

**PUBLIC CONTRACTS APPEALS BOARD**

**Case No. 53**

**RE: CT 2586/2004 - Advert Notice No: CT 27/2005 – Rehabilitation of Maghtab,  
Qortin and Wied Fulija Landfills in Malta. Aerial Emissions Control  
Works**

This call for tenders, published in the Maltese Government Gazette and the Official Journal of the European Communities respectively on the 22 February, 2005, was issued by the Contracts Department following a request transmitted to the latter by WasteServ Malta Ltd.

The closing date for this call for offers was 17 May, 2005.

An Evaluation Board consisting of Messrs.

Mr Joe Degiorgio	Chairperson
Mr Kevin Mizzi	Secretary
Ing Vincent Magri	Member
Mr Marco Abela	Member
Dr Ing Christopher Ciantar	Member
Ing Aurelio Attard	Member
Mr Vladimir Filipovic	Member

was appointed to analyse an initial total of five (5) accepted offers submitted by different tenderers.

The global estimated value of the contract in question was Lm 3.3 million.

Following notification to appellants that their “*tender is not among the selected ones since it has been adjudicated as technically non-compliant because it obtained 60.40 points whilst the minimum requirement was that of 70 points*”, Messrs World Waste Solutions Malta/ Van Der Wiel Infra & Milieu B.V. filed an objection on 28 September, 2005 against a deposit of Lm 16,500.

The Public Contracts Appeals Board (PCAB) made up of Mr. Alfred Triganza (Chairman) with Mr Anthony Pavia and Mr. Edwin Muscat, respectively acting as members, convened a public hearing on 04.11.2005 to discuss this objection.

Present for the hearings were:

**WorldWaste Solutions Malta/ Van Der Wiel Infra & Milieu B.V.**

Dr Adrian Delia  
 Dr Wessel H. R. Baron van Boetzelaer  
 Mr Mario Bonnici  
 Mr Emmanuel Bonnici  
 Arch. Ray Sammut  
 Arch. Pierre Zammit  
 Mr Gerardus P.T.M. Simons  
 Mr Frederick Welling

## **WasteServ Malta Ltd**

Dr Stefan L. Frendo  
Dr Antoine Cremona

## **Evaluation Committee**

Mr Joe Degiorgio	Chairperson
Mr Kevin Mizzi	Secretary
Ing Vincent Magri	Member
Mr Marco Abela	Member
Dr Ing Christopher Ciantar	Member
Ing Aurelio Attard	Member
Mr Vladimir Filipovic	Member

After the Chairman's introduction relating to this objection, the representatives of appellants, namely, *World Waste Solutions Malta/ Van Der Wield Infra & Milieu BV* were invited to give a brief resume' regarding the motive leading to their objection.

Dr Adrian Delia, one of the appellants' legal representatives started by stating that in their preliminary submission they pointed out that (i) in the tender document, other than the declared criteria, there was no objective system for adjudicating points and (ii) in the Technical Compliance Grid that was forwarded to them by the Department of Contracts, other than the total number of points awarded to the other tenderers and a breakdown of the points given to their clients, no breakdown of the points given to the other tenderers was provided. He argued that, in the circumstances, they did not have the material to object upon once they did not know how many points the other tenderers achieved for each description of criterion. Dr Delia insisted that WasteServ Malta Ltd, should at least explain how the scoring of the points was done because there was a complete allowance for discretion.

Dr Delia proceeded by explaining that the Technical Compliance Grid contained a maximum score for each of the six criteria but there was no method which explained how the adjudication would be conducted. He contended that they could not have misinterpreted the description in the Technical Compliance Grid because the specifications of the tender document did not allow for subjectivity. Dr Delia argued that, once his clients had satisfied the criteria, they should have been awarded the maximum number of points allotted to each criterion.

In order to substantiate his argument the appellants' legal representative brought forward the following representations, namely:

- a. In the tender document the description under '**Experience as a contractor**' specified that '*He shall have successfully completed at least 2 similar projects over the last 3 years as Main Contractor*'. Dr Delia said that in spite of the fact that the objectors had complied with the requirements of this criterion, they were only awarded 12.4 points out of 20;
- b. As regards '**Equipment**', in the tender document the description was given as '*Tenderer owns or has access to the key items of equipment necessary for proper works implementation – specified in the (Form 4.5.2).*' The appellants' legal representative declared that all key items of equipment were owned by or

directly accessed by objectors, and therefore his clients could not understand why they got 3 points instead of 5;

- c. Dr Delia said that for **Quality Control Assurance System**, in spite of the fact that they submitted the ISO 9001:2000 and the VCA Certificates, yet they did not get full points but 6.8 out of 10. Under this criterion the following description was given '*Please provide (...) details of the Quality Assurance System(s) it is proposed to use to ensure successful completion of the Works.*';
- d. Furthermore, Dr Delia made reference to **Clause 31 Criteria for Award**, claiming that these, as stated in the tender document, were completely unworkable. He explained that whilst under clause 31.1 it was specified that '*The Evaluation committee shall select the Tenderer whose Tender has been determined to meet the administrative and technical criteria, and has offered the most economically advantageous offer*', clause 31.3 stated that '*The most economically advantageous tender is established by weighing technical quality against price on a 60/40 basis respectively*'. The lawyer maintained that, due to the objectivity of the technical criteria, all bidders who satisfied these requirements would obtain the maximum number of points and therefore the tender would have to be awarded to the offer with the lowest price. Thus, he contended that the awarding criteria of this tender were flawed because the tender could never be awarded to the most economically advantageous offer but to the cheapest one.

Dr Wessel H. R. Baron van Boetzelaer, another legal representative for appellants, said that in the tender dossier it was indicated that certain amount of points would be given to those tenderers who fulfilled the objective technical criteria. He pointed out that there was no possible space for subjective assessment because a bidder was either 'compliant' or 'not compliant'. Mr Boetzlaer insisted that once they met the requirements requested in the description of each criterion in the *Technical Compliance Grid* they should have been awarded full points. He gave some examples to substantiate his argument. Dr Boetzelaer alleged that the method of point granting and the way the assessment had taken place was not correct, not objective and not transparent.

Dr Stefan Frendo, representing WasteServ Malta Ltd, said that apparently the appellants wanted to know why they were excluded with reference to the others that were not excluded. He contended that the appeal procedure was not meant for this sort of objection. The lawyer was of the opinion that, once the appellants did not know what they were precisely objecting against, then, this objection was an abuse of the appeals procedure.

Dr Frendo denied his Dutch colleague's allegation that there was a breach of the public procurement regulations.

Also, Dr Frendo pointed out that Clauses 29.1 and 29.2 stated that '*The Evaluation Committee shall evaluate and compare only those Tenders determined as substantially compliant in accordance with Clause 28. above*' and '*the evaluation of Tenders will take into account not only Construction cost, but also Operation cost and resources required (ease of operation and maintenance) in line with the requirements of the Employer's Requirement*', respectively. As a consequence, WasteServ Malta

Ltd's legal advisor, stated that all the 'Employer's Requirements' (Volume 3), which formed an essential part of the tender documents, also needed to be taken into account.

With regard to the discretionary process of the Evaluation Committee, Dr Frendo emphasised that the Appeals Board had to be very careful in not substituting the discretion of an Evaluation Committee with their own discretion. He claimed that the PCAB could not change the points unless they found that there were very serious reasons for doing so, such as a manifest error of judgement and preferences, or unless it was proved that the discretion of the Evaluation Committee was seriously vitiated. If this was not the case, then the PCAB should not disturb the discretion of the Evaluation Committee because this would be undermining and distorting the whole process.

Dr Frendo said that, contrary to the impression given by the appellants that the tender was obscure, the PCAB should take note of the fact that the Evaluation Committee had conducted a clarification exercise with all interested parties. Also, he said that throughout the whole evaluation process the Evaluation Committee was assisted by a foreign consultant Scott Wilson Kirkpatrick & Co Ltd, who was the expert contracted by WasteServ Malta Ltd to compile the report on the 'Development of Rehabilitation Strategies for Maghtab, Qortin and tal-Fulija Landfills' in 2004. The same firm was, in part, also responsible for the drafting of the procurement document, including the Tender Dossier. Dr Delia intervened to state that, following the adjudication and evaluation, this firm also comforted the findings and the decision reached by the Evaluation Committee. Furthermore, the Chairman of the Evaluation Committee sought the advice of Mr Barry Gore (Scott Wilson Kirkpatrick & Co Ltd) following the letter of objection in which several issues relating to the scoring of the objectors' bid were raised. Mr Gore answered all queries raised by the objectors in this case which showed that, in spite of what was stated, there was no obscurity or hidden deliberation to exclude anybody.

With regard to the Technical Compliance Grid provided by the Contracting Authority, Dr Frendo clarified that, regrettably, there was a mistake because it did not represent the points given by Evaluator number 1 only because it showed the average points awarded by the five Evaluators of the Evaluation Committee.

As regards the appellants' request to furnish them with the breakdown of the points given to the other tenderers, Dr Frendo said that, in principle, WasteServ Malta Ltd, being the final beneficiary, was not against giving such information to the other party because its only interest was the implementation of the project. However, he drew the PCAB's attention to the fact that once the other tenderers were still in the running, there could be a breach of confidentiality and, therefore, it was up to the Board to decide whether the request was justified or not.

Dr Frendo concluded his opening statement by contending that the objection was unsustainable because apparently the objectors simply wanted to know what went wrong, if anything was wrong. He suspected that this was a very dangerous 'fishing expedition'.

On taking the witness stand, Mr Joseph Degiorgio, Chairperson Evaluation Committee, clarified that all technical issues would be dealt with by the technical evaluators because he was not a technical person.

On cross-examination by the PCAB, the Chairperson Evaluation Committee said that the Evaluation Committee was first nominated by WasteServ Malta Ltd and then approved and appointed by the Department of Contracts. Then, he explained the procedure following throughout the whole tendering and evaluation process. The actual publication/issue of the tender and the opening session was conducted by the Contracts Department. Subsequently, the Evaluation Committee evaluated in detail each individual offer, which was followed by the issue of a number of clarification letters. Mr Degiorgio said that Tenderers were not permitted to submit financial or additional information. Apart from this, the Evaluation Committee held clarification meetings with the bidders. The evaluation procedure continued with the assessment of each individual offer against the technical criteria of the tender dossier by each individual Evaluator.

With regard to the issue raised in respect of established criteria, Mr Degiorgio explained that, Clause 29.1 specified that *'The Evaluation Committee shall evaluate and compare only those Tenders determined as substantially compliant in accordance with Clause 28 above.'*

When Dr Delia asked the witness to explain how the points on each of the criterion of the Technical Compliance Grid were given, Mr Degiorgio replied that he was not in a position to answer because he was not involved in the awarding of points and also because he was not a technical member.

Mr Aurelio Attard, one of the five Evaluators, was the second witness to take the stand. On cross-examination by Dr Delia, Mr Attard confirmed that there were five voting technical members and that the Chairman and the Secretary did not participate in the scoring process. He declared that they did not have an *a priori* method of point scoring and that each Evaluator had a different evaluation scale of his/her own. He testified that in their evaluation, they took into consideration what tenderers offered against what was required in the tender dossier, including the clarification exercises. Mr Attard said that every Evaluator scored independently against the maximum points shown in the Technical Compliance Grid and then they compiled the average points of the Scoring Sheets and were included in the final report. He pointed out that although the final scores of each evaluator were not the same, there was a consistency in their judgement.

Dr Delia asked Mr Attard various questions on his attribution of points to World Waste Solutions Malta/ Van Der Wiel Infra & Milieu B.V. in respect of the various criteria featuring in the Technical Compliance Grid.

When he was referred to the description of 'Experience as a contractor', for which he gave them 15/20, Mr Attard said that in his judgement he took into consideration the technical similarity of the projects to the requirement in the tender dossier and not the number of the projects. He claimed that the defining criteria specifying in detail the kind of project that a tenderer had to offer was included under Volume 3 – 'Employer's Requirements'.

Mr Attard confirmed that he gave the appellants 6 points out of 10 for 'Quality Control Assurance System' and that the technical compliance grid asked for the description of the quality control assurance system that was to be used. He said although the appellants presented ISO 9001:2000 and VCA certifications, however, tenderers were required to submit the quality control methodology that the contractor intended to adopt during the course of works. Dr Delia drew the witness' attention to the fact that Volume 1 Clause 4.1.3 (j) required '*An outline of the Quality Assurance System(s) to be used (Form 4.5.6) and' which meant that the tenderer had to submit the greatest level of details that had to satisfy their requirement.*'

Mr Attard replied by quoting from Form 4.5.6. which required tenderers to '*provide ... details of the Quality Assurance System(s) ...*'. In reply to Dr Delia's question as to whether a tenderer was obliged to submit 'an outline' or 'details', the witness stated that a tenderer had to submit the greatest level of details that needed to satisfy their requirements.

As regards 'Equipment', the tender dossier specified that '*Tenderer owns or has access to the key items of equipment necessary for proper works implementation – specified in the (Form 4.5.2).*' When asked whether the tenderer actually complied with this criterion, Mr Attard answered by quoting from his personal notes taken during the clarifications meeting wherein he noted that "the main offer submitted is effectively not meeting the requirements." He was not aware whether the other evaluators shared that opinion and confirmed that he gave a score of 2 out of 5.

With regards to 'Work Programme', Mr Attard confirmed that the tenderer had submitted a 'Bar Chart' and that he gave them 9 points out of 15. He said that the reply given to the clarification required about the four months trial period was reflected in the marks given.

As far as 'Personnel' was concerned, Mr Attard said that once 'Language' was one of the requirements on the CV, he took it into consideration in his evaluation. Furthermore, he explained that although the CV did not feature in the Technical Compliance Grid they included a CV template in the Tender Dossier. Dr Delia insisted that it was not a consideration but a requirement.

On cross-examination by the PCAB, Mr Attard confirmed that during clarification only normal discussions were held. Furthermore, the same witness confirmed that the evaluators were not subjected to any mental conditioning. He also declared that they were aware of the identity of the tenderers during evaluation because they were present for the tenders' opening session.

Dr Frendo cross-examined Mr Attard and the latter confirmed that each evaluator awarded points in compliance with the requirements of the Tender Dossier. Mr Attard testified that the bidders knew of the scoring structure beforehand because this was indicated in the Technical Compliance Grid of the Tender Dossier.

With regard to Scott Wilson Kirkpatrick & Co Ltd, Mr Attard said that, apart from assisting the Evaluation Committee, the Company was contracted to compile interim reports as well as being involved in the drafting of the Tender Dossier. Also, the witness stated that Scott Wilson Kirkpatrick & Co Ltd were provided with all the tender documents and a copy of all offers.

Mr Attard confirmed that he was aware of the Scott Wilson Kirkpatrick & Co Ltd's report dated 10 October 2005 and that his conclusions comforted the decision reached by the Evaluation Committee.

Mr Attard pointed that although the Evaluation Committee had sought the consultant's advice in respect of the technical submissions, the Evaluators' score did not reflect fully the consultant's score because his score was lower than the average points awarded by the evaluators as shown hereunder:

<b>Criterion</b>	<b>Evaluators</b>	<b>Scot Wilson</b>
Experience as a Contractor	12.4/ 20	12.0/ 20
Personnel	7.8/ 15	7.0/ 15
Equipment	3/ 5	2/ 5
Method Statements	21.2/ 35	12.0/ 35
Work Programme	9.2/ 15	7.0/ 10
Quality Control Assurance System	6.8/ 10	2.0/ 5
<b>Total</b>	<b>60.4/ 100</b>	

He explained that the Evaluators' scoring under 'Work programme' was out of 15 whilst that of Scott Wilson Kirkpatrick & Co Ltd was out of 10. This was due to the fact that in the Scott Wilson Kirkpatrick & Co Ltd's Evaluation Grid there was an additional item for maintenance costs.

During his testimony, Mr Attard insisted that the fact that Scott Wilson Kirkpatrick & Co Ltd scored differently was a proof that the consultants did not influence their judgement and that they had assessed the offers according to their individual personal judgement. Furthermore, he pointed out that Scott Wilson Kirkpatrick & Co Ltd were not Evaluators but Consultants/ Advisers.

He confirmed that they had the Scott Wilson Kirkpatrick & Co Ltd's original report dated 18 July 2005 before they concluded their report. It was noted that the Evaluator's Technical Compliance Grids were also dated 18 July 2005. However, Mr Attard reiterated that the fact that they scored differently was a proof that they were not influenced by the report.

Dr Delia insisted that the Scott Wilson Kirkpatrick & Co Ltd's original report dated 18 July 2005 should be exhibited in order to establish the marking system used. He said that a scoring system should be a scientific method in order not to allow subjectivity. He argued that standards were not judged on the same method because the points for each criterion were awarded subjectively by each evaluator.

Dr Cremona, another legal representative for WasteServ Malta Ltd, explained that in a scenario which involves five different people (Evaluators), no matter how objective the criteria are, one would always expect an element of subjectivity. Every evaluator has a personal discretion and an own subjective evaluation in accordance with the objective criteria in the Technical Compliance Grid. He said that the evaluation committee was appointed by the Contracting Authority to conduct an examination of

the bids submitted and to evaluate same against a set of objective selection criteria as outlined in the Scoring column of the Technical Compliance Grid in the tender dossier. He emphasised that there was no breach of the public procurement regulations.

At this point, Dr Wessel HR van Boetzelear insisted that a public tender should be transparent and that the method of point granting should be objective and known in advance. He said that the whole evaluation exercise was completely subjective. Dr Boetzelear said that the subjective evaluation of facts was wrong and it was not possible in public tendering. He argued that, if the method of points given was the same, they should have the same level of discretion.

On cross-examination by Dr Delia, Mr Frederick Welling declared that they had satisfied all the criteria set out in the Technical Compliance Grid and that they had answered all questions asked in the clarification exercise. However, replying to Dr Cremona's specific question, the witness said that he was not present during the clarification meeting.

When, Dr Delia was about to ask Mr Welling questions on the Scott Wilson Kirkpatrick & Co Ltd's report, there were interruptions from the other party's representatives. Dr Delia insisted that, once this document was presented as evidence, he should be permitted to rebut issues raised therein either through the cross-examination of the witness or by means of written submissions. The PCAB explained that they were going to give them a right of reply because they intended to ask the parties concerned to present written submissions. On the lawyer's request this incident was verbalised as follows: 'Dr Delia, for the appellant is, at 12.45, introducing his first witness in front of the Board ... has not even asked his first question yet, ... this being objected to and interrupted to continuously.'

Subsequently, the cross-examination of Mr Welling was continued by Dr Boetzelear as Dr Delia decided not to ask him any questions. The witness testified that their company had worldwide and vast experience in gas extraction and landfill rehabilitation projects. He confirmed that they had submitted the CVs exactly as requested and that they had completely satisfied all questions related to the 'Method Statement' criterion, including clarifications. As regards the 'Quality control and Assurance System', Mr Boetzelear said that the ISO was a certified system that was accepted worldwide. As a consequence, he did not agree with the findings and conclusions of that Scott Wilson Kirkpatrick & Co Ltd's report.

On cross-examination by Dr Frenedo, Mr Welling explained that the experience in gas extraction was relevant to the aerial emission control project because the scope of the tender was the control of emissions from a landfill. Also, he pointed out that the difference between them was minor. Mr Welling declared that although he did not visit the site and did not read the Scott Wilson Kirkpatrick & Co Ltd's report about the rehabilitation of the site which was published as an Annex with the tender dossier, his colleagues did.

In his conclusions, Dr Delia informed the PCAB that although his clients had submitted all the required documents, Mr Welling desired to exhibit other documents in respect of points he had just testified upon regarding experience and personnel. He explained that they wanted to present these documents because they were relevant to

the Scott Wilson Kirkpatrick & Co Ltd's report which was seen for the first time during these proceedings. The PCAB drew his attention that during this hearing it was revealed that the Scott Wilson Kirkpatrick & Co Ltd's report did not influence the final decision because it was only part of a consulting process. Dr Delia explained that the witness wanted to present those documents not because they were missing from the original submission but to prove the point that what the Evaluation Committee decided upon was not required. Moreover, his clients would have been able to provide all other pertinent information had they been asked to do so.

On his part, Dr Cremona said that, at this stage, the tender dossier specifically barred tenderers from submitting any additional documentation and therefore, if these were to be presented, they would be disqualifying their own bid.

Dr Frendo concluded his intervention by stating that the appellants had obtained the minimum standard but failed on the 70 point benchmark. He said that it was inadmissible at this stage for the appellants to provide new documentation with a view to get bonus points.

At that moment, Dr Delia verbalised that: 'The reason for us submitting these documents has been fulfilled already because we are now being informed that if you are proficient in English you would get bonus points. That is one of the reasons why we were saying that the system was not clear in our eyes, would have never been clear, because we did not know that they would get bonus points in English but not for example in being graduates at University in technical matters which are related.' Then, Dr Delia withdrew their request for the submission of information because he understood that the point had been made clearer by the admission of WasteServ Malta Ltd's team.

At the end of the sitting it was agreed that written submissions were to be forwarded to the Secretary of the PCAB and to exchange same between parties by not later than 12.00 hours (Noon) of Monday, 21 November 2005. They were also required to submit them by electronic mail. Also, if the parties had any reservations, they were granted permission to respond and furnish the PCAB and the other party with their final submissions within 48 hours, that is, by 12.00 hours (Noon) of Wednesday, 23 November 2005. It was made clear that no new evidence was to be included in their respective submissions.

The submissions by both parties were made as agreed and appear as Appendices 'A' to 'C' to this sentence.

## **Appendix A**

**Submissions of appellants World Waste Solutions Malta / Van Der Wiel Infra & Milieu B.V. as Leader (hereinafter collectively referred to as “appellants”) in the appeal regarding the tender offer for the rehabilitation of Maghtab, Qortin and Wied Fulija Landfills (CT 2586/2004) (hereinafter referred to as the “tender offer”);**

The appellants respectfully submit that:

Whereas WasteServ Malta Limited (hereinafter referred to as the “Contracting Authority”) issued the above-cited tender offer;

Whereas the tender offer was published in the EU Official Journal;

Whereas appellants submitted their tender bid regarding the tender offer;

Whereas by means of a letter dated 22<sup>nd</sup> September, 2005 sent by the Department of Public Contracts the appellants were informed that their tender bid was “not among the selected ones since it has been adjudicated as technically non-compliant because it obtained 60.40 points whilst the minimum requirement was that of 70 points”;

Whereas the appellants have obtained, after due request, the Technical Compliance Grid of the adjudication process in the tender offer (hereinafter referred to as the “Technical Compliance Grid”), labeled as worked out by Evaluator No 1, but which in the public hearing mentioned hereunder, it transpired that such Grid was actually showing the average marking of all the members of the Evaluation Committee;

Whereas the grid is composed of six criteria, (namely i) experience as contractor, ii) personnel, iii) equipment, iv) method statements, v) work programme and vi) quality control); and accordingly lists the number of points that the appellants were awarded as per each criterion and the resulting total number of those points;

Whereas the said grid also lists the resulting total number of points awarded to the other bidders but it does not show the relative points awarded to each bidder as per each criterion;

Whereas the appellants felt aggrieved by their exclusion from the tendering process and filed their objections on the 28<sup>th</sup> September 2005;

Whereas the appellants put forward their grievances in a public hearing in front of this honourable Board held at the Department of Contracts at 9.00 am on Friday, 4<sup>th</sup> November 2005;

Whereas during the said public hearing, this honourable Board heard the evidence tendered by, a member of the Evaluation Committee of the Contracting Authority (hereinafter referred to as the “Evaluation Committee”), namely Engineer Aurelio Attard;

Whereas this Board during the said public hearing declared that it was going to take Mr Attard's testimony as representative of the whole Board;

Whereas the appellants in the said hearing were asked by this honourable Board to submit their submissions in writing and therefore the appellants respectfully submit the following grievances;

### **1. LACK OF OBJECTIVITY, EQUALITY AND TRANSPARENCY IN THE CONTRACTING AUTHORITY'S CONDUCT**

Preliminarily, the appellants submit that the Evaluation Committee, in awarding its points, did not interpret the criteria listed in the Technical Compliance Grid in an objective, equal and transparent manner. In the appellants view, this constitutes a serious infringement since the criteria, as worded, did not allow for subjectivity and therefore any bidder that satisfied the criteria should have been awarded the maximum number of points allotted to each criterion. However, the adjudication committee chose to arbitrarily award points subjectively vis-à-vis each criterion.

From the said deposition by Engineer Aurelio Attard, it transpires that the members of the Committee interpreted each technical criterion in the Technical Compliance Grid each to his own subjective personal standards.

If one had to look at the third criterion in the Technical Compliance Grid, namely "Equipment", the tenderer is required to "own or have access to the key items of equipment necessary for proper works implementation – specified in the Form 4.5.2." There is no doubt about the objectivity of this criterion, since a bidder would either satisfy this criterion or not. Since upon being asked whether the appellants complied or not with this criterion, Mr. Attard answered in the positive, it is therefore inconceivable therefore how the applicants, who showed that they satisfy this criterion, obtained less points than the maximum allotted to that criterion.

To illustrate this point further it is sufficient to consider how Mr Attard said that he allotted points vis-à-vis the first criterion, namely "Experience as a contractor", which stipulated that "the leading partner shall have successfully completed at least two similar projects over the last three years as main contractor". When being asked how many projects must have a bidder submitted in order to obtain the maximum points, Mr Attard failed to answer. Upon being asked again, Mr Attard testified that the number of projects was only relatively important since in his allotment of points regarding this particular criterion, apart from the quantitative aspect of the projects, he also took in consideration and the degree of similarity of the projects with the present project. However, upon being asked repeatedly to specify how he apportioned his points between these two aspects (i.e. quantity and similarity of projects), he failed to give an answer. This example goes on to demonstrate how the objectivity, if any, of the conduct Evaluation Committee cannot be possibly verified *a posteriori* by a reviewing board (such as this honourable Board). This is a serious infringement of the maxim established by ECJ jurisprudence that "The principle of equality implies an obligation of transparency in order to permit verification that it has been complied with" (see, inter alia, Case C-92/00 *HI* [2002] ECR I-5553, paragraph 45, and Case C-470/99 *Universale-Bau and Others* [2002] ECR I-11617, paragraph 91).

Moreover, Mr Attard admitted that when awarding points he also considered the level of the English language of the personnel proposed by the appellants for this project. This factor, which later proved to be decisive, was absolutely not known *a priori* to the appellants.

## **1.1 Legislation and jurisprudence on the concept of discrimination in the field of public procurement.**

### ***1.1.1 Maltese legislation on the principles of objectivity and nondiscrimination***

The law itself stipulates that in a tender offer, the bidders are bound to furnish evidence of their technical capacity only if so requested by the contracting authority. Art. 47 of Legal Notice 299 of 2003 (Public Contracts Regulations), as amended by Legal Notices 377 and 473 of 2004, lays down that:

*(2) **Where the contracting authority requires evidence** of the candidates' or tenderers' technical capacity this may, as a general rule, be furnished by one or more of the following means according to the nature, quantity and purpose of the products, works or services to be supplied...*

*A contrariu sensu*, when the contracting authority is not expressly requiring evidence that a bidder satisfies a particular technical criterion, then that contracting authority cannot base any decision upon such undeclared criterion.

Moreover, as a general principle, our law stipulates that contracting authorities shall uphold the principles of non-discrimination and equality. In fact, Regulation 4(1) of the above-mentioned Legal Notice, stipulates that:

*Contracting authorities shall ensure that there is no discrimination between undertakings, and that all undertakings are treated equally in all calls for tenders whatever their estimated value.*

As will be further expounded hereunder, the European Courts have frequently stated that the principles of nondiscrimination and equality encompass the principles of objectivity and transparency.

### ***1.1.2 European jurisprudence on the concept of nondiscrimination and its corollaries: i) objectivity, and ii) transparency***

The European Court of First Instance (hereinafter referred to as "CFI") and the European Court of Justice (hereinafter referred to as "ECJ") have authoritatively established that when a contracting entity lays down prescriptive requirements in the contract documents, observance of the principle of equal treatment of tenderers requires that all the tenders must comply with them so as to ensure objective comparison of the tenders (see, *inter alia*, Case C-243/89 *Commission v Denmark* [1993] ECR I-3353, paragraph 37; and Case C-87/94 *Commission v Belgium* [1996] ECR I-2043, paragraph 70). Additionally, it has been established that the procedure for comparing tenders has to comply at every stage with both the principle of the equal treatment of tenderers and the principle of transparency so as to afford equality of opportunity to all tenderers when formulating their tenders (see, *inter alia*, *Commission v Belgium*, cited above, paragraph 54).

As specified in Chapter II(1) of the Commission Interpretative Communication on the Community law applicable to public procurement (4.7.2001, Brussels, COM(2001)), the European public procurement Directives make it clear that the technical criteria have to be objective and relevant to the contract:

*In order to enhance transparency, the Directives oblige contracting authorities to indicate the technical specifications in the general or contractual documents relating to each contract. The objective of these rules is the opening up of public markets, the creation of genuine competition and preventing markets being reserved for national or specific undertakings (i.e. avoiding discrimination). Technical specifications include all characteristics required by the contracting authority in order to ensure that the product or service fulfils the use for which it is intended. These technical specifications give objective and measurable details of the subject matter of the contract and therefore have to be linked to the subject matter of the contract.*

## **1.2 Verification by a reviewing authority**

The European Courts have laid down that in order for the principle of transparency to be upheld, a reviewing authority must necessarily be in a position to verify that any risk of favouritism or arbitrariness has been completely excluded in the conduct of the contracting authority.

### ***1.2.1 Verification of the absence of any risk of favouritism and arbitrariness, as a corollary of the principle of transparency***

In the appellate case (C-496-99) *CAS Succhi di Frutta v Commission* [1999] ECR II-3181, the ECJ authoritatively stated that:

*The principle of transparency which is its corollary [of the principle of nondiscrimination] is essentially intended to preclude any risk of favouritism or arbitrariness on the part of the contracting authority. It implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.*

Thus, it follows that if a reviewing authority (such as this honorable Board) is not in a position to verify that any risk of favouritism or arbitrariness was excluded by the contracting authority, then such a contracting authority has breached the principles of transparency and nondiscrimination required by law.

### ***1.2.2 Method of assessment in breach of the principle of transparency***

In the present case, when one compares the mode of operation of the Evaluation Committee with how the tender documents were drafted, it is sufficiently clear that the criteria were interpreted in a different way by the Committee than how a person exercising ordinary care would understand and interpret their **exact** significance.

Another fact which demonstrates the lack of transparency in the conduct of the Evaluation Committee is the fact that, as stated in the premises above, in the copy of the Technical Compliance Grid given to the appellants, the point awarded to the other bidders vis-à-vis each criterion were deleted. This is clearly in infringement of the principle of transparency. In fact, in the Opinion of the Advocate General in *Consorzio Aziende Metano (Co.Na.Me.) v Comune di Cingia de' Botti* “the principle of transparency is, moreover, a guiding principle for the award procedure as a whole. It also comprises, for example, the **demonstrability** of decisions taken by contracting authorities...” (Case C-231/03, paragraph 90).

Therefore, we respectfully submit that this reviewing authority, namely this honourable Board, is not in a position to verify that the Evaluation Committee of the contracting authority precluded any risk of favouritism or arbitrariness. This, according to the ECJ jurisprudence, would necessarily indicate that the principles of objectivity, equality and transparency have not been abided to by the said Committee.

## **2. IRRELEVANT CONSIDERATIONS**

Furthermore and without prejudice to the above, the decision to exclude the appellants from the tender process was also one based on irrelevant considerations. As already mentioned above, in the above-mentioned public hearing Mr Aurelio Attard divulged the fact that the fluency in English was one of the considerations of the members of the Evaluation Committee in the awarding of their points. This not only infringes the principle that a tenderer should not be judged on what is not asked of him but it also runs counter to the rule that the information sought from the tenderers has to be confined to the subject matter of the public contract. This principle emanates from Regulation 47(1)(3)(6) of the above-mentioned Legal Notice:

*The extent of the information referred to in regulation 46 and in subregulations (1), (2) and (3) of this regulation must be confined to the subject matter of the public contract.*

It is inconceivable how the English fluency of the experts proposed by the appellants for a public contract regarding the rehabilitation of a landfill. Thus the fact that the Evaluation Committee took into consideration such extraneous and irrelevant criteria is another infringement committed by the said Committee in arriving at the decision which is the subject of this appeal.

## **3. RESULTING FUNDAMENTAL FLAWS IN THE AWARD CRITERIA**

Furthermore and without prejudice to the above, the criteria for award as stated in the Tender Document are completely unworkable. According to Clause 31.1 of the Tender Document, the Evaluation Committee is bound “to select the Tenderer whose Tender has been determined to meet the administrative and technical criteria, and has offered the most economically advantageous offer”. Then Clause 31.3 states that “The most economically advantageous tender is established by weighing technical quality against price on a 60/40 basis respectively”.

Moreover, according to Article 25(2) of the above-mentioned Legal Notice:

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

Therefore it follows that, when the award is to be made to the most economically advantageous offer, the Evaluation Committee cannot limit itself to the price but must take other contract-related criteria into consideration.

In fact, in two 2003 cases, namely *Strabag Benelux v Council* (T-183/00) and *Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT)* (C-315/01), the ECJ, stated that, in the case where the award is to be made to the most economically advantageous offer, while Article 26(1) of Directive 93/36 leaves it to the contracting authority to choose the criteria on which it intends to base its award of the contract, that choice may relate only to criteria aimed at identifying the offer which is the most economically advantageous (also see, inter alia, *Case 31/87 Beentjes* [1988] ECR 4635, paragraph 19, *Case C-19/00 SIAC Construction* [2001] ECR I-7725, paragraph 36, and *Case C-513/99 Concordia Bus Finland* [2002] ECR I-7213, paragraph 59).

It is submitted that a proper and objective evaluation of the technical criteria in the present case would result in all bidders obtaining the maximum number of points. Therefore it follows that since according to the tender offer, the award is to be made on the basis of a 60/40 ratio of technical quality against price, this tender would be automatically awarded to the offer with the lowest price. Consequently, in principle, this tender could never be awarded to the most economically advantageous offer and thus the awarding criteria of this tender offer are intrinsically flawed.

#### **4. UNJUSTIFIABLE AND ARBITRARY AWARDING OF POINTS**

Additionally and without prejudice to the above, the appellants submit that in his testimony, Mr Attard, although being asked repeatedly, failed to demonstrate how and why he awarded the points in the manner that he did. In fact, the points awarded as per each criterion are unjustifiable and unexplainable as shall be demonstrated hereunder:

##### **4.1 Experience as a contractor**

In the tender document, the following description is given: “*He shall have successfully completed at least 2 similar projects over the last 3 years as Main Contractor*” (Cl. 4.2.A.5 or Cl. 4.2.B.6).

The appellants have a proven track record and long term experience with complex projects similar to the Rehabilitation of Landfill project on Malta. In the letter from the appellants on the Clarification Issue (2) dated July 6<sup>th</sup> 2005 (reference 5156-1/RK/GW), further reports were submitted on similar projects in which the appellants were the Main Contractors in the past.

The appellants therefore have easily successfully completed two similar projects (as the project in this tender offer) over the last 3 years as a Main Contractor. The

appellants refer to the following projects that can be regarded as “similar” to the present project:

- Project Yanzoabang China
- Project Villa Dominico Argentina
- Project Landfill Bandeirantes Brasil
- Project Landfill Boldershoek The Netherlands
- Project Landfill and Biogas Ecopark De Wierde The Netherlands
- Project Waste Water Treatment Plant Den Bosch The Netherlands
- Project Environmental Project Landfill Drachtstervaart The Netherlands
- Project Environmental Project Maarsse The Netherlands

The appellants submit that since they complied with this criterion, upon an objective assessment, they should have been awarded full points.

#### **4.2 Personnel**

In the tender document, the following description is given: “*The tenderer has suitably qualified personnel to fill the following positions i.e. in number and with experience stated in the relevant table in the point 4.2.7 of the Instructions to Tenderers:*

1. *Project Manager/Home Office Co-ordinator (...);*
2. *Site Manager (...);*
3. *Quality Control Manager (...);*
4. *Health and Safety Manager (...).*

With reference to the appellants’ letter on the Clarification Issue (1) dated June 16<sup>th</sup> 2005, reference 5137/RK/GW and the Tender documents with the Curriculum Vitae, appellants has completely complied with this criterion. All positions as mentioned have been filled in and all personnel have long and highly qualified (relevant) experience.

The appellants are therefore fully convinced about the quality of its personnel and the long term experience of this personnel. These personnel have more experience with similar works than the minimum qualification asked in the tender documents:

Once again, the appellants complied with this criterion and therefore the full marks awardable should have been given.

#### **4.3 Equipment**

This criterion specified: “*Tenderer owns or has access to the key items of equipment necessary for proper works implementation – specified in the (Form 4.5.2).*”

The appellants have ownership of, access to and the availability over **all** the key items of equipment for finalising the work (such as: excavators, bulldozers, dumptrucks, loaders, compactors, drilling machine, degassing installation (compressors et cetera). Moreover, the Bonnici Brothers group, one of the present appellants, are the sole

importers in Malta for the Caterpillar brand of machinery and parts, which are undoubtedly the world's largest equipment supplier<sup>1</sup>.

Van der Wiel is the dealer for the Netherlands as well as for South America and Asia for landfill gas flares (from the supplier Hofstetter). Van der Wiel manufactures turnkey degassing and biogas plants within own workshops. They have demonstrable experience in the field of landfill gas. Van der Wiel has the possibility for renting flares.

It is evident that all key items of equipment is owned by or directly accessed by appellants, who therefore fully comply and again surpass the requirements in this criterion. There is no doubt that the full five points should have been awarded in this case.

#### **4.4 Method Statement**

In the tender document, the following description is given for this criterion: *“Comprehensive Method Statements for major activities (to be read in conjunction with Work Programme) with drawings where applicable, showing the methods proposed by the Tenderer for carrying out the Works. Proposed technical solution as well as list of spare parts for the installed equipment for 3 years.”*

The appellants have included in their tender bid a list of spare parts for the installed equipment (degassing system) for three years.

Further the appellants have drawn a highly detailed Method Statement (including drawings of the proposed methods) that is even comprehensible by non-technical people. The Work Programme is connected to this Method Statement (1 on 1) and thus the appellants have complied fully and comprehensively with this criterion.

The leading partner is highly experienced in degassing and rehabilitation of landfills (see reference list) and it is incomprehensible how and why this Method Statement - that has been applied in several projects and thus proven its successfulness, is deemed as “insufficient”. One here must pose the question why is this method being deemed insufficient to the Malta government if this same method of Van der Wiel is considered (European Union) “State-of-the-Art” by Dutch and foreign governments.

Therefore even in this case, the appellants should have been awarded the maximum points.

#### **4.5 Work programme**

In the tender documents, this criterion is described as follows: *“A Work Programme (...)- Bar Chart with brief descriptions of major activities, showing the order of procedure and timing in which Tenderer proposes to carry out Works.”*

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<sup>1</sup> In 2004, Caterpillar posted sales and revenues of \$30.25 billion and a profit of \$2.03 billion. Approximately half of all sales were to customers outside of the United States, maintaining Caterpillar's position as a global supplier and leading U.S. exporter.

The appellants refer to the highly detailed Work Programme (bar chart) that they submitted with their tender bid.

This Work Programme is far more detailed than requested (Waste Serv requested only a bar chart and client submitted one) Again here one cannot comprehend why the maximum points were not awarded in this case.

#### **4.6 Quality control and Assurance system**

In the tender document, the following description is given: “*Please provide (..) details of the Quality Assurance Systems(s) it is proposed to use to ensure successful completion of the Works.*”.

The criterion sees only to the quality assurance systems applied by the contractor, ensuring the principal successful completion of the Works.

The leading partner, Van der Wiel Infra & Milieu B.V., has ISO 9001:2000 certification. This partner is also certified for VCA. VCA is the Dutch name for SCC and SCC stands for Safety Checklist Constructor. This is the highest level of safety working in the Netherlands and is a European admitted safety control system. With the ISO 9001:2000 and the SCC certificates Van der Wiel confirms to all parts of the requested safety and quality assurance system.

This tender bid complies fully to the highest assurance systems possible in its working method. There is no other or higher “*Quality Assurance System*” possible and therefore here the objector should be awarded the full ten points.

It is therefore sufficiently clear that the operation of the Adjudication Committee in awarding its points was also unjustifiable and not based on any objective considerations.

#### **5. CONCLUSION**

Therefore, because of the reasons expounded above, namely 1) the lack of objectivity, transparency and equality, 2) irrelevant considerations, 3) resulting fundamental flaws in the awarding criteria, and 4) unjustifiable and arbitrary awarding of points; the appellants humbly request the Public Contracts Appeal Board to declare that the evaluation process by the Evaluating Committee in the present tender offer constitutes an infringement of Maltese and European public procurement legislation; and consequently to annul the Committee’s decision to exclude the appellants from the tender process.

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**Dr. Adrian Delia LL.D**

## **Appendix B**

**Written submissions in connection with the appeal lodged by ‘World Waste Solutions Malta/Van der Wiel Infra & Milieu BV as Leader’ (“The Appellants”) interms of the letter dated 22nd September 2005 issued by the Director General (Contracts) and in connection with Tender Number CT2586/2004.**

Submissions of WasteServ Malta Limited (WasteServ .) as the final beneficiary of the contract number CT 2586/2004.

### **1. Appeal dated 28th September 2005 lodged by the Appellants**

1.1 In their letter of objection dated 28th September 2005 the Appellants present two preliminary objections and submissions in substance per criterion. Addressing each individual criterion for adjudication. Appellants assert that the adjudicated points are *completely and unreservedly subjective* and that the scoring *has resulted in being at least subjective, evidently unequivocal (sic), un-transparent* and allegedly unjust.

They argue that the point system is equivocal in that either the points are attributed on an individual only basis, in which case they contend that they should have been allocated maximum points (i.e. 100 points) or on a comparative basis in which case they contend that they were not in a position to lodge a proper appeal since they were not given access to the breakdown of points per criterion awarded to the other bidders.

1.2 The objection then addresses the six technical criteria listed in the Technical Evaluation Grid published by the Contracting Authority and make a detailed own re-evaluation of their claim. For each criterion, the letter of objection distinguishes between the two scenarios described by the Appellants themselves above, i.e. either the award of full points or else the suggested score in terms of their evaluation of own strengths and merits per criterion.

1.3 Appellants further contend that the scope of the present tender falls within their full capabilities and proven track record. and therefore they ask the Public Contracts Appeals Board (hereinafter .PCAB.) to declare that their bid should not have been disqualified and that the process should proceed with the opening of their financial statements.

### **2. Hearing at the PCAB**

2.1 The PCAB held an oral sitting on Friday 4th November 2005 in which following the legal submissions of counsel for appellant and counsel for WasteServ, the PCAB heard the witness of the Chairman of the Evaluation Board, Mr. Joseph De Giorgio, of one of the voting members of the Evaluation Committee Ing. Aurelio Attard and of Mr. Frits Welling from Van der Wiel Infra & Milieu BV, the Leader firm/partner.

2.2 **Mr. De Giorgio** confirmed the scores reached by the Evaluation Committee and explained to the PCAB that the compiled Technical Evaluation Grid forwarded to the Appellants prior to their appeal represented the average of the scores reached by the five evaluators. The witness explained that the Secretary and himself did not participate in the scoring process. He also explained that the external consultant Scott Wilson Kirkpatrick Co. Ltd (.Scott Wilson.) was also asked to review their

adjudication following a preliminary report and that in terms of the report submitted in these proceedings he felt comforted by the scoring of the external consultant, in 3 that it attributed in actual fact lower points to the Appellants. bid than the Evaluation Committee.

2.3 In his examination-in-chief and cross-examination, **Ing. Aurelio Attard** then explained in detail the evaluation process conducted by the Evaluation Committee, the internal meetings held, the role of the external consultancy firm Scott Wilson and the scoring process. Ing. Attard explained that each individual bid was scored against a set of objective criteria which in turn had different weightings as shown in the Technical Evaluation Grid. He described in detail how each evaluator marked all the bids separately and how the Evaluation Committee in view of the highly technical nature of the Employers. Specifications in this tender, decided to hold identical clarification meetings with all the bidders.

2.4 The last witness to be produced was Mr. Frits Welling, representative of the LeaderFirm. Mr. Welling in his examination-in-chief, tried to trace the history of Van der Wiel, the achievements, past projects and knowledge in the area of landfill management and development. He unsurprisingly confirmed that in his opinion his firm should not have been excluded from this process since he felt that the bid satisfied the criteria set out in the Tender documentation. Direct reference was made to the clarification meeting held with the Appellants, and the witness argued that all the documentation asked for by the Evaluation Committee in this meeting had been duly submitted by the Appellants. In cross-examination however the witness answered that he was not present for the said clarification meeting. Mr. Welling also confirmed that experience in gas extraction was relevant for a tender concerning aerial emission control and that the two areas were so intrinsically inter-related that one could not distinguish aerial emission control from gas extraction and 4 management projects. This could not be substantiated as Mr. Welling had not even visited the site and was not familiar with the scientific .Site Investigation Report. (drawn up by Scott Wilson), a summary of which was published as an annex to the Tender Dossier.

### **3. Adoption of correct procedure by the contracting authority and exclusion of bid**

3.1 As already submitted in Waste Serv .s written pleadings, the objection letter filed by the Appellants before the PCAB, does not adduce any grounds of procedural irregularity or other defects in the process of evaluation and subsequent adjudication of the individual tenders in terms of their respective bids. Appellants fail to indicate any single instance where the conduct of the Evaluation Committee or the Contracting Authority was in breach of the provisions of LN 177 of 2005 or the pre-existing public contracts regulations

3.2 Indeed, the Evaluation Committee, composed of five voting members, the Chairman and the Secretary, was duly appointed by the Director General (Contracts) in terms of the said Legal Notice, conducted its proceedings in strict compliance with the provisions of the applicable procurement legislation and the terms and conditions of the Tender Dossier, and *inter alia* held open and identical clarification meetings with all the bidders. Throughout the whole process, not only has the contracting authority through its Evaluation Committee complied with the letter and

the spirit of the law, but it has acted in accordance with best practice in the field of public procurement and with maximum transparency.

1 LN 299 of 2003 (as amended) 5

3.3 This is directly recognised by the Appellants in their appeal. Whereas they object to the fact that their bid was *'not among the selected ones since it has been adjudicated as technically non-compliant because it obtained 60.40 points whilst the minimum requirement was that of 70 points* in terms of the letter of the Director General (Contracts), they do not contest that the procedure was in fact conducted fairly and in accordance with the law. This appeal is thus merely a weak attempt to replace the evaluation process conducted by the Evaluation Committee with a different appreciation of the offer they submitted, since the Evaluation Committee has excluded their offer.

3.4 In their appeal, the Appellants allege that *"the adjudicated points are completely and unreservedly subjective. Other than the description as given in the tender documents, there is no objective system for adjudicating points."* This assertion is both misleading and factually incorrect for the following reasons:

3.4.1 Whereas contrary to what has been alleged by the Appellants, there is absolutely nothing intrinsically irregular, illegal or otherwise unfair in a subjective award of points by the individual evaluators in terms of their collective remit, it is utterly incorrect to assert that in this process there was no objective benchmark or ruler for the evaluation of the individual bids and their respective scoring for adjudication purposes. As the Appellants are well aware, and as was amply proven in the oral hearing in front of the PCAB, the Contracting Authority published a **'Technical Compliance Grid'** (as part of the Tender Dossier) in which the six objective criteria for adjudication and their respective weighting in terms of percentage points were clearly set out. According to the Tender Dossier, in order for a tender to be declared as technically compliant and therefore later to be adjudicated in terms of the financial proposals, a tender had to score a minimum of 70 points out of a possible 100.

3.4.2 These points were in turn clearly divided as follows: (a) 20 points for *experience as a Contractor*, (b) 15 points for *Personnel*, (c) 5 points for *Equipment*, (d) 35 points for *Method Statements*, (e) 15 points for the *Work Programme* and (f) the final 10 points for the *Quality Assurance system* in place.

3.4.3 In the corroborated evidence given by members of the Evaluation Committee, both voting (Ing. Aurelio Attard) and non-voting (Chairman Mr. Joseph De Giorgio), each tender was individually marked with respect to each one of the six criteria above-mentioned and a final comparative exercise was then undertaken in order to streamline scores and to ensure uniformity of judgement. Appellants were given a copy of a compiled Technical Evaluation Grid showing an average of their scoring per criterion and the total scores of the other participating bidders.

3.4.4 If, as is clearly the case, there was therefore (1) no irregularity or breach of procurement legislation by the Contracting Authority whilst at the same time, (2) the Evaluation Committee has used an objective set of criteria against which to score the individual tenders submitted in response to its call for offers, the

Appellants. objection evidently rests solely on the fact that they disagree with the result of what is termed in their appeal as the subjective evaluation. of the evaluators. This argument is tantamount to an unacceptable attempt at replacing the discretion of judgement entrusted by law and in terms of the Tender Dossier to the Contracting Authority and the Evaluation Committee appointed by it.

3.4.5 Such evaluation of the individual merits of each tender, when one considers the provisions of the Employer.s Requirements and the peculiarities of the particular project, ought not be disturbed by the PCAB unless there is a fundamental error of judgement or for instance gross negligence on the part of the Contracting Authority in the adjudication process. This is evidently not the case in this instance, as it has not even been alleged by the Appellants let alone proved. In addition the PCAB should even more refrain from reviewing on its merits decisions reached by evaluation committees in contracts (as the present services contract), where there are strong complex and technical elements which are best adjudicated by the persons appointed by the Director General (Contracts) and who have hands-on access to all the technical documentation and the specifications of the particular project.

3.5 In addition, WasteServ Malta Limited, respectfully submits that it does not have to prove in these proceedings that the Contracting Authority has acted correctly and that the adjudication process was open, transparent and fair by for instance proving that the scoring was correct and not capricious. The burden to prove otherwise in these proceedings clearly rests on the Appellants. But Appellants have instead limited themselves to try to add to the terms of their original bid by discussing its merits and reviewing it all over again at the oral hearing, in a direct attempt at trying to show that the total score of 60.40 attributed on average by the five members of the Contracting Authority.s Evaluation Committee was wrong.

3.6 In these circumstances and in order to reaffirm that the PCAB should never disturb the decision of the Director General (Contracts) unless it is convinced that such decision is fundamentally flawed or otherwise contrary to the applicable public procurement regime, WasteServ however feels that in these circumstances it should address particular grievances indicated by the Appellants in their letter of objection. This will enable the PCAB to ascertain that not only was the process conducted in accordance with the public contracts regulations but that the exclusion of the 8 Appellant.s bid is furthermore justifiable in objective terms. An example of this is the objection to the scoring done by the Evaluation Committee on the first criterion, i.e. the experience as a contractor.

3.7 In their letter of objection, Appellants claim that:

*“Objector has a proven track record and long term experience with complex projects similar to the Rehabilitation of Landfill project on Malta. In the letter from client on the Clarification Issue (2) dated July 6th 2005 (reference 5156-1/RK/GW), further reports were submitted on similar projects to which he (Leader) was Main Contractor in the past. Objector therefore has easily successfully completed 2 similar projects (as the Malta project) over the last 3 years as a Main Contractor. We refer to the following projects that can be regarded as ‘similar’ to the Malta project:*

- *Project Yanzoabang China*
- *Project Villa Dominico Argentina*
- *Project Landfill Bandeirantes Brasil*
- *Project Landfill Boldershoek The Netherlands*
- *Project Landfill and Biogas Ecopark De Wierde The Netherlands*
- *Project Waste Water Treatment Plant Den Bosch The Netherlands*
- *Project Environmental Project Landfill Drachstervant The Netherlands*
- *Project Environmental Project Maarssen The Netherlands*

*Client complies completely with this criterion. If we had to apply the individual only basis the full 20 points should be awarded, if we had to apply the comparative basis once tender 3 has a full four (4) times the required experience he should still be attributed at least 18 (instead of 12.4) points.*

3.8 Mr. Welling then, in his evidence argued that his company has vast experience around the world in gas extraction and landfill rehabilitation projects, without distinguishing between aerial emission control and gas extraction projects. This clearly reflects the way in which Appellant.s offer was compiled. It is respectfully 9 being submitted that the Appellants compiled their bid by means of a simple exercise in trying to fulfil the minimum standards set out in the dossier without little reference to the Employers. Requirements, which in terms of the tender documentation itself form an essential part thereof. The failure to appreciate the difference in the nature of the projects is one such example, both in the bid and in Mr. Welling.s oral evidence. The requirements of this tender call for more than just conventional gas and leachate management systems.

3.9 The disused Maghtab, Qortin and Wied Fulija landfills have undergone a detailed scientific site investigation as documented in a four-volume publication commonly referred to as the Scott Wilson Report. This work consisted of a thorough investigation of the waste masses, measurement and monitoring of aerial emissions, sea and groundwater quality and temperature profiles to form a characterisation of each site. These studies were used to assess the impact that each landfill is having on the surrounding environment currently and potentially in the future should there be no intervention. The tender documentation was therefore the result of these reports. In view of the particular nature of the project, quite unique in its mix of different waste streams, given the size, the slopes and the problems which may surface in treating gas extraction experience in novel gas emission control or innovative projects were therefore a must. Conventional gas and leachate management systems like those submitted by the Appellants do not completely address the requirements of this tender.

3.10 Points 4.12 to 4.14 above refer only to one criterion for adjudication . experience as contractor (20 points). Problems with the Appellants. bid are evident in all the other criteria, which Wasterserv does not feel it is proper to address in these 10 proceedings, which Appellants have tried to transform into a sort of open .fishing expedition..

3.11 In addition, although also not bound to do so, the Evaluation Committee, in order to further ensure the correctness of the scoring process and of the individual evaluation by the Committee of the individual bids, has also commissioned an external review of the whole process by the consultancy firm Scott Wilson. A

summary of the general findings of the external reviewers in connection with the Appellants. tender was attached to WasteServ's written pleadings. With respect to the same criterion (experience as contractor) mentioned above, Scott Wilson describe the Appellants bid in the following terms:

*In addition to the management of landfill gas or flaring and power generation experience of complex sites requiring a range of options including innovative collection and treatment systems similar to the particular requirements of the sites in Malta was required.*

*Van der Wiel is a Dutch company within the WWS consortium. It can claim a history of conventional landfill gas extraction projects for flaring and power generation including some large projects in South America and Asia. **No evidence is provided to demonstrate experience of more novel gas emission control or innovative projects. Much of the evidence provided is for smaller schemes and some relates to leachate management and treatment.***

*Van der Wiel is the lead partner in the consortium and the company responsible for the landfill gas works. The other partners (Bonnici and Zrar) have very limited relevant experience of landfill engineering for their roles and will be reliant on WdW for training and guidance. **There is no work experience detailed for Zrar limited. The experience detailed for Bonnici Brothers Limited is predominantly limited to civil engineering works, namely road construction, trenching and general civil engineering works.***

*The overall score of 12/20 reflects **the lack of experience in similar situations with the development and deployment of novel treatment systems in addition to the inexperience of the junior partners.** [emphasis added].*

3.12 For this particular criterion the Evaluation Committee awarded the Appellants 12.4 points over 20;

3.13 Contrary to what was alleged and not substantiated by the Appellants in the oral hearing, the Scott Wilson Evaluation Report dated 10th October 2005 addresses all the award criteria and the issues addressed by the Appellants in their appeal and in each section offers a significant degree of comfort to the decisions reached by the Evaluation Committee as in the case of .experience as contractor. addressed above.

3.14 It is beyond the scope of these submissions to address each criterion and to compare the scoring on the basis of which the Director General (Contracts) issued the letter of the 22nd September, however the exhaustive way in which the external reviewer has addressed these criteria leaves little room for doubt that the Appellants. bid had to be rejected in that it substantively failed to satisfy the Employer.s requirements.

#### **4. WasteServ Malta Limited and CT 27/2005**

4.1 Whereas WasteServ Malta Limited has participated in these appeal proceedings by filing a written reply to the objection, by taking an active role at the oral hearing and by presenting these submissions, it has to be stressed again that in terms of the applicable public procurement regulations and Volume 2 of the Tender

Dossier, it is **not** the Contracting Authority. As the final beneficiary of the proposed works 12 contract for aerial emissions control works in connection with the rehabilitation of Magħtab, Qortin and Wied Fulija Landfills, it is in addition not interested in selecting one particular tenderer and not another.

4.2 The final beneficiary however, entrusted with the successful implementation of its own projects, budgeting and the financing of its own projects, has an interest in ascertaining that the contract is awarded to the tenderer who presents the most advantageous offer, in line with the Tender Dossier. Such award will ensure strict compliance with the Employers. Requirements and will enable the final beneficiary to meet targets relating to delivery, to budget correctly for the project and to account for the utilisation of funds deriving from the European Commission.

4.3 From the bid documentation submitted by the Appellants in response to the EU contract notice published by the Director General (Contracts) in this case, and from the evidence produced in these appeal proceedings, the Tenderer which presents the most economically advantageous bid in terms of Article 31.3 of the Tender Dossier and which is in compliance with the Employer.s Requirements is evidently not the Appellant.

4.4 For these reasons, it is submitted that the appeal lodged by the Appellants WorldWaste Solutions Malta/Van der Wiel Infra & Milieu BV as Leader, should be dismissed.

Dr. Stefan Frendo

Dr. Antoine Cremona

## Appendix C

### **Additional Written Submissions by WasteServ Malta Limited in connection with Appeal lodged by World Waste Solutions re: Tender Number CT2586/2004 published by the Director of Contracts.**

WasteServ Malta Limited, as the final beneficiary of Tender No. CT2586/2004, refers to the written submissions filed with the Secretariat of the Public Contracts Appeals Board (PCAB) yesterday 21st November (11:26 am) and in addition respectfully submits that:

1. Contrary to what is stated in the written submissions filed by the Appellants, it has to be stressed once again that WasteServ Malta Limited (WasteServ) is **not** the Contracting Authority. The Contracting Authority in this case is the Director General (Contracts) in terms of LN 177 of 2005 and in terms of the draft contract contained in Volume 2 of the Tender Dossier (page 1 hereby attached and marked as Doc.WM 1 for ease of reference). WasteServ is only the final beneficiary of this public works contract and is only interested to see that the contract is awarded by the Director General (Contracts) to the most economically advantageous bidder in terms of the Tender Dossier, particularly the Employers' Requirements;
2. In their written submissions the Appellants make a series of illogical, unreasonable and unfounded allegations in particular with respect to what they call '*lack of objectivity, equality and transparency in the contracting authority's conduct*' which do not feature as a basis of their Appeal dated 28th September 2005. They argue that the contracting authority breached the duties of equality and non-discrimination and quote case-law of the European Court of Justice (ECJ) and the Court of First Instance (CFI) in Luxembourg to which this side fully subscribes.

It has to be pointed out that it is inadmissible and utterly offensive at this late stage of the proceedings to adduce fully unsubstantiated and unproven allegations of discrimination or inequality in treatment. These proceedings which have started off as an open 'fishing expedition' by the Appellants are now being turned into a mud slinging exercise which is completely unacceptable and can in no way be sanctioned by the PCAB.

WasteServ is fully aware of the relevant public procurement legislation and the various pronouncements of the ECJ on the correct interpretation thereof. Appellants however should not have merely quoted these judgements. They should have clearly proven by means of documentary evidence, witnesses and other admissible evidence how and in what exact terms these principles have been breached by the Director of Contracts as the contracting authority in this procurement process. Instead, they purposely use judgements relating to cases in which the ECJ and the CFI were presented with facts attesting discrimination or inequality of treatment in a most feeble attempt to substantiate their submissions.

In these proceedings, the burden of proof clearly rests on the Appellants to prove that the Director General (Contracts) treated the equal unequally; that he discriminated in favour of other bidders and that his judgement supported by the Evaluation Committee and the General Contracts Committee and comforted

by the external consultancy firm Scott Wilson, was arbitrary. Not a shred of evidence was presented in this respect. It is, with all due respect, a failed fishing expedition.

WasteServ therefore submits that, primarily these new allegations are inadmissible at this stage. Secondly, in any case there was in real terms absolutely no form of discrimination whatsoever between the tenderers and that in any case this is clearly an unacceptable attempt at misguiding or in a way put pressure on the PCAB to reverse the decision of the Director General (Contracts). Indeed, the whole process was completely transparent and in accordance with best practice in the field of public procurement. The Evaluation Committee held clarification sessions with all bidders and had its proceedings reviewed by an external consultant which is even more than what is generally expected from an evaluation committee. Finally in any case, if the Appellants felt that there was some form of discrimination, the burden of proof clearly rested on them to prove such discrimination or lack of objectivity.

3. The Appellants in their submissions (page 5, para.2) argue that the PCAB *'is not in a position to verify that the Evaluation Committee of the Contracting Authority precluded any risk of favouritism or arbitrariness'*. This is not the case as the PCAB has the whole set of documentation in the file forwarded by the Contracts Department. This was already made amply clear at the oral hearing by the Chairman of the PCAB. In addition it was also clear that the Chairman himself at the said hearing worked out the averages shown in the Technical Evaluation Grid, in order to verify that it indeed represented averages.

4. Appellants also argue in their written submissions that the criteria for award as stated in the Tender Document are *'completely unworkable'*. This is an unsubstantiated allegation which in any case remains unproven. However, even if for argument's sake, and for that purpose alone, it were conceded that the criteria were indeed unworkable, they were in any case the same for all potential bidders (and thus no discrimination whatsoever can be alleged) and were made public well in advance of submission of the bids. The Appellants, by submitting a bid in response to the tender documentation containing those criteria which they term 'unworkable' ratified the dossier itself and created a quasi-contractual relationship with the contracting authority wherein they agreed to be adjudicated in terms of the Tender Dossier. It has to be stressed again however that these allegations were in any case not in the least proved in current proceedings.

5. With respect to the principle of transparency, Appellants quote the *Conorzio Aziende Metano* case (page 5 para. 1) and specifically quote the Advocate General in the following terms: *'[the principle of transparency also comprises, for example the demonstrability of decisions taken by contracting authorities.'* At the same time, they argue that failure by the Director General (Contracts) to disclose the points awarded to the other bidders. This reasoning is clearly flawed and misleading. The opinion of the Advocate General in *Conorzio Aziende Metano* clearly does not refer to disclosure or demonstrability of the points awarded to **other** bidders but to own points and scoring which was in turn duly provided by the Director General. Indeed, the contracting authority has scored the individual bidders separately and the points afforded to other bidders had and have no relevance whatsoever for the purposes of each tenderer. In addition public contracting authorities in public procurement

processes are clearly bound by strict duties of confidentiality vis-à-vis all the bidders and cannot therefore disclose such scores prior to final award of the contract.

6. Finally, with as regards the assertion that upon objective assessment of their bid, Appellants should have been awarded full points, suffice it to say that evidently every interpretation (even of Tender Dossiers) has naturally to be drawn to its logical conclusion. The Appellants' interpretation of the provisions of the tender dossier would, in the first place, lead to the virtual annihilation of the evaluation exercise in the procurement process since, according to them, whosoever satisfies minimum criteria are to automatically obtain maximum points. This would lead to the absurd result that if, for instance, five bidders were to satisfy the minimum criteria (and therefore be awarded full points according to Appellants) the contract would have to be concluded with five contractors! Evidently this is not the purpose of the whole process which, on the contrary, is meant to lead to the award of the contract to the bidder tendering the most advantageous offer in line with the requirements. WasteServ humbly submits that it need not address this point further.

These are the final submissions which are being presented by WasteServ Malta Limited as the final beneficiary of the Contract number CT2586/05 in terms of the minutes of the last hearing before this Board on 4th. November 2005.

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Dr. Stefan L. Frendo

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Dr. Antoine Cremona

This Board,

- having noted that the appellants, in terms of their “reasoned letter of objection” dated 28 September, 2005 and also through their verbal submissions presented during the public hearing held on the 21 November, 2005, had objected to the decision taken by the General Contracts Committee;
- having established that the appellants have mentioned various areas where they should have been awarded full, or at least very high, marks;
- having examined whether sufficient grounds have been brought forward which could have resulted in a decision to re-examine the technical considerations of the Adjudication Board;
- having taken note of the fact that the appellants’ main rationale of the appeal appears to lie on the premise that once a bidder achieves the standards required by the tender specification, full marks should be awarded and that anything else which is subjective lacks transparency;
- having established that the point system tends to allow examiners a latitude of discrimination as a result of which they are required to use their subjectivity;
- having noted that the appellants have also brought forward the plea that there must exist a verification of the absence of any risk of favouritism and arbitrariness, as a corollary of the principle of transparency;
- having established that the contents of the Tender Document were clear and unequivocal and the appellants had not aired any preliminary reservations against such contents as well as the procedure to be used during adjudication;
- having allowed appellants to put forward their arguments freely both during the official sitting and in writing as well as giving them every opportunity to prove abuse of discretion or favouritism by the evaluating officers;
- having examined and also interpreted the Tender Document as well as the written submission presented by all interested parties

reached the following conclusions:-

1. the PCAB cannot take upon itself the re-evaluation of decisions taken at the level of the Adjudication Board unless clear evidence, or at least grave suspicions have resulted, during the sitting of the Board, of incorrect procedures or interpretations adopted by the Adjudication Board;
2. If the client had wanted a scenario wherein once a bidder achieves the standards required by the tender specification, full marks should be awarded, the client might easily have adopted a yes/no type of grid, namely, either *black* or *white*; in other words devoid of subjectivity. Instead the present grid was adopted which clearly requires a point system to be allotted by a number of individual examiners that are averaged out at the end to produce the final

recommendation. The procedure clearly implies a competitive element and negates the yes or no reasoning brought forward by appellants;

3. In this instance, the appeal that there was not sufficient objectivity and that the process was subjective and not transparent is not sufficient to invalidate the tender award in view of the fact that this Board recognises that a latitude of discrimination is granted thus supporting rational subjectivity during adjudication stage;
4. The point raised by appellants regarding the fact that there must exist a verification of the absence of any risk of favouritism and arbitrariness, as a corollary of the principle of transparency is considered to be pointless as this is precisely what the PCAB is about;
5. Any protest regarding the procedure to be used during adjudication should have been brought forward before the closing date for submission of tenders. It is to be noted that one is expected not to enter any competition where the rules are known 'a priori'. This Board feels that, in similar circumstances, it is futile for any participant to claim that the rules were not clear;
6. In this Board's opinion the appellants failed to prove any abuse of discretion or favouritism by the evaluating officers and, as a result, in conclusion, the PCAB feels that the appellants have not managed to bring forward sufficient proof that the adjudication procedure was flawed or that any favouritism was exercised and as a consequence finds against the appellants.

In consequence to points 1 to 6 above, this Board has decided to reject the appeal.

Furthermore, this Board recommends that the appellants should not be refunded the amount deposited in lodging this claim.

**Alfred R. Triganza**  
Chairman

**Anthony Pavia**  
Member

**Edwin Muscat**  
Member

*09 December 2005*