specification that could be reached. When in doubt, the solution could not be exclusion but a clarification. That is why it is fundamental to have more than one evaluator.

Final Submissions by Dr. Norval Desira (Recommended Bidder – JV Healthcare)

Dr Desira stated that one has to take in consideration what the legislator requested. This Board or the Department of Contracts does not have the power to replace the legislator. When the legislator created the rules, he intentionally did not make a composition of the evaluation, and he quotes:

'The Evaluation committee should be appointed by the Contracting Authority not by the Director of Contracts with the purpose of evaluating tenders received and for making recommendations there off.'

The legislator appointed the Contracting Authority to decide the number of members in the evaluation committee. The competent forum, which is the constitutional court determines, what the legislator wants, if it violates any principles of best practice or if there is a fundamental right of the objector.

The Director of Contracts does not have this power, The Department of Contracts can only provide information and guidance on the interpretation and application of these rules, and only where there is doubt. In this case, there is no doubt that the legislator is leaving it up to the Contracting Authority to determine the composition of the Evaluation Committee. Referring to paragraph B

'To establish and regulate the procedure, to be followed during meetings of the General Contract Committee, the Department of Contracts Committee, and the Evaluation Committee.'

This tribunal cannot replace the competent court.

The distinction is fine. The objection is about the composition of the adjudication committee not about the tender process. The tribunal can annul the evaluation and go back with the same original documents and offers presented by the bidders, to a new Evaluation Committee.

The tender bid offered by the objector was filled by an experienced person and a manufacturer Enrico Cerruti. The manufacturer should have known that the active ingredient, is released in the ileum and colon, where PH exceeds 6.5. There is no need for more documentation since the SPC itself, which is a legal document submitted to the European Medicines Authority to be licenced states that it exceeds 6.5 PH. The evaluator had every reason to say that in specification 2.2 he requested that the active ingredient is released equal to or above 7, which means that at a minimum it has to be 7. The CPSU

who have a big responsibility for the people with this condition, needed tables of certain qualifications and a minimum of PH 7. The requirement was crystal clear.

Final Submissions by Dr. Mark Anthony Debono (Department of Contracts)

Dr. Debono maintained that "disintegration" and "release" are synonymous. The evaluator was justified in disqualifying the bid.

He rejected claims about evaluator numbers, noting the department acts within legal limits.

Regarding the grievance where the information was not given from the beginning, he referred to Akzo vs the European Commission Communities dated 24th June 1986 Case 53/85. Judgement of the court 5th chamber. The court and he quote:

'*Having regard to the extremely serious damage which could result from an improper communication of documents to a competitor, the commission must, before implementing its decision, give the undertaking an opportunity to bring an action before the court, with a view to having the assessments made, reviewed by it, and to prevent the documents in question.'*

The Contracting Authority cannot give out information to its competitor. Regarding the conformity, with the tender specifications we submit that since there is no manifest error of assessment, the decision of the Evaluation Committee should be upheld by this board.

Dr Debono referred to case 35 Compu time Ltd vs Mita 35 of 2012 decided on April 29th, 2015, where the European Justice Court announced these principles. Another case Encroymit vs Agency for infrastructure, Appeal Court Case 35 of 2022 decided June 22nd, 2022, where the court stated that every bidder must scrutinize the offer bid and cannot pretend to be given a chance to arrange his offer to be compatible.

Final Submissions by Dr. Leon Camilleri (CPSU)

Dr. Camilleri emphasized that law does not prescribe evaluator numbers, and the sole evaluator was a qualified senior pharmacist.

The objectors presented proof but there was only one witness, Dr Cherubino, no one from Medicine Authority or from the manufacturer, only emails.

Dr Cherubino has a lot of experience but is not a doctor or a scientist or a pharmacist. The Evaluator is a senior pharmacist.

Dr Cherubino said that the disintegration and the release of the active ingredient happens in the same moment. Once it disintegrates the ingredient is released. In the objector's additional letter, the active ingredient is released at 7 or above. The SPC given states that the disintegration releases at PH 6.5 and experienced pharmacist knows that if the disintegration releases at PH 6.5 the active ingredient would be released too.

The Evaluation Committee could only reject, what is written in the most important document submitted, the SPC known by the Court of Appeals.

Conclusion of the Hearing

With no further submissions, Chairman Mr. Kenneth Swain thanked all parties and formally concluded the session.

End of Minutes

Hereby resolves:

The Board refers to the minutes of the Board sittings of the 14th July 2025 and 16th September 2025.

Having noted the objection filed by Cherubino Limited (hereinafter referred to as the Appellant) on 7th April 2025, refers to the claims made by the same Appellant with regard to the tender of reference CT 2227/2024 listed as Case No. 2134 in the records of the Public Contracts Review Board.

Appearing for the Appellant:	Dr Matthew Paris & Dr Zack Esmail
Appearing for the Contracting Authority:	Dr Alexia J Farrugia Zrinzo & Dr Leon Camilleri
Appearing for the Department of Contracts:	Dr Audrey Marlene Buttigieg Vella & Dr Mark Anthony Debono
Appearing for the Recommended Bidder:	Dr Norval Desira

Whereby, the Appellant asserts that by a letter dated 28th March 2025, Cherubino was informed that its offer was considered technically non-compliant, as the product proposed (Pentacol 400mg tablets) releases its active ingredient at a pH exceeding 6.5, whereas the tender specification required release at pH equal to or above 7. Cherubino contests this decision and raises the following main grievances:

1. **Failure to Provide Information (Regulation 90)**

   Cherubino requested disclosure of the brand and model of the product offered by the recommended bidder under Regulation 90 of S.L. 601.03. The DOC and CPSU failed to provide this information, breaching their obligations of transparency and natural justice, including the principle of equality of arms.

   Cherubino cites the Court of Appeal judgment in South Lease Ltd vs CPSU (22 June 2022), affirming that parties in quasi-judicial proceedings have a right to relevant information, even where the data is commercially sensitive.

Accordingly, Cherubino requests that the PCRB, as an interim measure, order disclosure of the requested information before the hearing.

2. Erroneous Technical Evaluation

The evaluation committee allegedly failed to consider the full documentation submitted, which demonstrates that Cherubino's offer complied with the technical specifications.

The manufacturer's declaration from SOFAR S.p.A., producer of Pentacol 400mg modified-release tablets, confirms that the product releases the active ingredient at pH above 7, in line with the USP monograph "Mesalamine delayed-release tablets."

The appellant maintains that the technical compliance was clearly proven, and that rejecting the bid as non-compliant constitutes an erroneous assessment contrary to Regulation 62(1) of S.L. 601.03, which requires that economic operators be deemed eligible from the outset if they meet the tender conditions.

3. Breach of Procurement Policy Note 40

Cherubino argues that if the committee found any ambiguity in the documentation, it was required by Procurement Policy Note No. 40 to seek clarification rather than summarily exclude the offer. This policy obliges evaluation committees to request clarification where documentation appears ambiguous or insufficiently explicit.

The appellant references PCRB's own ruling in South Lease Ltd vs CPSU (2 April 2024) and the EU case Tideland Signal Ltd v Commission (Case T-211/02), both holding that contracting authorities must seek clarification where compliance can be reasonably verified through additional information.

4. Irregular composition of Evaluation Committee

On 18 July 2025, the Appellant, through its legal representatives Dalli Paris Advocates, filed an application before the Public Contracts Review Board (PCRB) requesting permission to introduce an additional (fourth) grievance in its ongoing objection proceedings relating to Tender CT 2227/2024 for the supply of Mesalazine 400mg MR/EC tablets.

The request followed revelations made during the PCRB hearing held on 4 July 2025, where it emerged from the testimony of Mr. Adrian Spiteri, a member of the Technical Evaluation Committee (TEC), that the committee was composed of a Chairperson, a Secretary, and only one evaluator — namely, Mr. Spiteri himself. The Appellant explained that it could not have been aware of this fact earlier, as the composition of evaluation committees is typically disclosed only during the course of PCRB proceedings to maintain confidentiality and avoid conflicts of interest.

The appellant relied on past PCRB and judicial precedents confirming that the Board may authorise the addition of new grievances during proceedings where the underlying facts were unknown and could not reasonably have been known earlier. Reference was made in particular to PCRB Case No.

1943 (decision of 29 February 2024), where the Board allowed a new grievance concerning the composition of an evaluation committee to be admitted after similar circumstances emerged mid-hearing. The application also cited the judgment in A. Falzon Energy Projects Ltd. v. Central Procurement and Supplies Unit, in which the Court of Appeal (Superior Jurisdiction) confirmed that such an addition does not invalidate proceedings even if other parties are not initially invited to comment prior to the decision.

On 1 September 2025, through its decree, the Board granted permission for the appellant to introduce this additional claim.

On 3rd September 2025, the Appellant submitted formally its fourth ground of Appeal where it argued that the composition of the TEC in this case, consisting of a single evaluator, constitutes a serious procedural flaw in breach of the Standard Operating Procedures (SoP) Guidelines for Tender Evaluation Committees, Version 1.1, issued by the Department of Contracts. These guidelines explicitly require that an evaluation committee be composed of a Chairperson, a Secretary, and three or an odd number of evaluators. According to the appellant, this rule has been consistently interpreted as requiring at least three evaluators to ensure transparency, fairness, and balanced judgment during the evaluation process.

To substantiate its position, the Appellant cited several PCRB precedents, including Cases No. 2079, 2080, 2081, 2082, and 2086 (2024), in which the Board held that evaluations carried out by a single evaluator were procedurally flawed and contrary to best practices. In these cases, the Board observed that having multiple evaluators reduces the risk of bias, enhances objectivity, and ensures a fairer assessment of bids. The Board had also underlined that the presence of only one evaluator contradicts the SoP Guidelines and fundamental principles of transparency and fairness in public procurement.

This Board also noted the Contracting Authority's and DOC's Reasoned Letter of Replies filed on 16th April 2025 and 15th September 2025, and its verbal submission during the hearings held on 14th July 2025 and 16th September 2025, in that:

1. The Contracting Authority began by addressing the appellant's first ground of appeal, relating to the alleged failure to provide information. Cherubino claimed that its position had been prejudiced because the DOC had not disclosed the brand name of the product offered by the recommended bidder despite a formal request for information. The DOC and CPSU submitted that the rejection letter sent on 28 March 2025 contained all the information required under Regulation 242(1) of the Public Procurement Regulations (PPR). They further explained that under Regulation 242(2)(c), the authority responsible for the tendering process must provide any additional information, including the name and characteristics of the successful tenderer, within fifteen days of receiving a written request. In this case, Cherubino's request was made on 3 April 2025, while the objection

was filed on 6 April 2025, giving the contracting authority less than one working day to respond. Therefore, the claim that the DOC and CPSU failed to fulfil their disclosure obligations was unfounded and premature. Nevertheless, in the interest of transparency, the contracting authority disclosed that the recommended bidder's product was Asacol 400mg gastro-resistant tablets.

2. Turning to the second ground of appeal, the DOC and CPSU firmly rejected Cherubino's claim that its product was compliant with the tender specifications. They explained that the tender's mandatory technical requirement under specification 2.2 clearly required that the medicinal product must release the active ingredient at a pH equal to or above 7. The product offered by Cherubino, Pentacol 400mg, was supported by a Summary of Product Characteristics (SPC) which explicitly states that the product releases the active ingredient at a pH higher than 6.5. The contracting authority stressed that the SPC is not merely supporting literature but an integral part of the technical offer and a binding document defining the product's pharmaceutical characteristics. This position, they noted, has been confirmed by the Court of Appeal in its judgments Pharma.MT Limited v Director of Contracts et (30 March 2022) and Multigas Limited v CPSU et (27 January 2021), where the SPC was held to constitute essential documentation necessary to demonstrate compliance with technical specifications. Since the SPC clearly contradicted the tender requirement, the evaluation committee had no discretion but to find the offer non-compliant.

   The DOC and CPSU also commented on the manufacturer's declaration provided by Cherubino, which claimed that the product released the active ingredient at pH above 7 according to the USP (United States Pharmacopeia) monograph. The contracting authority considered this statement insufficient and inconsistent with the SPC, which is the controlling document for evaluation purposes. Moreover, the letter did not specifically refer to the Pentacol brand name and cited U.S. standards rather than European pharmacopoeia references. For these reasons, the manufacturer's letter could not override or correct the information contained in the SPC, and the evaluation committee's determination of technical non-compliance was justified and correct.

3. With respect to the third ground of appeal, Cherubino alleged that the evaluation committee failed to comply with the principles of Procurement Policy Note No. 40, which directs contracting authorities to seek clarifications where an offer appears ambiguous or insufficiently clear. In reply, the DOC and CPSU argued that this principle was inapplicable in the present case, as the rejection of the offer did not arise from ambiguity or uncertainty but from a clear instance of non-compliance. The SPC unambiguously indicated that the product released its active ingredient at a pH above 6.5, falling short of the required minimum of 7. In such circumstances, there was no scope or obligation for the evaluation committee to request clarification. The non-conformity was substantive and not remediable through clarification.

4. The CPSU objects to Appellant's request to introduce and sustain this new grievance, maintaining that it is legally unfounded. The contracting authority argues that the Public Procurement Regulations (S.L. 601.03) do not prescribe any specific number of evaluators required for the

composition of an Evaluation Committee. Therefore, the claim that the committee should include three or more evaluators, as alleged by the appellant, has no basis in law.

The CPSU further contends that while the Department of Contracts' internal policies or guidelines, such as the Standard Operating Procedures (SoP) for Tender Evaluation Committees, may govern internal administrative practice, non-compliance with an internal policy does not equate to a breach of law, provided the evaluation process respects the minimum safeguards required by statute. Consequently, an evaluation report prepared by a committee duly appointed under the applicable regulations cannot be invalidated merely because internal procedures were not followed in every respect.

The CPSU also stresses that prior PCRB or judicial decisions in which re-evaluations were ordered due to single-member committees do not bind the Board in the present case, since the Maltese legal system does not recognise binding precedent. Each objection must be determined according to its own facts and merits, and earlier rulings cannot compel the Board to reach a similar outcome.

In conclusion, the Department of Contracts and the Central Procurement and Supplies Unit maintained that all relevant information had been disclosed in accordance with Regulation 242 of the Public Procurement Regulations, that the evaluation committee's decision was based on objective and documented evidence of non-compliance, and that no procedural irregularity or breach of law had occurred. The rejection of Cherubino Ltd.'s offer was thus correct both in fact and in law. Accordingly, the Contracting Authority requested the Board to dismiss the objection in its entirety, confirm the evaluation committee's decision and the award in favour of JV Healthcare Ltd., and order that the deposit lodged by Cherubino Ltd. be forfeited.

This Board also noted the Recommended Bidder's Reasoned Letters of Replies filed on 17th April 2025 and 12th September 2025, and its verbal submission during the hearings held on 14th July 2025 and 16th September 2025, in that:

1. The Recommended Bidder submits that the Appellant's objection is totally unfounded both in fact and at law, for reasons which have already been detailed in the reply filed by the Department of Contracts and the CPSU, dated 16th April 2025, which reasons are adopted by the Recommended Bidder as its own.
2. On 12 September 2025, the Recommended Bidder filed its formal reply before this Board in response to the fourth grievance lodged by Cherubino Ltd., Concerning the alleged irregular composition of the evaluation committee in relation to Tender CT 2227/2024. The recommended bidder submits that the fourth grievance is entirely unfounded both in fact and in law. It argues that the Public Procurement Regulations intentionally do not regulate the specific composition of the evaluation committees. Instead, the Regulations define an "Evaluation Committee" as a committee appointed by contracting authorities for the purpose of evaluating tenders and making

recommendations. This definition, according to the Recommended Bidder, makes clear that decisions regarding the number or qualifications of members composing an evaluation committee fall entirely within the discretion of the contracting authority. The Law therefore does not preclude the possibility of an evaluation being conducted by a single evaluator.

In support of this interpretation, the Recommended Bidder, note that the Regulations expressly establish and regulate the composition of several other bodies, including the General Contracts Committee (Regulation 65), Departmental Contracts Committee (Regulation 74), the Special Contracts Committee (Regulation 78), the Commercial Sanctions Tribunal (Regulation 96) and the Public Contracts Review Board (Regulation 80), but contain no equivalent provision governing the structure of evaluation committees. This legislative silence, it argues, confirm that the matter was deliberately left to the discretion of the contracting authorities.

The appellant's reliance on the "Standard Operating Procedures for Tender Evaluation Committees – Version 1.1" is dismissed by the Recommended bidder as irrelevant, since these standard procedures are merely administrative guidelines with no binding legal force. They provide general procedural advice but cannot override or supplement the explicit wording of the Regulations.

Hence, the Recommended Bidder requests the Board to reject in full the Appellant's contentions.

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 witness duly summoned, will now consider Appellant's grievances as follows in their entirety.

a) Failure to Provide Information

The Board notes that the grievance concerning failure to provide information was sufficiently addressed during the sittings. Accordingly, this grievance has been exhausted and requires no further consideration.

b) Erroneous Technical Evaluation & Breach of Procurement Policy Note 40

The Board has carefully examined the Appellant's claim that its offer was wrongfully excluded on the basis of an erroneous interpretation of the product's compliance with the tender specification requiring release of the active ingredient at a pH equal to or above 7. The Board notes that the Appellant had submitted, alongside the Summary of Product Characteristics (SPC), a manufacturer's declaration confirming that the product releases the active ingredient at a pH above 7, in line with the applicable USP monograph. Despite this, no clarification was sought by the Evaluation Committee to reconcile the apparent ambiguity between the SPC wording and the manufacturer's declaration.

In this regard, the Board draws direct reference to the reasoning adopted in PCRB Case 2091, wherein it was held that evaluation committees have an obligation, derived from Procurement Policy Note 40, to seek clarification in cases where ambiguity is evident and where the information required to confirm compliance is readily available. As similarly stated in that decision and endorsed by the Board, *"it is incumbent upon an evaluation committee to seek clarification rather than to dismiss an offer where the ambiguity is practically resolvable."* This principle is rooted in the overarching principles of good administration, proportionality, and fair competition that underpin both the Public Procurement Regulations and Directive 2014/24/EU.

The Board finds that the Evaluation Committee's decision to exclude the Appellant's offer without requesting clarification constituted a disproportionate and procedurally flawed exercise of discretion. The available evidence, namely, the manufacturer's declaration, should have prompted a clarificatory request under Procurement Policy Note 40. The Committee's failure to do so resulted in an incomplete assessment of the Appellant's compliance and undermined the transparency of the process. Consequently, the Board concludes that the technical evaluation was erroneous and contrary to the principles of fairness and proportionality enshrined in public procurement law.

The Board therefore disagrees with the evaluation committee's interpretation and procedure, and upholds the appellant's argument.

c) Irregular composition of Evaluation Committee

The Board has duly examined the objection raised by the preferred bidder's legal counsel, who submits that the "Standard Operating Procedures (SoP) Guidelines for Tender Evaluation Committees (TEC) Version 1.1 Department of Contracts" are not vested with the force of law and therefore ought not to be accorded decisive weight in reviewing the validity of the evaluation process. Counsel grounds his argument upon the *maxim ubi lex voluit, dixit; ubi noluit, tacuit*.

The Board does not find this submission convincing. It is axiomatic that procurement processes in Malta are not governed solely by the literal terms of domestic legislation but operate within the overarching framework of European Union law, in particular the principles of transparency, equal treatment, non-discrimination, and proportionality, as enshrined in Directive 2014/24/EU and transposed into national law. These principles require that contracting authorities conduct evaluations in a manner that is not only lawful but also fair, objective, and resistant to arbitrary or biased determinations.

The SoP in question is not a gratuitous administrative code but an instrument that concretises these EU-derived principles into practical procedures. The requirement that a Tender Evaluation Committee be composed of at least three evaluators, or any odd number thereof, unless expressly authorised otherwise by the Director of Contracts, is a safeguard that promotes collective deliberation, checks and balances, and the minimisation of subjective bias. Such a procedural

safeguard is entirely consistent with, and indeed gives tangible effect to, the binding principles of fairness and transparency.

To suggest that the absence of statutory codification diminishes the normative weight of such procedures is to misconstrue their role. Far from creating novel obligations, the SoP gives operational expression to the obligations already implicit in law. It cannot be said that compliance with these guidelines is optional where adherence to them is the very means by which contracting authorities demonstrate fidelity to EU procurement law.

Accordingly, the conduct of an evaluation by a single evaluator, in contravention of the SoP and absent the requisite authorisation from the Director of Contracts, is not a trivial or technical irregularity. It strikes at the heart of transparency and objectivity, rendering the process inherently deficient. The Board is therefore unable to accept the contention that the deficiency is inconsequential merely because the SoP does not possess the status of legislation. The safeguard of multiple evaluators forms part of the practical machinery by which the legal principles of public procurement are upheld, and its breach fatally undermines the credibility of the tendering process.

The Board therefore upholds the appellant's argument.

The Board,

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

a) To Uphold Appellant's contentions with respect to the second, third and fourth grievance.
b) Revokes the recommendation of award made in favour of the recommended bidder;
c) Orders the reintegration of the Appellant's bid in the re-evaluation process, which re-evaluation shall be performed by a newly constituted evaluation committee and shall implement the Board's findings;
d) Directs that the deposit paid by the Appellant to be reimbursed.

Mr Kenneth Swain	**Mr Keith Victor Grech**	**Mr Lawrence Ancilleri**
Chairman	**Member**	**Member**