

# An Analysis of WasteServ Malta Limited's Procurement: A Case Study Perspective

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Report by the Auditor General

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## List of Abbreviations

3DES	Triple Data Encryption Standard
ADT	Malta Transport Authority
AES	Advanced Encryption Standard
CA	Civic amenity
CEO	Chief Executive Officer
DAB	Dispute Adjudication Board
DCC	Departmental Contracts Committee
DoC	Department of Contracts
EAFRD	European Agricultural Fund for Rural Development
ESF	European Social Fund
EU	European Union
FIDIC	Fédération Internationale Des Ingénieurs-Conseils (International Federation of Consulting Engineers)
GCC	General Contracts Committee
Kwh	Kilowatt hour
LN	Legal Notice
M&E	Mechanical and Electrical
MEAT	Most Economically Advantageous Tender
MEPA	Malta Environment and Planning Authority
MFEI	Ministry of Finance, the Economy and Investment
MRA	Malta Resources Authority
MRF	Material Recovery Facility
MRRA	Ministry for Resources and Rural Affairs
MSW	Municipal Solid Waste
MTP	Materials Treatment Plant
NAO	National Audit Office
PAN	Post award negotiations
PCRB	Public Contracts Review Board
PM	Particulate matter
PV	Photovoltaic
RDF	Refuse-derived fuel
SCC	Special Contracts Committee
T.R.E.E.	Training and Development of Resources for Environmental Employment
VAT	Value Added Tax
Vol	Volume
WSM	WasteServ Malta Limited



## Executive Summary

1. WasteServ Malta Limited (WSM) is responsible for organising, managing and operating integrated systems for waste management, including systems for the minimisation, collection, transport, sorting, reuse, utilisation, recycling, treatment and disposal of solid and hazardous waste. WSM also operates integrated systems for the export of waste to destinations outside the Maltese islands.
2. WSM falls under the responsibility of the Ministry for Sustainable Development, the Environment and Climate Change; however, prior to March 2013, this entity fell within the portfolio of the Ministry for Resources and Rural Affairs.
3. Since its establishment in 2002, WSM has developed a number of sites and facilities intended at aiding the organisation in the achievement of its sustainable waste management objectives. The facilities run by WSM include: civic amenity sites, bring-in sites, the Ta' Żwejra Landfill, the Għallis Engineered Landfill, the Sant' Antnin Waste Treatment Plant, a thermal treatment facility, the Gozo Waste Treatment and Transfer Facility, the Sant' Antnin Family Park, Magħtab Environmental Park and other initiatives related to renewable energy.
4. The main objective of this audit was to determine whether WSM's procurement practices were compliant with and adhered to pertinent public procurement regulations. In view of the numerous contracts awarded during the period under review (2006-2012), NAO adopted a case study approach as the basis of its methodological design. The contracted value corresponding to the five case studies selected was that of €34.32 million.
5. The case studies reviewed as part of this audit were the:
  - a. Construction of a Leisure Area at the Marsaskala Family Park;
  - b. Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at Tal-Kus, I/o Xewkija, Gozo;
  - c. Improvement to the Sant' Antnin Waste Treatment Plant and Material Recycling Facility;
  - d. Negotiated Contract for the Supply, Delivery, Installation and Maintenance of Play Equipment for Children and Cast In-situ Safety Rubber Surfacing at the Family Park, Marsaskala; and
  - e. Period Contract for the Removal and Export of Filter Cake and Boiler Dust generated from the Marsa Thermal Treatment Facility.

6. In addition to the five case studies, NAO reviewed the appeals lodged by third parties in relation to WSM contracts with the Public Contracts Review Board (PCRB) during the period 2011-2012.
7. Hereunder are the more salient findings and conclusions identified following this audit.
8. An essential component in ascertaining value for money is a realistic initial project estimate. In the cases reviewed, NAO noted that there were significant divergences from WSM's initial estimation of costs to actual contracted amounts. Shortcomings in this regard imply that WSM did not have a reliable benchmark against which to gauge the financial viability of offers received.
9. NAO considered such substantial differences between WSM estimates and contracted amounts, ranging from 42 per cent over-estimation to 15 per cent under-estimation, attributable to two possible factors. First, such discrepancies may have been indicative of poor estimate compilation, with insufficient attention directed towards the sourcing of essential market intelligence. Second, discrepancies of this magnitude may also have resulted from vast changes to project scope and/or design.
10. Aside from reservations in determining value for money emerging in relation to the reliability of project estimates, NAO noted significant variations that mainly stemmed from changes in project design after contract award. Variations between contracted amounts and final project costs were most pronounced in two case studies, that is, the construction of a leisure area at the Marsaskala Family Park and the improvement undertaken with respect to the Sant' Antnin Waste Treatment Plant and Material Recycling Facility. In these two cases, the recorded variations amounted to approximately €600,000 (53 per cent over the contracted amount) and €6,000,000 (23 per cent over the contracted amount), respectively.
11. Despite the justifications put forward by WSM, NAO deemed it unacceptable for WSM and any other contracting authority to resort to such a level of variations and deviation from the original tender estimate and contract value, as was the case with respect to these projects. NAO is of the opinion that contracting authorities are to ensure robust project planning and estimates, rather than issuing a tender and simply request approval for changes in design and/or cost variations when these inevitably arise during implementation. In this case, NAO could not ascertain nor discredit the notion that such variations impinged on the ranking merit or the final project cost.
12. In NAO's view, WSM's failure to appropriately and comprehensively ensure robust project planning with respect to the Sant' Antnin Waste Treatment Plant conditioned the Department of Contract's (DoC) vetting process, constraining the latter's endorsement to avoid jeopardising the project's funding and implementation.
13. At the time of reporting, WSM indicated to NAO that the Gozo Waste Treatment and Transfer Facility project at Tal-Kus was being reviewed with the possibility of major changes in project scope and design. WSM maintained that these changes were due to unforeseen circumstances that took place following the publication of the tender. As per WSM's draft request to DoC for the approval of variations (pending submission), the resulting cumulative value of variations is indicated as 23 per cent of the contract value.
14. The main audit concern of the contract for the supply and maintenance of play equipment at the Marsaskala Family Park was WSM resorting to a negotiated contract, and the fact that this process involved only one contractor. This concern did not



arise from a compliance aspect, as WSM did obtain the required authorisation. The concern arose from the justification presented, since the nature of the procurement clearly did not warrant the claimed urgency. NAO deemed that contracting authorities should only request and obtain authorisation to bypass the normal open procurement procedure in exceptional cases, exclusively reserved for projects warranting such urgency.

15. With reference to the period contracts for the removal and export of filter cake and boiler dust, NAO questioned the resort to such contracts rather than a longer term tender. The estimated rate per tonne of waste removed as calculated by WSM was significantly higher than the actual contracted price. The estimated cost was €650, €560 and €440 per tonne (excluding VAT) for the three period contracts respectively. The contracted rate per tonne was €495, €389 and €345 (excluding VAT). Although WSM did revise downwards its estimated rate as calculated in the first contract to reflect the lower rate contracted when estimating the cost of subsequent contracts, WSM's estimated rate remained significantly higher than that actually contracted. This could indicate that the calculations of the estimated rate made by WSM were inadequate. On the other hand, it was noted that the Contractor had also tendered significantly lower prices in subsequent offers than that initially tendered in the first period contract. This could indicate an inflated cost per tonne and a high profit margin to Contractor in the initial period contract awarded.
16. Out of the 15 appeals lodged against WSM during the period 2011-2012, 10 of these objections were upheld by PCR. In NAO's opinion, this situation left much to be desired, particularly so when one considered that the Departmental Contracts Committee, the General Contracts Committee (GCC) and DoC would have endorsed the recommended tender result. Notwithstanding this three level process of review, numerous shortcomings emerged with respect to these award decisions.
17. From the cases reviewed, it transpired that PCR overturned WSM's award decisions for a variety of reasons. Most notable were the instances where WSM awarded the contract to a non-compliant bidder, the award of a contract despite ambiguity in tender instructions, a lack of adherence to the stipulated evaluation criteria, and a case where an appellant had to lodge three appeals with respect to the same contract.
18. In all cases involving appeals, an amount of delay in tender award was inevitable. WSM, or any other contracting authority, should have sought to reduce the incidence of appeals through the implementation of sound award processes. Moreover, the time lapse between the tender submission and the award result should not have exceeded a reasonable period. NAO is, however, cognisant of the fact that an element of delay with respect to the appeals process was attributable to PCR.
19. NAO is of the opinion that in some of the cases, the appeal process may have been avoided had WSM been better informed of the procurement regulations and applied better judgment when evaluating bids. GCC could have been instrumental in reducing the number of appeals through more rigorous vetting of disqualified and recommended tenderers at the award endorsing stage.



# Chapter 1 - Introduction

## 1.1 Establishing Context

- 1.1.1 Following the global economic slowdown, during which many economies suffered from periods of economic recession, many countries faced the hard realisation that periods of uncontrolled expenditure resulted in excessive national debts rendering further borrowing problematic and unsustainable. Common consensus towards improved financial stability and sustainable government expenditure resulted, as many governments acknowledged that it was imperative for any country to avoid excessive budget deficits. Given the reduction in expenditure by most economies, even nationally, it therefore becomes even more pertinent that public funds are efficiently and effectively managed and that sound procurement practices are adhered to by the entities administering such funds.
- 1.1.2 The National Audit Office (NAO) has, over the years, been actively involved in the audit of public procurement-related issues, with this responsibility effectively constituting an integral part of this Office's core business function. To this end, this Office has adopted a proactive and varied approach with respect to the auditing of public procurement.
- 1.1.3 Corporate-level issues are regularly reported upon through NAO's Annual Audit Reports, which delve into considerable detail as regards procurement-related shortcomings identified with respect to particular ministries and government departments. Other periodically issued reports also adopt a broad analytical perspective, such as the 'Procurement Analysis through Case Studies 2007-2009'. In addition, a performance audit report entitled 'Procurement Capability across the Public Administration' was undertaken by NAO in 2009. This report provided a detailed review and discussion of the various aspects of public procurement, including the strategic importance of the procurement function, knowledge and skills required in procurement, policies and procedures governing procurement, internal controls and compliance, and the planning of procurement requirements.
- 1.1.4 Moving away from the corporate analytical perspective, NAO also frequently undertakes specific reviews of organisation-based procurement practices. Examples of such narrowly scoped audits include the 2009 report on 'Control Mechanisms Deployed by the Malta Transport Authority (ADT) in Road Construction Projects partly

financed through the Fifth Italo-Maltese Financial Protocol' and the 2010 report entitled 'Enemalta Corporation Tender for Generating Capacity'. The most recently published report of this nature is the July 2013 audit entitled, 'An Analysis of Enemalta Corporation's Fuel Procurement'.

1.1.5 More in line with this latter perspective, the procurement activity undertaken by WasteServ Malta Limited (WSM) has been audited in part in the 'Report by the Auditor General Public Accounts 2011'. However, due to surfacing media reports and allegations, and also in response to concerns raised by the Opposition during the previous administration, this Office has considered it opportune to scrutinise the procurement function within WSM in greater depth.

## 1.2 Company Profile

1.2.1 Established in November 2002, WSM is registered as a private company in accordance with the Companies Act 1995, with an authorised share capital of €11.6 million (equivalent to five million Maltese Liri). The Malta Government Investments Ltd holds ninety-nine thousand nine hundred and ninety-nine (99,999) ordinary shares of a nominal value of €2.33 (one Maltese Lira) each. The Malta Investment Management Company Ltd holds the remaining ordinary share of a nominal value of €2.33 (one Maltese Lira). The management and administration of the company is vested in a board of directors, composed of not less than two and not more than five directors, including a Chairman. A Chief Executive Officer (CEO) is responsible for the day-to-day operations of the organisation.

1.2.2 WSM is responsible for organising, managing and operating integrated systems for waste management, including integrated systems for the minimisation, collection, transport, sorting, reuse, utilisation, recycling, treatment and disposal of solid and hazardous waste. WSM also operates integrated systems for the export of waste to destinations outside the Maltese islands.

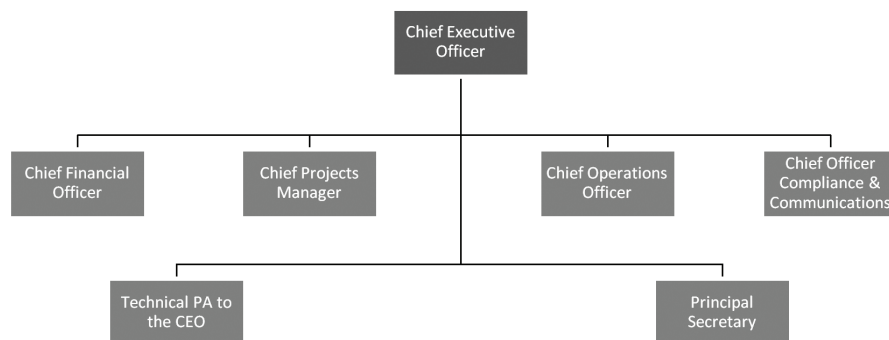
1.2.3 As per its vision statement "*to turn waste into a resource*", WSM seeks to reach its objectives by taking the necessary measures to ensure sustainable waste management. In support of this vision, the company's mission statement states that WSM is "*to organise, supervise and control the provision of major waste management facilities and related services throughout the Maltese Islands*" and "*to develop sites and facilities in accordance to local and international legislation, in order to ensure sustainable waste management.*"

1.2.4 Since its establishment in 2002, WSM has developed a number of sites and facilities intended at aiding the organisation in the achievement of its sustainable waste management objectives.

1.2.5 WSM falls under the responsibility of the Ministry for Sustainable Development, the Environment and Climate Change; however, prior to March 2013, this entity fell within the portfolio of the Ministry for Resources and Rural Affairs (MRRA). In terms of waste management, the Malta Environment and Planning Authority (MEPA) plays a crucial role with respect to WSM's remit, especially in relation to the implementation of the Waste Management Strategy and the provision of timely and practical advice on the conformity with current waste legislation and regulation to Government.

1.2.6 Figure 1 depicts WSM's management organisational set-up as at 2011.

**Figure 1: WSM Management Organisation Chart**



1.2.7 WSM’s income and expenditure for the years 2009 to 2012 is represented in Table 1.

**Table 1: WSM Income and Expenditure, 2009 - 2012**

	2009	2010	2011	2012
<b>Income (€)</b>	10,330,069	14,496,672	20,851,422	21,408,440
<b>Expenditure (€)</b>	14,030,022	20,910,271	26,969,291	27,944,298

### 1.3 The Waste Management Scenario in Europe and Malta

1.3.1 Within Europe, annual waste generation exceeds 1.8 billion tonnes, the equivalent of 3.5 tonnes per person. Locally, the annual generation of household waste amounts to one tonne per household, resulting in approximately 400,000 tonnes.

1.3.2 The current trend indicates that waste is increasing by three per cent per annum, with a forecasted increase of 100 per cent in municipal waste by 2025. Households, commercial activities, industry, agriculture, construction and demolition projects, mining and quarrying activities, and the generation of energy are the main generators of such waste. Given the generation of such vast quantities of waste, it is imperative that waste management does not cause any harm to human health or the environment.

1.3.3 During the past years, Malta has faced increasing pressure from the European Commission as well as local organisations to increase its environmental awareness. In this regard, Government has taken positive steps with the result that waste management legislation in Malta has grown significantly. An increased environmental awareness has also resulted in considerable efforts in the collection, sorting, recycling and exporting of waste. To this extent, WSM operates a number of different areas and functions (engineered landfills, recycling plants, rehabilitation) correspondingly regulated by a number of legal notices.

1.3.4 A number of EU Directives also influence the local waste management strategy. These include the:

- a. Packaging and Package Waste Directive (94/62/EC);
- b. Landfill Directive (1999/31/EC);
- c. Waste Electrical and Electronic Equipment Directive (2002/96/EC);
- d. Batteries and Accumulators Directive (2013/56/EC);
- e. Waste Framework Directive(2008/98/EC);
- f. End of Life Vehicles (2000/53/EC); and
- g. Waste Shipment Regulation (1013/2006).

- 1.3.5 Current local waste management policies reflect those set out in Malta's first ever strategy document – 'A Solid Waste Management Strategy for the Maltese Islands' - published by Government in October 2001 , and last updated in December 2010.
- 1.3.6 Since the Company's inception, considerable developments have occurred in this sector, including the:
- a. closure of the Magħtab and Qortin landfills;
  - b. establishment of engineered landfill facilities at Ta' Żwejra and Għallis;
  - c. introduction of bring-in centres;
  - d. introduction of civic amenity (CA) sites;
  - e. design of the upgrading of the existing Sant' Antnin composting facility;
  - f. introduction of cooking oil collection systems for its conversion to biodiesel;
  - g. introduction of construction and demolition landfills and the halting of the dumping of such waste to the engineered landfill;
  - h. closure of the non-compliant incinerators; and
  - i. evaluation of the potential for the introduction of waste-to-energy facilities in the new thermal facility at Marsa and the upgraded plant at Sant' Antnin.

## 1.4 WSM Operations

1.4.1 In fulfilling its legal obligations and attaining the goals set out in its policy document, WSM runs a number of facilities and projects that address diverse aspects of waste management.

1.4.2 The facilities run by WSM include:

a. **Civic Amenity Sites**

Situated at Mrieħel, Ħal Far, Luqa, Magħtab and Tal-Kus (Gozo), members of the public can bring and discard a variety of household bulky waste in these supervised facilities. These sites differ from 'Bring-In Sites', where various items, namely paper, plastic, metal and glass can be deposited, as CA sites cater for the separate disposal of domestic bulky waste, such as refrigerators, electronic products, waste from DIY activities, garden waste and tyres. These centres optimise the collection of certain types of waste and increase the recovery of secondary materials.

b. **Bring-In Sites**

The introduction of 'Bring-In Sites' in 2002 was spearheaded by WSM in collaboration with local councils. Four hundred such sites are available across Malta and Gozo, which consist of four disposing containers (blue for plastic, white for paper, brown for glass and black for metal) in which the public can dispose of clean, source-segregated, recyclable materials. Materials from these bring-in sites are collected separately and taken to the Material Recovery Facility at the Sant' Antnin Waste Treatment Plant, where these are further hand-sorted, packed in large bales and then sold on a monthly basis to the highest bidder, who in turn exports the materials for further treatment, mainly in European and Asian countries. WSM has since handed over the responsibility for the collection and maintenance of the 'Bring-In Sites' to local councils.

c. **Ta' Żwejra Landfill**

Utilised during the period April 2004 to December 2006, the Ta' Żwejra landfill consisted of an engineered waste storage site for the disposal of municipal solid waste and the production of energy from waste deposits.

- d. **Għallis Engineered Landfill**  
In 2006, Għallis was approved as the site for the development of a long-term engineered landfill.
- e. **Sant' Antnin Waste Treatment Plant**  
The plant was established to:
- increase waste separation in Malta;
  - recover materials from waste considered as a resource while simultaneously relieving the burden on the landfill, thereby gaining extra landfill space and exporting recovered material for reuse and recycling;
  - produce compost/stabilised digestate<sup>1</sup>;
  - produce electricity from waste; and
  - reduce waste for better environment as a result of air quality improvement.
- f. **Thermal Treatment Facility**  
This facility treats abattoir waste, clinical waste, refuse-derived fuel<sup>2</sup> (RDF) and other wastes such as used solvents and industrial sludge. Notionally, additional expansion would increase efficiency, rendering the plant not only self-sufficient, but also capable of exporting electricity to the national grid while furnishing the abattoir with a supply of steam.
- g. **Gozo Waste Treatment and Transfer Facility**  
This plant is currently under development at Tal-Kus, limits of Xewkija, Gozo. The plant was initially intended to comprise a controlled facility for the reception, sorting, processing, interim storage and transfer of waste originating from Gozo and Comino. It was envisaged that this permanent facility will replace the temporary transfer station currently in operation at the site of the closed Qortin landfill. The new facility was planned to cater for a variety of waste streams, including dry recyclables for further treatment or export, municipal solid waste (MSW) for further treatment in Malta, as well as bulky waste, which was to be processed (shredded where possible, compacted or baled) and eventually transferred to Malta. Initially, the targeted completion date was December 2013; however, the project is currently in abeyance with possible changes in design and concept still being evaluated.
- h. **Renewable Energy**  
WSM is installing renewable energy technologies, mainly PV systems and wind turbines, at the various waste management facilities and CA sites, with the aim of educating the public on green electricity while simultaneously producing part of the power needed for the site's operation. Up to October 2012, the amount of energy generated at the various CA sites was in excess of 123,000 kwh.
- i. **Sant' Antnin Family Park**  
Co-funded by the European Union (EU) fund for the rehabilitation of closed landfills in Malta and Gozo, this project consisted of the rehabilitation of the closed landfill in Marsaskala (operative during the 1970s). Primarily intended as a leisure park, the area exceeds 80 tumoli of land and included the restoration of St. Anthony's Chapel and the construction of a visitor's centre intended to serve as an education centre on waste management.

<sup>1</sup> **Digestate** is a nutrient-rich substance produced by anaerobic digestion that can be used as a fertiliser.

<sup>2</sup> **Refuse-derived fuel** is a fuel produced by shredding or dehydrating solid waste.

**j. Training and Development of Resources for Environmental Employment (T.R.E.E.) Project Training Centre**

This project was launched in November 2009 and co-funded by the EU through the European Social Fund (ESF) with a total budget of €1.2 million. The T.R.E.E. Centre, supported by WSM, is responsible for the management of this ESF project. The project aims at enabling and encouraging environmental stewardship through the empowerment of socially disadvantaged participants via adequate training and skills transfer. The target groups include early school leavers, victims of domestic abuse, ex-convicts, substance abusers and asylum seekers, among others. The project further aims to enhance the employability of trainees within the environmental employment sector.

**k. Magħtab Environmental Park**

The rehabilitation project of the dumpsite that has been closed since 2004 covers an area of 280 tumoli. The project is co-financed through EU funds and is to include the rehabilitation of the closed dumpsite, a gas plant, a Mechanical and Biological Treatment Plant, a Mechanical Treatment Plant, a Bulky Waste Facility and an Anaerobic Digestion/Biogas Plant. This project consisted of two phases: Phase I (completed), comprising a pilot project of a representative area of the site, and Phase II (pending completion) which comprises the remainder of the site.

## 1.5 Methodology

- 1.5.1** This audit was conducted in terms of Para 9(a) of the First Schedule of the Auditor General and National Audit Office Act, 1997 and in accordance with generally accepted practices and guidelines applicable to NAO.
- 1.5.2** During the course of the audit, NAO held meetings and interviews with senior WSM officials and reviewed relevant documentation made available. The audit adopted a case study approach through the selection of five contracts, including direct, period and negotiated contracts as well as open tenders issued through the Department of Contracts (DoC).
- 1.5.3** The main objective of the audit was to determine whether WSM's procurement practices were compliant with and adhered to pertinent public procurement regulations. NAO did not delve into whether the implementation of the projects reviewed was compliant with the original criteria under which EU funding was granted.
- 1.5.4** In view of the numerous contracts awarded during the period under review (2006-2012), many lacking any form of homogeneity, and bearing in mind feasibility considerations, NAO adopted a case study approach as the basis of its methodological design. For this reason, this audit report makes no attempt at generalising beyond the single cases focused upon, or at inferring population-wide conclusions. However, such audit findings do serve to highlight the strengths and weaknesses relevant to the case studies.
- 1.5.5** In order to conduct this audit, NAO requested a list of tenders awarded by WSM during the period 2006-2012. The particular case studies examined were selected after due consideration of the following variables:



- a. materiality (in terms of contract value);
- b. recentness;
- c. nature of the acquired object (supplies, services or works);
- d. tendering procedure (one-off/period contracts through direct, negotiated or open);
- e. package (single or three-package);
- f. funding (local or EU);
- g. appeals procedure resorted to (if any); and
- h. variations to contract value.

1.5.6 In order to capture as broad a spectrum of variables as possible, the selection criteria utilised focused on the inherent diversity among potential cases. Such a consideration enabled NAO to address a variety of procurement contracts entered into by WSM, thereby allowing this Office to comment upon various facets of the organisation's procurement capabilities. Specific attention was directed at the fact that each of the aforementioned variables featured in at least one of the case studies. In addition, some variables featured with greater frequency than others, as a number of the case studies targeted more than one influencing variable.

1.5.7 Details of the selected case studies are as follows:

a. **Case Study 1 – Construction of a Leisure Area at the Marsaskala Family Park (CT 3054/2011)**

Open tender procedure of the single-package type, with a contract value of €1.07 million (excluding VAT) and a final expenditure of €1.64 (excluding VAT). The EU co-financed this project under the European Agricultural Fund for Rural Development (EAFRD).

The main determining variables in selecting this tender were (a) the high variations between the contract value and the final expenditure, (b) the objection to the tender award filed by an aggrieved bidder, and (c) the funding criteria.

b. **Case Study 2 – Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at Tal-Kus, I/o Xewkija Gozo (CT 3004/10)**

Open tender procedure of the three-package type, with a contract value of €8.24 million (including VAT). The EU co-financed this project under the Cohesion Fund.

The relatively high contract value warranted the inclusion of this tender in the case study selection. Secondary justifications for the selection include (a) recentness, (b) the objection to the tender award by an aggrieved bidder, (c) the nature of the acquisition (works), and (d) the funding criteria.

c. **Case Study 3 – Improvement to the Sant' Antnin Waste Treatment Plant and Material Recycling Facility (CT 2089/2005)**

This tender did not feature in the original selection; however, NAO identified components within this project that raised concern. These were:

- i. Extension of the Materials Treatment Plant (MTP) Shed - contract value €820,468; and
- ii. Procurement of One Baler for the Upgrade of the Material Recovery Facility at the Sant' Antnin Waste Treatment Plant - contract value €658,508 (excluding VAT).

These two components were identified since both consisted of locally funded direct contracts exceeding the threshold for direct orders. However, during the

initial review of documentation it became apparent that these cases formed part of a larger project. Due to this, NAO expanded the review of these cases by auditing the procurement of the entire project. The contract value for this project amounting to €24.7 million (excluding VAT).

**d. Case Study 4 – Negotiated Contract for the Supply, Delivery, Installation and Maintenance of Play Equipment for Children and Cast In-situ Safety Rubber Surfacing at the Family Park, Marsaskala (CT 5000/2012)**

This tender consisted of a locally funded, negotiated contract, with a value of €290,836 (excluding VAT). NAO selected this case study due to the negotiated procurement procedure adopted for this tender.

**e. Case Study 5 – Period Contract for the Removal and Export of Filter Cake and Boiler Dust generated from the Marsa Thermal Treatment Facility (WSM 41/2012, WSM 287/2012 & WSM 93/2013)**

The selection criterion for this tender was the need to widen the audit coverage by reviewing a period contract. The period contracts WSM 41/2012, WSM 287/2012 and WSM 93/2013 were awarded for a period of twelve months on an ‘if and when required’ basis, or until the value of €120,000 (excluding VAT) was exhausted, whichever the earlier. These period contracts were awarded at a value of 495/tonne, 389/tonne and 345/tonne (excluding VAT), respectively.

1.5.8 The total contract award value of the selected case studies amounts to €34.32 million (excluding VAT).

1.5.9 The following table illustrates the main selection variables for each of the selected case studies.

**Table 2: Selection Criteria Applied to Case Studies**

Case Study	Selection Criteria												
	Package		Funding		Procedure				Category			Appeal	Variations
	Single	Three	Local	EU	Open	Negotiated	Restricted	Direct Contract	Services	Works	Supplies		
Case Study 1	X		X	X	X					X		X	X
Case Study 2		X	X	X	X					X		X	
Case Study 3		X	X	X	X	X*				X	X	X	X
Case Study 4			X			X					X		
Case Study 5	X		X		X				X				

\* Negotiated Procedure relates to spare parts for Lots II-IV of Case Study 3, procured under separate contracts.

1.5.10 Following the selection of case studies, NAO reviewed all available documentation relating to the tenders in question. For every case study, this Office obtained the original files from DoC (where applicable) and WSM.

1.5.11 Through previous significant and repeated exposure to public procurement and related issues/concerns, NAO was cognisant of the fact that while each procurement transaction would have its peculiarities, various issues/concerns/findings would be common to all transactions. Drawing on previous experience, this Office drew up an audit checklist template covering expected across-the-board findings. This checklist addresses, among other topics, actions and matters related to:

- a. Pre-tender activities;
- b. Tender announcement and launch;
- c. Pre package submission;
- d. Submission closing date;
- e. Package opening session;
- f. Short-listing;
- g. Evaluation;
- h. Adjudication;
- i. Publication of results;
- j. Appeals;
- k. Award of tender;
- l. Post award negotiations;
- m. Contract endorsement;
- n. Sub-contracting;
- o. WSM's role in the procurement process;
- p. Tender conditions; and
- q. Others.

1.5.12 Apart from the 'commonalities' encountered in the five case studies, each tender manifested issues, concerns and findings that were case-specific to the transaction. These were analysed separately from the 'commonalities' exercise, given the diverse nature of these issues.



## Chapter 2 - The Case Studies

### 2.1 Case Study 1: Construction of a Leisure Area at the Marsaskala Family Park (CT 3054/2011)

#### *Tender Model, Costing and Timing*

- 2.1.1 This EU co-financed tender consisted of an open procedure, single-package type tender process. Following approval from DoC, WSM adopted the accelerated process for this tender.
- 2.1.2 Apart from the ambiguity in the instructions to tenderers as to whether samples were required or otherwise, which was the main subject of contention during the appeal process, NAO deemed that the tender document contained all the required information, sections and provisions/clauses, setting the path the tendering process was expected to follow. Such procedure, package type, and documentation, followed the legal requirement for procurement expenditure below €2 million.
- 2.1.3 WSM indicated that the issue relating to the provision of samples was also the subject of clarification replies provided to bidders, which stated that no literature and samples were requested. The anomaly arose with respect to conflicting instructions provided in the technical specifications, which in fact required the submission of samples, and remained undetected during the review process prior to tender publication.
- 2.1.4 The estimate drawn up by WSM amounted to €1.85 million (excluding VAT). The contract's award value was that of €1.07 million (excluding VAT), while final expenditure was that of €1.64 million (excluding VAT).
- 2.1.5 It is worth noting that originally, WSM had issued a call for interest under another tender (CT 2521/2009), which included the restoration of a landfill area and the construction of a storm-water culvert system. This tender was subject to three different EU funding sources distinguished by the three separate tender lots, namely:
- Lot I - Leisure Area for Visitors - EAFRD Measure 3.1.3;
  - Lot II - Valley Restoration and Storm Water Culvert - EAFRD Measure 3.23; and
  - Lot III - Rehabilitation and Restoration of a Closed Landfill - CF 118.

- 2.1.6 The tender was cancelled by DoC and it was decided to divide the works subject to different funding sources under separate tender procedures. The case study under review (CT 3054/2011) featured the works previously considered under Lot I of CT 2521/2009. In terms of Lot II of the original tender, WSM undertook the execution of the culvert system and other enabling works with the assistance of the Works Division, procuring supplies and works by means of existing Works Division period contracts and other minor contracts by WSM. Works under Lot III were procured separately by means of tender CT 3040/2011.
- 2.1.7 In terms of funding implications, the cost of Lot I, as per original tender, was estimated at circa €1.97 million, excluding VAT (also excluding mechanical and electrical plans (M&Es) issued in a tender clarification and estimated at circa €55,000). The estimated cost of these works under CT 3054/2011 amounted to circa €1.85 million, excluding VAT (including M&Es).
- 2.1.8 According to WSM, the cancellation of the original tender was beyond its control, and completely unforeseeable. The timely implementation of the project was therefore put at risk, constraining WSM to resort to an accelerated procedure to procure the works, citing time constraints.
- 2.1.9 As per the special conditions forming part of the contract, works were to be executed within six months from 8 May 2012, that is, when the notice to start works was issued by WSM. The Contractor completed the project within the established period.

#### *WSM's Role*

- 2.1.10 On the basis of the documentation reviewed, NAO considers WSM to have acted within its enabling act, following the norms as required by the pertinent procurement regulations. WSM sought approval and endorsement from DoC in relation to the proposed Evaluation Committee. All members of the Evaluation Committee signed the 'declaration of impartiality and confidentiality', thereby declaring an absence of conflict of interest and ensuring secrecy with respect to the tender under review.
- 2.1.11 It is worth noting that from the initial stages of the tendering process, WSM maintained a constant level of communication with DoC, seeking approval and endorsement as and when required.
- 2.1.12 From the documentation made available to this Office, there appears to have been no engagement of external consultants in relation to this tender. However, WSM indicated that the original park design and estimate was conducted by Messrs iAS (Architects) and Messrs CYAN Engineering (M&Es). Furthermore, iAS were marginally involved in the re-issue (other than for the revision in the Bills of Quantities) and CYAN were involved in the re-design of the M&Es as issued during the clarification.
- 2.1.13 WSM conducted an Environmental Planning Statement as required by the pertinent regulations. The Environmental Planning Directorate of MEPA approved the Environmental Planning Statement on 29 April 2009.

#### *Process*

- 2.1.14 NAO considers that the pre-submission process of this tender followed the legal norms attributed to public procurement processes. DoC vetted and endorsed the draft tender document prior to publication, and endorsed the Evaluation Committee proposed by WSM.

- 2.1.15 WSM forwarded to DoC the replies to clarifications, with the latter circulating the replies among all bidders. Tenders were deposited at DoC and subsequently opened in public.
- 2.1.16 NAO considers that in the case of one of the clarifications, WSM and DoC, could have been more proactive. In relation to the changes in the M&E plans effected by WSM just four days prior to the tender submission deadline, this Office is of the opinion that WSM should have voluntarily extended the submission date. This was not the case, with the extension granted following a request by a prospective tenderer channelled through a clarification.
- 2.1.17 The appeal process and the eventual award appear to have adhered to the pertinent legislative requirements of public procurement. Further details specifically relating to this appeal are presented in Section 3.6.

#### *Evaluation and Adjudication Process*

- 2.1.18 WSM refrained from appointing a shortlisting or adjudication committee, opting to entrust the Evaluation Committee with fulfilling all of these roles. The Evaluation Committee, was recommended by WSM and subsequently approved by DoC.<sup>3</sup>
- 2.1.19 The tender document clearly set the evaluation criteria/specifications upon which the Evaluation Committee based its decision. Such criteria served as the benchmark for evaluating and eliminating bidders deemed non-compliant to such specifications. The evaluation criteria utilised included the bidders' financial and economic standing, and their technical capacity with respect to tender work requirements, among others.

#### *Tender Award Process*

- 2.1.20 The Evaluation Committee recommended a bidder for tender award, which GCC and DoC upheld and endorsed. No details regarding the publication (media) of the award notice were found in the provided documentation; however, this Office confirmed that DoC published the award notice and informed all tenderers of the process' outcome.
- 2.1.21 WSM awarded the tender to the lowest priced offer among the administratively, technically and financially compliant bidders.

#### *Appeal*

- 2.1.22 Following the evaluation outcome, one of the eliminated tenderers filed an appeal, resulting in the suspension of the award process. The Public Contracts Review Board (PCRB) presided over the appeal, and following the submissions of all concerned parties, found that ambiguity in the instructions in the tender document created an element of uncertainty with respect to sample provision. In view of this finding, PCRB ordered the reinstatement of the appellant and all other bidders, and the provision of fresh samples from the reinstated bidders.
- 2.1.23 This Office noted that DoC had reviewed the conditions binding the bidders as part of the draft tender vetting process. In addition, the General Contracts Committee (GCC) and DoC endorsed the award recommendation made by the Evaluation Committee. In

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<sup>3</sup> Evaluation can follow a filtering process, whereby a shortlisting committee identifies administratively compliant offers, an evaluation committee then evaluates remaining offers on their technical merit, while an adjudication committee evaluates and ranks the technically compliant offers according to financial criteria. Alternatively, an evaluation committee may assume all of these roles.

NAO's understanding, GCC and DoC ought to pay greater attention when scrutinising offers prior to the endorsement of award recommendations, thereby ensuring that the evaluation carried out by the assigned committee was fair and equitable, and that the best decision in fact and in law was taken.

2.1.24 It is worth noting that PCRB criticised WSM for the inconsistencies in the tender document with regard to the submission, or otherwise, of samples. In the appeal report PCRB indicated that WSM,

*"...did nothing but complicate a situation which was based not only on an incongruent scenario but also went as far as conditioning the outcome of this hearing ... The PCRB ... concludes that there is no doubt whatsoever that the specifications, terms and conditions of this tender left very much to be desired particularly in view of the fact that they contained contradictory instruments which, albeit no one challenged, should not have been included in the first place, especially when one considers the level of vetting which one normally expects in these circumstances ... The Board cannot but insist enough on the fact that, whilst the onus of a bid being submitted correctly and as requested by the tender document's specifications rests with the bidder/s, similarly the onus for a tender document to contain the right and proper information, instructions and so forth rests on the contracting authority."*

#### Variations

2.1.25 During the period of project implementation, a series of variations to the project ensued. WSM sought DoC approval and endorsement for such variations, with the latter vetting the request and authorising the variations. The variations sustained amounted to approximately €573,000 (excluding VAT) representing 54 per cent of the contract value. WSM sought to justify these variations, stating that *"the majority of which are for works which were not included in the original scope of the Contract as a result of improved design instructions issued by WasteServ, unforeseen site conditions and constraints, discoveries and additional works."*

2.1.26 WSM provided further details and explanations relating to the aforementioned 54 per cent variations. It was indicated that approximately 21 per cent of these variations resulted from the late eviction of the batching plant from the area. Another five per cent were attributable to unforeseen circumstances (most notably, the presence of a cave and loose foundation material) and efforts intended to render the site safe (loose cliff edge and cliff face material). Part of the remaining variations (accounting for 1.7 per cent) resulted from MEPA instructions and consultations by the Veterinary Department with respect to stables. Approximately 12 per cent of the variations related to the enlarged reservoir, while the remaining 14 per cent were incurred due to design improvements.

2.1.27 NAO looks askance at the fact that this tender was subject to such variations, totalling 29 requests for variations, even more so when considering that the re-launched version included the separation of considerable works, items and revised M&E plans. The level of variations exceeded what can be reasonably attributed to unforeseen circumstances, accentuated by the fact that variations resulted from changes in design and works. Such situations cast doubt on WSM's estimates and tend to emphasise the perception of poorly managed project design processes.



## *Value for Money*

- 2.1.28 In conducting procurement activities, contracting authorities are to ensure that the process attains the best value for money possible. In order to ensure such value for money, the contracting authorities require reasonably accurate costing/estimates for the projects that are to be undertaken.
- 2.1.29 In this case, WSM's project estimate amounted to €1.85 million (excluding VAT), with an award of €1.07 million (excluding VAT). A number of variations ensued and the actual expenditure ultimately was that of €1.64 million (excluding VAT).
- 2.1.30 Given the discrepancy between the WSM's estimate, contract award value and actual expenditure, NAO looks askance at the accuracy of the initial estimate and the level of value for money assurance adopted by WSM.
- 2.1.31 WSM sought to justify the discrepancy between the estimate and the contract value by indicating that at least one of the tenderers was reasonably close to the estimate and that market prices were used in arriving at such an estimate. Furthermore, WSM affirmed that experience indicated that market prices were frequently ignored in the tenderers' submissions. Moreover, WSM indicated that an abnormally low price test on the tendered offers illustrated that the awarded tenderer would pass such a test, and that after all, design improvements were intended at obtaining better product value within the funding parameters available.

## *Conclusion*

- 2.1.32 To the best of our knowledge, WSM provided all the pertinent documentation to this Office, with such documentation provided in a timely and effective manner. WSM provided records that were filed correctly, containing proper minutes and fully documented. Such documentation facilitated the case study review and was essential in the conduct of this audit.
- 2.1.33 The main audit concerns of this tender revolve around the problematic and ambiguous tender instructions, the radical change to the M&E design just four days prior to the closing date for tender submission, the lack of accurate estimates, and the variations that ensued.
- 2.1.34 In NAO's view, given the level of vetting and the ongoing correspondence between WSM and DoC prior to tender publication, one would not expect any ambiguity to feature in the instructions provided to tenderers. Even more so, the Evaluation Committee failed to compensate for such a shortcoming in the tender document, which failure resulted in an appeal case. As previously indicated, WSM noted that the ambiguity in terms of the sample provision was not detected during the review and evaluation process (paragraph 2.1.3 refers). WSM further noted that the intention of not requesting literature and samples was rendered evident in the tender document and in the subsequent clarifications issued.
- 2.1.35 In cases where extraneous circumstances dictate so, it is preferable that a contracting authority undertakes changes in project design prior to the submission of bids, rather than engaging in post award negotiations (PAN) and/or incurring variations. However, in order to ensure greater transparency and an equal playing field, in this case, WSM should have extended the submission closing date voluntarily and not following a request by one of the bidders. Although indicating its agreement, WSM held reservations on this matter. To this end, WSM claimed that DoC preferred to set deadlines as stipulated in procurement regulations and not to voluntarily extend

deadlines, and have tenderers request extensions should circumstances so warrant. WSM also noted that voluntary extension may imply underhand pressure by an economic operator and hence an attempt by the Contracting Authority to favour a particular tenderer.

2.1.36 Despite the justifications put forward by WSM, NAO deemed it unacceptable for WSM and any other contracting authority to resort to such a level of variations and deviation from the original tender cost/estimate and contract value, as was the case with respect to this project. NAO is of the opinion that contracting authorities are to ensure robust project planning and cost/estimates, rather than issuing a tender and simply request approval for changes in design and/or cost variations when these inevitably arise. In this case, NAO cannot ascertain nor discredit the notion that such variations impinged on the ranking merit or the final project cost. However, such actions, especially given the substantial variation of approximately 54 per cent, cast doubt on the pre-tender activity involving project design and cost/estimates.

## 2.2 Case Study 2: Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at Tal-Kus l/o Xewkija Gozo (CT 3004/2010)

### *Tender Model, Costing and Timing*

2.2.1 This EU co-financed tender consisted of an open procedure, three-package type, tendering process.

2.2.2 NAO deemed the tender document to contain the required information, sections and provisions/clauses, setting the path to be followed in the tendering process. Such procedure, package type, and documentation, adhered to the legal requirement for procurement expenditures of such value.

2.2.3 The project estimate drawn up by WSM amounted to €7,186,331 exclusive of VAT (€8,479,870 including VAT), and comprised three lots with the following cost outlay: €500,000 Lot I - Excavation Works, €6,263,255 Lot II - Design and Build and €423,076 Lot III - Operation. This project was awarded to the recommended tenderer at a value of €8,241,902 (including VAT).

2.2.4 The contract was signed on 18 March 2013, with an estimated period of execution of 18 months from date of commencement, 1 June 2013. According to WSM, the project is currently on hold, pending DoC approval for the considerable changes in terms of project scope and design. In the draft request for variations to DoC (pending submission), WSM indicated that an extension to contract completion date of 164 days would be required, with 13 May 2015 indicated as the revised planned date of completion. At the time of reporting WSM clarified with this Office that the request was still at draft stage and had not yet been submitted. The 164 days extension did not include the current 'suspension' of the contract, which was already in its second month. Hence, the contract was, by implication, likely to extend further than May 2015.

### *WSM's Role*

2.2.5 From evidence made available to this Office, WSM acted within its enabling act, following the norms as required by the pertinent procurement regulations. WSM sought approval and endorsement from DoC in relation to the proposed Evaluation Committee. All members of the Evaluation Committee signed the 'declaration of impartiality and confidentiality', thereby declaring an absence of conflict of interest and ensuring secrecy with respect to the tender under review.

- 2.2.6 It is worth noting that from the initial stages of the tendering process WSM maintained a constant level of communication with DoC, seeking approval and endorsement as and when deemed necessary.
- 2.2.7 Furthermore, from the documentation made available, WSM engaged the services of external consultants in relation to this tender. The consultant's input included the preparation of the conceptual design, preparation of the tender document and the tender estimate.

#### *Process*

- 2.2.8 NAO considers that the pre-submission process of this tender followed the legal norms attributed to public procurement processes. DoC vetted and endorsed the draft tender document prior to publication, and endorsed the Evaluation Committee as proposed by WSM.
- 2.2.9 WSM forwarded to DoC the replies to clarifications, with the latter circulating the replies among all prospective bidders. In response to requests forwarded by bidders in the form of clarifications, WSM extended the submission date from 28 April 2011 to 19 May 2011. Tender offers were deposited at DoC and subsequently opened in public.

#### *Evaluation and Adjudication Process*

- 2.2.10 WSM refrained from appointing a short-listing or adjudication committee, but opted to entrust the Evaluation Committee with all of these roles. The Evaluation Committee, as composed, was recommended by WSM and subsequently approved by DoC.
- 2.2.11 DoC refrained from appointing an ad hoc Special Contracts Committee (SCC) and entrusted GCC to endorse, or turn down, the recommendation of the Evaluation Committee.
- 2.2.12 The tender document clearly set the evaluation criteria/specifications upon which the Evaluation Committee based its decision. Such criteria served as the benchmark for evaluating and eliminating bidders deemed to be non-compliant to such criteria/specifications. The evaluation criteria utilised included the bidders' financial and economic standing, and their technical capacity with respect to tender work requirements, among others.

#### *Tender Award Process*

- 2.2.13 The Evaluation Committee recommended a bidder for tender award, which GCC and DoC upheld and endorsed. The award decision was published by DoC on its internet portal. Moreover, from the provided documentation, NAO confirmed that DoC informed all tenderers of the evaluation outcome.
- 2.2.14 The GCC awarded the tender to the cheapest, administratively, technically and financially compliant offer, as recommended by the Evaluation Committee.

#### *Appeal*

- 2.2.15 Following the evaluation outcome, one of the bidders filed an objection with the PCRB, resulting in the suspension of the award process. The appeal filed on 16 January 2012 by BS Environment Joint Venture contested the disqualification of the offer on lack of administrative compliance with respect to clause 14 of the tender document.

- 2.2.16 The appeal took a legal compliance perspective on the interpretation of clause 14 of the tender document. In essence, the main contention stemmed from the language in which the bidder provided documentation, namely incomplete or in the Italian language as opposed to the English language (as requested in the tender document).
- 2.2.17 Following the introduction of amendments to the procurement regulations, the appellant claimed that such shortcomings in the submission did not warrant disqualification. In addition, the appellant argued that WSM could have requested such documents as required and therefore grant the possibility to submit such documents against payment of a fee of €50.
- 2.2.18 Having heard the submissions of all interested parties, the PCRB upheld the appeal and recommended the reinstatement of the appellant and the reimbursement of the deposit paid for the appeal to be lodged. Notwithstanding PCRB's recommendation, WSM maintained that it had adhered to Clause 14 of the tender document, which required the submission of all documents in English or supported by a translation. Hence, WSM argued that the Evaluation Committee had acted correctly, as per established practices. While acknowledging that the PCRB viewed the situation differently, WSM disagreed with PCRB's recommendation.

### *Variations*

- 2.2.19 At the time of reporting, WSM indicated to NAO that the project was being reviewed with the possibility of major changes in project scope and design. The excavation works relating to Lot I have been undertaken with no variations; however, this is contingent upon possible revisions in terms of project scope and design, which may necessitate further works giving rise to variations. The other primary changes currently under consideration are:
- a. The substitution of the equipment for the mechanical pre-treatment of the waste with simpler waste compaction equipment; and
  - b. The extension of the roof area from that contemplated in the original tender to cover the whole area of the facility.

WSM maintained that these changes were due to unforeseen circumstances that took place following the publishing of the tender. As per WSM's draft request to DoC (pending submission) for the approval of variations, the resulting cumulative value of variations is indicated as 23 per cent of the contract value.

### *Value for Money*

- 2.2.20 In conducting procurement activities, contracting authorities are to ensure that the process attains the best value for money possible. In ensuring such value for money, the contracting authority requires reasonably accurate costing/estimates for the projects that are to be undertaken. Given that this project is still in its initial implementation stages, NAO is not in a position to comment upon value for money considerations.

### *Conclusion*

- 2.2.21 To the best of our knowledge, WSM provided all of the pertinent documentation to this Office, with such documentation provided in a timely and effective manner. WSM provided records that were filed correctly, containing proper minutes and fully documented. Such documentation facilitated the case study review and was essential in the conduct of this audit.

2.2.22 Following tender award, an aggrieved bidder filed an appeal. The appeal resulted in the reinstatement of the bidder who eventually won the tender as the offer was classified as the lowest priced administratively and technically compliant offer.

2.2.23 NAO cannot but stress the importance of promoting a higher level of competition with contracting authorities refraining from causing undue hindrance to the tendering process. Moreover, contracting authorities should adopt a proactive approach, use all available mechanisms to ensure a level of competition essential in obtaining greater value for money, and not rest on the assumption that an aggrieved bidder would file an appeal.

### 2.3 Case Study 3: Improvement of the Sant' Antnin Waste Treatment Plant and Material Recycling Facility (CT 2089/2005)

#### *Introduction*

2.3.1 This tender consisted of multiple lots, four in all, which together formed one project. The tendering procedure entailed a tender launch process leading to the submission of offers, whereby prospective bidders could bid for all, specific, or a single lot, presenting separate submissions for each lot. Separate evaluation of each lot took place, as per the evaluation criteria. Following evaluation, the process evolved (from contract signing until commissioning) independently for each lot. Therefore, the following text details the tendering process from launch to evaluation in a joint manner, with post evaluation processes reported separately for each lot.

2.3.2 It is worth noting that this tender sustained substantial variations in the assigned lots. In the main, the variations stemmed from changes in design. WSM sought to justify such changes by indicating that all four lots were for design-build contracts and that changes resulted from the interdependency of the lots, that is, the design of one contract affected the design of other contracts. According to WSM, the design requirements were not, or not substantially, altered during execution. Given such a justification, NAO cannot but question the tender design and the lack of foresight exhibited by WSM in segmenting the project into four Lots, resulting in three contractors operating on one project, thereby creating exposure to problems arising from the interdependency of the lots.

#### *Tender Model, Costing and Timing*

2.3.3 Funding for this tender consisted of local funds with respect to Lots I and II, while Lots III and IV were co-funded by the EU. The tender model implemented consisted of an open tendering procedure, adopting the three-package process. Due to the complexity and varied nature of the project, consisting of three types of recycling facilities and the civil works required to house such facilities, this tender consisted of four distinct lots, these being: Lot I Civil Works, Lot II Mechanical Treatment Plant, Lot III Biological Plant and Lot IV Mechanical Recycling Facility. The tender estimate drawn up by WSM amounted to Lm9.81 million exclusive of VAT (equivalent to €22.85 million). The total values for the design-build contracts of Lots I to IV amounted to €24.7 million (excluding VAT).

2.3.4 DoC, on behalf of WSM, published the call for this tender in the Government Gazette on 28 October 2005, with the EU Contract Notice dispatched on 25 October 2005 and subsequently published in the EU Journal.

2.3.5 Initially, the closing date for the submission of offers in relation to this tender was 20 December 2005; however, this due date was extended to 31 January 2006. As

indicated, since the tendering process consisted of distinct lots, tenderers could bid for all, specific, or a single lot.

- 2.3.6 From the documentation made available to NAO, the project management/supervision was entrusted to IGM. WSM indicated that the engagement of the project management/supervision firm was subject to a separate public tender, with the direct order being resorted to when substantial delays incurred in the execution of works constrained WSM to seek DoC approval for the extension of the original contract. Following DoC's decline, WSM sought Ministry of Finance (MFIN) approval for a direct order standing at Lm11,200 (equivalent to €26,089) through a request dated 27 April 2007, with the approval being granted on 3 May 2007. Given that the Engineer (IGM) had been engaged throughout the project, WSM deemed it ideal to retain the same Engineer. In view of DoC's refusal to extend the Engineer's original contract, WSM resorted to a direct contract, seeking relevant approval from MFIN. WSM claimed that the retention of the Engineer should not have been bound by a pre-determined timeframe, but should have been bound to the effective period within which works were executed.
- 2.3.7 NAO deemed that the tender document contained all the required information, sections and provisions/clauses setting the path that the tendering process was expected to follow. The procedure, package type, and documentation, adhered to the legal requirements for such procurement expenditure.

#### *WSM's Role*

- 2.3.8 On the basis of documentation reviewed, WSM acted within its enabling act, following the norms as required by the pertinent procurement regulations. WSM sought approval and endorsement from DoC in relation to the proposed WSM Evaluation Committee. All members of the Evaluation Committee signed the 'declaration of impartiality and confidentiality', thereby declaring an absence of conflict of interest and ensuring secrecy with respect to the tenders under review.
- 2.3.9 It is worth noting that from the initial stages of the tendering process, WSM maintained a constant level of communication with DoC, seeking approval and endorsement as and when deemed necessary. Such practice extended to post award activities and circumstances that ensued. In addition, from the documentation made available to this Office, WSM engaged external consultants in order to assist the Evaluation Committee.

#### *Process*

- 2.3.10 From the information furnished, NAO considers that the pre-submission process of this tender followed the legal norms relevant to public procurement processes. DoC endorsed the tender document and the Evaluation Committee as proposed by WSM. In addition, all of the members composing this committee signed the declaration of 'confidentiality and impartiality'.
- 2.3.11 WSM replied to all requests for clarifications received and instructed DoC to circulate such clarifications among all bidders. In addition, WSM held a site visit/clarification meeting. As stipulated through the pertinent legislative framework, tenderers deposited the tender packages at DoC, with the tenders being opened during a public session.

## Evaluation and Adjudication Process

2.3.12 WSM refrained from appointing a shortlisting or adjudication committee, but opted to entrust the Evaluation Committee to fulfil all of these roles; however, external experts assisted this Committee in executing its function.

2.3.13 DoC opted not to appoint an ad hoc SCC and entrusted GCC with endorsing, or otherwise, the recommendations of the Evaluation Committee.

2.3.14 The tender document clearly set the evaluation criteria/specifications upon which the Evaluation Committee based its decision. Given that for each of the four Lots, most offers exceeded the budgeted amount, the selection criteria followed the American Pairwise model<sup>4</sup>. The criteria attached to this model served as the benchmark for the ranking process of compliant bidders (for each of the four Lots), both with respect to the technical and financial evaluation. Non-compliant bidders were eliminated and did not form part of the ranked bidders. Among other criteria, the evaluation criteria included the bidders' financial and economic standing, as well as their technical capacity with respect to tender work requirements.

## Tender Award Process

2.3.15 The Evaluation Committee recommended a bidder for tender award for each of the four Lots. GCC and DoC upheld and endorsed the recommendations of the Evaluation Committee. No details regarding the publication of the award notice were found; however, WSM indicated that DoC had published the award on its notice board as was practice at the time. In addition, despite requests from WSM, DoC did not take the necessary action leading to the publication of an EU Contract Award Notice. Nonetheless, from the provided documentation, this Office confirmed that all tenderers were informed of the outcome of the tendering process.

2.3.16 Table 3 illustrates the results of the evaluation process, indicating the first ranked (based on the Pairwise method) offer for each lot.

**Table 3: Recommended Award and Contract Value for Lots I to IV**

Lot	Tenderer	Contract Value (€) (excluding VAT) <sup>1</sup>
I	Strabag AG (+ BTA GmbH & CO. KG + Polidano Bros. Ltd)	7,337,116
II	Atzwanger SPA <sup>2</sup>	2,173,013
III	Haase Anlagenbau AG (+ Vassallo Builders Group Ltd)	13,270,705
IV	Atzwanger SPA	1,939,684

### Notes:

1. Tenders awarded in Lm, table indicates Euro equivalence; and
2. Initially awarded to Synmet Int BV for the value of €2.3 million; however, the Contractor filed for insolvency. Therefore the second in rank, Horstmann GmbH & Co. KG (+ Organic Waste Systems N.V + C&F Building Contractors Ltd. + Bonnici Bros. Ltd), was awarded the contract. However, Horstmann eventually filed for insolvency too and the contract was subsequently awarded to Atzwanger SPA. Synmet and Horstmann had higher financial offers; however, scored higher points with respect to the technical criteria. This explains why Atzwanger was ranked third despite its lower priced offer.

2.3.17 From the available documentation, the appeal process and the eventual awards for each of the four lots appear to have followed the pertinent legislative requirements of public procurement.

<sup>4</sup> Pairwise method: A system of ranking according to two preset criteria, each assigned a weight, in order to aggregate a total score, upon which bids are ranked. In the case of Lots I to IV, the weighting assigned to the financial and technical components was that of 40 per cent and 60 per cent, respectively.

## Appeal

- 2.3.18 Following the evaluation and award for each of the four lots, Haase Anlagenbau AG (one of the tenderers for Lot I) filed an appeal. The objection was raised in relation to the composition of the joint venture that was recommended for award, with the appellant's legal counsel questioning the regularity of the joint venture and the use of the Pairwise method of evaluation.
- 2.3.19 The appellant questioned the regularity of the joint venture composed of three members, since during the site visit held on 22 November 2005, held at Sant' Antnin Waste Treatment Plant, WSM had declared that "... a civil works contractor can join forces only for Lot I provided that the Joint Venture/Consortium is composed from not more than 2 members." The recommended bidder's legal representative indicated that the reply quoted by the appellant stemmed from a question requesting guidance as to the possibility of forming a joint venture for bidders interested in submitting offers for Lot I only. Therefore, bidders who submitted bids for Lots II, III, and IV, could have formed joint ventures in excess of two members.
- 2.3.20 In its other point of contention, the appellant indicated that the Pairwise method was not applicable for the award of Lot I, since this Lot did not have a technical aspect upon which the bidders had to submit an offer. The appellant supported this line of argument by stating that tenderers were not required to submit a 'Proposed Technical Solution', since WSM provided the design. WSM and the recommended bidder disagreed with such logic, with the latter's legal representative indicating that during the clarification meeting, WSM had informed bidders, including the appellant, of the applicability of the Pairwise method in relation to Lot I. Through its legal representative, WSM indicated that the tendering procedure consisting of the three-package model implied that a technical offer had to be submitted in package two. In addition, WSM claimed that as per clause 10, 'Modifications to Tender Documents', the benchmark for evaluation could in fact be changed on condition that all bidders were informed of such changes beforehand. Finally, WSM stated that the appellant had signed and annexed the minutes corresponding to the above-referred site meeting with the tender offer, and it was only at this stage that contentions relating to the Pairwise method had been raised.
- 2.3.21 Following the initial hearing, the parties concerned agreed to PCR B's<sup>5</sup> request to put forward and exchange their submissions by 6 October 2006 and provide corresponding requests by 13 October 2006. Having considered all issues raised during the hearing and having taken note of the written submissions and corresponding requests, the PCR B reached a conclusion on each issue as per its report dated 1 November 2006. In sum and on the basis of its conclusions, the Board did not uphold the appeal, and recommended against refunding the deposit submitted by the appellant in order to initiate the appeal.

## Post-Award Negotiations

- 2.3.22 The works tender for the 'Improvement of the Sant' Antnin Waste Treatment Plant' was subject to a contract period spanning 59 months, commencing on January 2007. During this period of project implementation, a series of variations to the project ensued. WSM sought DoC's endorsement for such variations, with the latter vetting the request and providing due authorisation. Such variations amounted to approximately 23 per cent of the contract value. Two of the direct orders issued in relation to this

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<sup>5</sup> For purposes of precision, the PCR B at this indicated time of appeal was referred to as the Public Contracts Appeals Board.



project were for the Lot IV Baler and extensive changes to the Mechanical Treatment Plant (shed). In addition, WSM engaged in separate negotiations with the Contractors awarded Lots II, III and IV for the procurement of spare parts and servicing, that amounted to €1.3 million annually. The following text illustrates such variations on a lot-by-lot basis.

#### *Variations: Lot I – Civil Works*

**2.3.23** This Lot consisted of the civil works in relation to the tender ‘Improvement of the Sant’ Antnin Waste Treatment Plant and Material Recovery Facility’. The planned civil works were estimated to cost Lm2.5 million (€5.8 million) excluding VAT. Such civil works included: the partial demolition of small buildings, the dismantling of the cladding and roofing of two existing buildings (and their reuse in two other locations), site preparation, ground works, access roads and utilities, foundation works, terrain infrastructure, upgrading of the administration building and utilities associated with the installation of the MTP. This contract of works was awarded for the sum of Lm3.15 million (€7.3 million) excluding VAT.

**2.3.24** Upon review of the documentation in relation to Lot I, this Office noted a considerable amount of variations. Of interest in this respect was correspondence submitted by WSM to Director General DoC on 23 June 2009, excerpts of which have been reproduced in Box 1.

#### **Box 1: Correspondence regarding CT 2089/2005 – Lot 1**

##### **Excerpt from Correspondence submitted by WSM to Director General DoC dated 23 June 2009**

... the awarding of different lots to different contractors has given rise to delicate interfacing situations, in particular between the Lot I Contractor and the other three Lots’ Contractors, and limitedly between the Lot II and Lot III Contractors. The most difficult situations, however, arise in the Lot I Contractor’s scope of works in undertaking civil works, mechanical and electrical installations (essentially services) to meet the specific requirements resulting from individual designs of the other Lots. This had been envisaged in the Lot I Bills of Quantities by the provision of an overall 10% contingency sum that, however, has been exhausted to cater for the changes in quantities to a number of bill items. Moreover, WasteServ has resolved to shift all its administrative offices to a Government owned property in an effort to reduce expenses for the leasing of office space. This property has been identified in the existing administrative building at the Sant’ Antnin plant which housed only the relative operational personnel. This however entails the demolition and reconstruction of a large part of this building and hence departs from the simple refurbishment entailed under [the] Lot I contract. Therefore, WasteServ is opting to propose the removal of the related civil works and electrical installation elements from within the Lot I Contract scope of works. ... On the other hand, however, the Lot I Contractor has submitted claims for presumed extra works, which the Supervision Engineer has determined as being already included in the original scope of works, and hence already costed in the relative Bills of Quantities. In fact these claims have been officially rejected and, should the Lot I Contractor persist in pursuing these claims, shall have to be referred to Dispute Adjudication procedures, failing which these shall have to be referred to Arbitration proceedings, all this in accordance with the FIDIC General Conditions of Contract. Other similar claims have been submitted by both the Lot II and Lot III Contractors, some of which are conductible, in WasteServ’s opinion, to defaults on the part of the Lot I Contractor. Hence, WasteServ shall be formulating counter claims in respect of the Contractors and which shall also be subject to the same Dispute Adjudication and eventual Arbitration procedures. ... All the above is evidence of the complexity of the management of three different Contractors for the performance of four different Contract Lots towards the finalisation of a single project.

The approved contract value for Lot I is of Lm3.15 million. As a result of the variations risen in Lot I due to the fact that different Lots have been awarded to different contractors, the FIDIC Engineer (Messrs Poyry/BCS/PBG Joint Venture - IGM) has identified a number of Contract Bills which will not be utilized due to the changes in the Employer’s Requirements thus determining a savings equivalent

to Lm600,927, thus resulting in a utilized amount as per original contract specification amounting to Lm2,632,374 (item 6 ...). As highlighted above, Messrs IGM have determined a substantial number of claims made on Lot I amounting to Lm1,898,153 (item 7 ...) equivalent to 60.3% of the Lot I original Contract Value which however translates to 41.2% if savings mentioned above are taken into consideration. The summation of the mentioned accepted variations (item 12) to the amount representing the utilized value from the original contract (item 6) Lm2,632,374 represents the total value to be financed via local funds, and amounts to Lm4,447,050 (item 8). This translates in an increase in the local funding of the project of Lm364,351 (item 10), or 3.2% of the overall project value (item 3). On the other hand, Messrs IGN have rejected claims to the value of Lm1.14 million (item 13), excluding additional potential claims on the claims already determined as acceptable by Messrs IGM. These claims will be referred to a Dispute Adjudication Board (DAB) to be set up in accordance to the FIDIC General Conditions of Contract.

Besides, the company believes it has solid grounds to issue counter claims in respect of both the Lot I and Lot III (Messrs Haase/Vassallo JV) Contractors to the value of Lm423,824.14. These claims relate to work performed by Lot I Contractor not being in accordance to the Employer's Requirements. Moreover, Lot III has requested specific works from the Lot I Contractor in order to meet the specific design requirements for the digester tank bases and oxidization tank bases which, however, WasteServ claims as should have been included in the Lot III civil works bill item. These claims again will be subject to the decisions of the DAB.

Should the above detailed counter claims materialize favourably for the company, the net variation from the overall project value would positively balance in favour of WasteServ by Lm59,473 (item 12) thus resulting in a reduction in the overall project value by 0.5%. ... Pursuant to the above, variation requests as per attached details are hereby being submitted in terms of Part III - Variation Orders of the Public Contracts Regulations, 2005. The total value of the Variations being requested amount to Lm1,898,153 in favour of Lot I Contractor, namely Messrs JV Strabag/Polidano/BTA, whilst the deductions for the total value of Lm517,450 from the related bill items shall also be taken into consideration and recoded accordingly.

Moreover, WasteServ request also the formulation of an Addendum to the Lot I Contractor by which the related bill items, namely the whole of Zone R valued at Lm48,429.43 in Lot I Civil Works and Items A.3.3.1.1., B1.1.7 and B.1.1.9 valued at Lm35,048 in Lot II Building Services amounting to a total value of Lm83,477.43 are to be removed from the contract scope of works.

**2.3.25** The main audit concern of Lot I revolved around the considerable amount of variations that featured during the implementation phase, which WSM attributed to the considerable interfacing problems that arose when implementing the different Lots. On the basis of documentation made available to NAO, and from a strictly compliance based perspective, this Office considers the manner by which WSM managed the variations arising as appropriate, seeking approval for such variations from MFEI and DoC.

**2.3.26** However, this Office deemed that variations corresponding to 60 per cent of the original contract value, totalling €4.4 million, exceeded what one would ordinarily consider as difficulties encountered due to the interfacing processes. Therefore, although not in a position to ascertain beyond any doubt as to whether such variations effectively resulted due to such interfacing problems or due to an element of poor planning, the sheer magnitude of such variations does raise concern. This concern is accentuated by the extensive changes in project design, which undoubtedly further compounded the aforementioned interfacing difficulties. In principle, WSM considered NAO's concerns as fair; however, maintained that the variations were unavoidable due to the manner in which the Lots were designed and eventually awarded to different Contractors, with different design requirements.

2.3.27 Compounding the issue was the fact that contentions arose with respect to the final certificate for recommended payment drawn up by the Project Engineer, IGM, with WSM and the Contractor failing to reach an agreement. According to WSM, the full and final settlement of the certified sum was still pending as at time of reporting. WSM was advised to issue a legal letter to the Contractor offering payment of the final certificate in full and final settlement. Should the Contractor fail to reply within the stipulated timeframe, WSM would proceed to deposit such a sum in Court.

2.3.28 NAO is of the opinion that variations and direct contracts should only be reserved for emergencies and unforeseen circumstances and not serve as a safety net for poor planning and ineffective management. WSM's recourse to additional variations, over and above variations that were already approved, are in NAO's view, a poor reflection on WSM's project management control function. WSM contended otherwise, asserting that such a conclusion could not be arrived at without delving deeper into the specific nature of the variations and the circumstances leading to them. However, NAO maintained its stand on the matter, basing such a view on the fact that WSM opted to segment the project into four lots and proceed to award relevant contracts on a lot-by-lot basis to different contractors. In NAO's opinion, the difficulties associated with such a manner of contracting should have been foreseen.

#### *Variations: Lot II – Mechanical Treatment Plant*

2.3.29 This Lot consisted of the provision of a MTP, which was to be housed in the infrastructure works appertaining to Lot I, and was estimated to cost Lm1 million (€2.33 million) excluding VAT. The intended function of this plant was the separation of organic waste, which was to be converted into compost.

2.3.30 Following the tender award stage, this Lot sustained considerable developments, both at pre-contract signing and during the implementation phase. Subsequent to the evaluation and adjudication process, Synmet International B.V. was ranked first with 91.27 points, thereby qualifying for tender award at a contract value of Lm996,183 (€2.30 million). However, this firm could not meet its obligations due to insolvency. As a result, Horstmann GmbH & Co. KG. (ranked second with a score of 59.28) became eligible for tender award at a contract value of Lm1 million (€2.4 million). To this effect, WSM issued a fresh evaluation report recommending Horstmann GmbH & Co. KG for tender award. Eventually, even this tenderer failed to fulfil the contractual obligations of the awarded contract due to a situation of insolvency. Given such circumstances, the contract was once again awarded to the next ranked bidder, that is, the firm that originally ranked third. To this end, WSM awarded the tender to Atzwanger S.p.A., with a contract value of Lm932,875 (€2.17 million) (note 2 to Table 3 refers).

2.3.31 Of note is the fact that WSM also entered into a direct contract procedure with this Contractor for the supply of spare parts, to the value of €55,609. In this regard, WSM indicated that spare parts did not form part of the original contract, reserving the right to determine the type, number and value of spare parts at a later stage. According to WSM, a direct contract was the only logical consequence as spares could only be procured from the original supplier of the plant, at least within the warranty period.

2.3.32 Upon seeking endorsement from DoC for the award of such a direct contract, DoC questioned the reason as to why such procurement was not *"... part and parcel of the original tender, thus avoiding unpleasant direct orders."* WSM justified such a direct contract by making reference to EU funding regulations, which do not allow for the reimbursement of consumables; however, WSM's response cited the co-funding arrangement in place with respect to Lots III and IV, while failing to provide specific justification for Lot II, which was locally funded.

2.3.33 In addition to the indicated direct contract, Lot II sustained considerable variations due to changes in project design. Such variations resulted in a total increase of approximately €700,000, equivalent to 32 per cent of the original contract value, spread over four Addenda to the original contract.

*Variations: Lot III – Biological Plant*

2.3.34 This Lot consisted of a contract for the provision of an Anaerobic Digester plant that was planned to interface with the civil works undertaken as per Lot I, and was estimated to cost Lm5.5 million (€12.90 million) excluding VAT. This contract was awarded to the joint venture Haase/Vassallo at a value of Lm5.7 million (€13.3 million) excluding VAT.

2.3.35 The initial stages of this Lot intimated at a certain element of teething or implementation divergences, as at pre-contract signature stage, discrepancies between WSM and the Contractor materialised. Such divergences were mainly attributable to the different positions maintained by WSM and the Contractor with respect to the interfacing of Lot III with Lot I and the operational costs incurred during the warm commissioning. It is worth noting that just days prior to contract signing such divergences remained unresolved, resulting in WSM requesting DoC's assistance as per correspondence dated 17 November 2006. Further correspondence dated 17 November 2006, indicated that WSM informed the Contractor that such issues were of a post-contract signing nature and subject to further discussion. Immediately drawing NAO's concern is this situation where WSM was willing to sign a contract with a party it deemed as adopting a position that was *"not fair and trustful"* and postpone the relevant discussion of such issues to a later stage. Though it is acknowledged that as indicated in correspondence with DoC, a level of urgency had materialised; NAO maintains that pending issues should have been, as much as possible, resolved prior to contract signing. This Office noted that such unresolved issues posed a risk to WSM's position, particularly in view of the complexity and interdependence of different elements of the project. At least, prior to contract signing, WSM sought to mitigate the risk arising from variations by providing clarifications and including a safeguard in the contract for Lot III.

2.3.36 The initial project implementation stage indicated that some form of interfacing problems would result. In fact, the Lot III Contractor requested an extension to the completion date due to delays caused by the Lot II Contractor. At an early stage, the Lot III Contractor claimed that apart from the seven week late start delay absorbed by the Contractor, further delays amounting to eight to twelve weeks would materialise. Such requests at the early stages of implementation indicated that some form of interfacing problems were bound to materialise. In fact, further into the implementation of the Lot III contract, notable delays ensued, with the Contractor for Lot III presenting claims resulting from such delays, and eventually the parties signed an additional addendum to the contract (Addendum 3). This Addendum gave rise to a revised time schedule based on pre-agreed time extensions.

2.3.37 However, despite initial efforts, other interfacing problems emerged nonetheless. Through correspondence dated 15 May 2009 (copy of which was resubmitted on 12 June 2009), the Lot III Contractor presented fresh delay claims, specifically arising from contract conditions whereby 'The Employer has failed to give the possibility to assemble the equipment of the pipe work without interruptions'. According to this correspondence, the claims arising due to 'interruption of assembly regarding the pipe work' were:

- a. Costs for return flight and transfer, one way (€6,500);
- b. Rental cost for Merlot (€825/week);
- c. Rental cost for containers (€490/week);
- d. Rental cost for tools (€7,500/week);
- e. Rental cost for Ford Transit (€975/week); and
- f. Rental cost for flat (€950/week).

Further to these claims, the Contractor reserved the right to claim any other costs incurred.

2.3.38 Numerous additional claims relating to various aspects of Lot III were raised by the Contractor. On its part, WSM also presented counter-arguments to such claims and issued delay charges to the Lot III Contractor. Details of such claims and counter-claims are presented in Appendix A in tabular format.

2.3.39 Regarding variations, NAO deemed that there might have been avoidable variations to project design through better planning at the design stage. With reference to the Ultra Filtration and Reverse Osmosis (RO) plant, during the tender clarification session, WSM had requested from prospective bidders a submission of the price for this plant. However, this offer did not form part of the financial evaluation of the tender, serving only as an indicative offer should WSM require the plant. In addition, due to the technical nature of the plant, should it be required, the responsibility for providing such a plant rested with the Contractor for Lot III. This situation exposed WSM to an unnecessary element of risk, since the purchase would be subject to a variation in Lot III and not to a competitive tendering process. Omitting such a substantial part of the project, valued by the Contractor at €383,000, resulting in a variation of approximately three per cent of the project cost is not an ideal situation, especially when the only option remaining under such circumstances would be the resort to a variation. One may note that this variation does not result from a change in the project components, but comprises the purchasing of an additional item. From the available documentation, NAO noted that during the clarification session stage, WSM was still considering the possibility of using an adjacent Sewage Water Treatment Plant located at Marsaskala instead of acquiring a new one under the Lot III project. From the review of documentation relating to this case, NAO was unable to comprehend how WSM failed to reach a decision as to whether the RO plant would be required during the design stage, yet during implementation, decided to procure the plant following internal discussions.

2.3.40 Despite requesting quotations during the clarification session, and the Lot III Contractor's adherence thereto, this same Contractor re-submitted a fresh quotation to WSM, dated 28 March 2006. It is unclear as to why the Contractor presented the fresh quotation (identically priced to the original quotation), particularly in view of the fact that the Contractor was bound by the original submission in this respect.

2.3.41 Moreover, NAO also deemed that at times, WSM sought DoC approval at a late stage in the process, thereby creating an element of undue pressure on the Department. Such instances may have limited the level of vetting and conditioned DoC's response by curtailing the time available to formulate an informed opinion in order to prevent further delay. A case in point were the requests made for the approval of the Ultra Filtration and Reverse Osmosis Plant, dated 25 June 2007 and 2 July 2007. Given that the quotation was reconfirmed on 2 April 2007, NAO deemed the three-month delay as unwarranted and inconsistent with the sense of urgency imparted by WSM to DoC, specifically when stating, *"Referred for your consideration and earliest instructions please, in order not to delay the design process for this Lot."* In this instance, DoC

approved the variation, indicating that if this variation did not, independently or in conjunction with other approved variations, exceed the five per cent threshold, GCC approval was not required. This in itself reflects normal procurement procedure, verifiable against the procurement regulations. However, on the basis of the documentation provided, NAO was unable to verify the justifications put forward by WSM in arguing that such variations were due to unforeseen circumstances, given that such evidence was not retained in file. Therefore, NAO finds difficulty in determining the basis upon which DoC formulated its opinion and subsequently granted approval.

2.3.42 Changes in payment schedules were also indicative of deficiencies at the planning stage. An addendum dated 27 August 2007 mandated revisions in terms of the project's payment schedule. WSM sought to justify such changes by arguing that most of Lot III's scope was the provision of machinery and process equipment. Therefore, WSM and the Contractor did not consider the monthly payment approach originally envisaged as per terms of contract as adequate. It is in this context that revisions to the payment schedule ensued. Given that payment schedules routinely form part of contracts, NAO looks askance at the need for revisions to such schedules. This is even more so when WSM claimed that such proposed amendments in the payment schedule reflected industry practice, *"It is industry practice to relate payments to project milestones and the JV Haase Vassallo has come forward with a proposal to replace the original contract conditions by a milestone-related payment schedule."* Given that such a payment schedule reflects industry practice, NAO questions the reason as to why such a schedule was not part of the original contract. In the main, WSM agreed with such conclusions; however, sought to emphasise the relevant context, indicating that this was WSM's first major tender. In addition, WSM indicated that it was supported by an external consultant, yet the level of assistance provided in this respect could have been better. Furthermore, WSM claimed that revisions to the payment schedule served as clarification rather than actual amendments. Following such changes, the revised payment schedule established specific milestones rather than perceived progress.

2.3.43 On 13 November 2009, the Contractor sent a series of letters to WSM. In the first communication, the Contractor referred to the current situation as an *"unsatisfying project situation"*, indicating willingness to resolve all pending issues through discussions with WSM and IGM. In the second communication, the Contractor requested a time extension in relation to the several claims raised from its end. The proposed extension implied that the 'Time for Completion' as referred to in sub-clause 1.1.33 of the contract would be revised upwards by 667 days to 52 months. WSM emphasised the dire situation within which the Contractor, and by implication the contract, was in at the time. The Contractor had requested evidence of WSM's financial arrangements with respect to the eventual settlement of this contract and had at one point indicated its possible withdrawal resulting in the termination of the contract. WSM complied with the Contractor's request, providing a copy of the EU Grant Agreement as proof of the availability of funds; however, such evidence was not deemed satisfactory by the Contractor. The situation was eventually resolved when Vassallo took over joint liability obligation.

2.3.44 Through the third communication, the Contractor submitted a list of claims, indicating those claims that were still active and those that had been settled. According to the Contractor, IGM (the project Engineer) had failed to address these claims as stipulated in the contract conditions, thereby this list was intended to serve as *"an act of clarification"* and a sign of *"goodwill in relation to an overall compromise"* with respect to the claims raised and the corresponding status of each. In the fourth communication, the Contractor referred to the liability of the Engineer in relation to the procedures for tackling the raised claims as stipulated in the contract agreement.

- 2.3.45 Further communication by the Contractor reflected the intention of the Contractor to engage in negotiations with regard to the delay charges and proceed with the project implementation, such that both parties could benefit from the proposed and mutually agreed way forward. In addition, the Contractor sought feedback in relation to the revised program presented from its end, dated 16 July 2009 and 29 September 2009. Moreover, the Contractor also sought clarification in relation to the Performance Guarantee.
- 2.3.46 The Contractor raised numerous other claims regarding various aspects of project implementation. These are presented in detail in Appendix A.
- 2.3.47 On 11 January 2013, WSM presented to the Contractor an ‘Employer’s Claim’ for delays amounting to €950,703. Such a claim was made against the alleged delay of 153 days valued on a daily basis as 0.05 per cent of the contract value. In its claim, WSM expanded upon the reasons that caused such a delay. The Contractor disagreed with such claims and on 21 January 2013 presented a reply to WSM. This reply presented the Contractor’s points of contention, indicating various reasons substantiating the position assumed against the liability to delay claims. This reply triggered further contention from WSM, with counter-replies provided to the Contractor on 8 February 2013. In reply, the Project Engineer considered the submissions of both parties, WSM and the Contractor, and gave an opinion on such. The recommendation of the Engineer, on consideration of all the claims, was that, the delay charges as claimed by WSM were correct; however, when considering the actions of goodwill by the Contractor, the claims should be revised to 139 days. Subsequent to this, on 8 February 2013, the Contractor presented the Project Engineer with a new claim and reaffirmed the yet uncertified amounts totalling €1.9 million, together with supporting documentation. The Contractor also indicated the willingness to meet the Project Engineer in order to discuss and clarify any items.
- 2.3.48 On 4 March 2013, WSM corresponded with the Project Engineer, indicating their position on each point, further reiterating, “... that the additional claims by the contractor should be declared as time-barred and requests that the Engineer issues his determination on these issues at the very earliest. It is our position that until such determination is issued, no further discussions or other procedures be contemplated.”
- 2.3.49 Following extensive exchanges between the Contractor for Lot III and WSM, there remained a significant level of divergence on the claims raised by both parties. This is evidenced by the continuous claims and counter-claims levied from both sides, and the contentions made in reply to such claims (Appendix A refers). As at 5 March 2013, such divergences remained, therefore the Contractor indicated that given such a situation, it was referring the case to a DAB. In addition, the Contractor indicated that a meeting should be held in order to determine who was to be the Sole Member acting as DAB. WSM indicated that, at the time of reporting, such disputes were still unresolved and under consideration; however, agreement was reached on the appointment of a Sole Member DAB, although such an agreement was yet to be finalised.

#### *Variations: Lot IV – Material Recovery Facility*

- 2.3.50 The Lot IV contract entailed the supply and installation of a Material Recovery Facility (MRF), estimated at €1.8 million (excluding VAT), awarded to Atzwanger S.p.A. for the value of €1.9 million (excluding VAT).

2.3.51 Through correspondence dated 20 October 2006, WSM requested feedback on the proposed contract for Lot IV from the Contractor Atzwanger S.p.A., in order to conclude the contract document thereby enabling both parties to proceed with the contract-signing phase.

2.3.52 At pre-contract stage, through correspondence dated 24 October 2006, the winning bidder, Atzwanger S.p.A., indicated the intention to hand over the entire project contract to Ecomaster Atzwanger S.p.A. Nonetheless, Atzwanger S.p.A. indicated that it would remain the responsible contracting party dealing with WSM. On 9 November 2006, WSM informed Atzwanger S.p.A. that such a request could not be accommodated and that the contract would be concluded between WSM and Atzwanger S.p.A. only. In addition, WSM referred to a request for an adjustment of the time-period submitted by Atzwanger, which was turned down by WSM. At a later stage, on 23 January 2007, Atzwanger S.p.A. again informed DoC and WSM of its intention to hand over the project to Ecomaster Atzwanger S.p.A., providing background regarding the setup of the company and its subsidiary (Ecomaster Atzwanger S.p.A.) while justifying the transfer on four fronts:

- a. Atzwanger placed bids for Lots II, III and IV, yet secured only Lot IV (Atzwanger was eventually contracted for Lot II following the insolvency of the first and second ranked bidders);
- b. Ecomaster Atzwanger S.p.A. holds expertise in this specific Lot;
- c. Atzwanger holds 51 per cent shareholding in Ecomaster Atzwanger S.p.A.; and
- d. Atzwanger S.p.A. would retain responsibility in case of non-compliance by Ecomaster Atzwanger S.p.A.

Prior to issuing approval with respect to such a request, DoC sought WSM's opinion on 7 February 2007. On 8 February 2007, WSM replied to DoC, indicating that it found no objection to assigning the contract from Atzwanger S.p.A. to Ecomaster Atzwanger S.p.A.

2.3.53 Without delving into the merits of such an approval, this Office finds difficulty in understanding how the request dated 24 October 2006 was turned down at pre-contract signing stage, yet approved at a later stage, especially since the justifications presented by WSM did not reflect new information. Had WSM approved of the handing over at the pre-contract signing stage, this situation would not have given rise to the requirement of an Addendum to the contract. Furthermore, NAO's concern in this respect was accentuated by the fact that an already complex project, involving the implementation of four separate Lots, was rendered even more complex by officious hindrance. In this regard, WSM presented justification for such a course of action by indicating that it had acted upon the advice provided by DoC when stating that a contract could only be concluded with the economic operator who had submitted the tender. Hence, WSM turned down the first request even if, as confirmed at a later stage, it had no objection to this assignment.

2.3.54 Through communication dated 3 January 2007, Atzwanger S.p.A. furnished DoC with three endorsed copies of the contract (entered into on 20 December 2006), together with the Performance and Advanced Payments Guarantees. On 17 January 2007, Ecomaster Atzwanger S.p.A. contacted IGM and WSM by electronic mail, indicating that pre-agreed timeframes were unattainable since WSM had, to date, refrained from approving (or otherwise) the major points relating to layout. On 1 February 2007, the Contractor requested a time extension, indicating that despite commencement date being set at 15 January 2007, "... due to the present situation, at the moment



*we [the Contractor] are unable to proceed with the contract design and execution of the works, because of some missing basic information from the Employer and the Engineer (Wasteserv/IGM)."*

- 2.3.55 NAO looks askance at the situation where the Contractor was not yet in a position to commence works consequential to delays caused by the lack of approvals/instructions from WSM.
- 2.3.56 Through communication dated 16 April 2007, the Contractor once again brought to the attention of WSM the delays sustained. The Contractor indicated two reasons for such delays, one being the delays caused by the Lot II contract, the other originating from the lack of approval in relation to the revised facility layout. In addition, the Contractor deemed that such delays were not within its control and questioned whether WSM would be utilising contingency funds in order to compensate for price escalations resulting from the delay in the purchase of equipment, which given the circumstances, would be incurred by the Contractor despite not bearing responsibility for such delays. DoC replied to such a request on 2 May 2007, turning down revisions in prices, further justifying its position as per the pertinent clauses in the contract agreement and FIDIC regulations.
- 2.3.57 At a general level of understanding, NAO is of the opinion that contract beneficiaries are to refrain from causing unwarranted delays whereby contractors bear the additional costs arising from such delays. In such circumstances, contract beneficiaries not only cause a negative impact on the contractor, but also on the interest generated by such tenders and the reputation of the contract beneficiary. Such a situation may negatively impinge on future tendering exercises. By means of example, this adverse effect may result in less bidders willing to participate in the tender process, and/or bidders adding a premium to the tender price, thereby hindering the competitive process and the benefits associated with the tender-based procurement system.
- 2.3.58 On 17 May 2007, the Contractor provided information and requests regarding several items, these being; building structures, program acceleration, equipment arrangement, civil works deletion, ballistic separator, moving floors, bale wrapping system, baler by-pass, equipment colour, value engineering, mobile equipment requirements and personnel requirement. Following this communication, WSM and the Lot IV Contractor entered into discussions. Initially, the Contractor expressed dissatisfaction with the replies furnished by WSM, providing further clarifications to the proposals put forward through the communication dated 17 May 2007. On 29 May 2007 and 23 June 2007, the Contractor provided further feedback in relation to the pending issues.
- 2.3.59 Further to these exchanges of communication, on 27 June 2007, WSM sought DoC approval for price variations in relation to an 'Accelerated Time Schedule'. WSM justified the variations in terms of future savings, since due to unforeseen circumstances the plant was required at a date prior to that originally set in 2005, during the contract drafting stage. The price variation in relation to this request would cost WSM Lm24,000 exclusive of VAT (€58,234), with a saving of Lm2/tonne (€4.66/tonne) of recycled waste, the savings equating to the difference between storage cost of waste versus the recycling cost of waste. The request for the approval of the 'Accelerated Time Schedule' included the proposed conditions WSM would eventually impose on the Lot IV Contractor for such a variation.
- 2.3.60 In view of the fact that the plant was required prior to the originally stipulated completion date, and given that such a situation arose from circumstances beyond

WSM's control, it was highly commendable that WSM sought to mitigate such circumstances by using a financial incentive.

2.3.61 On 23 August 2007, the Lot IV Contractor furnished WSM with a quotation in relation to variations. The variations originated from the following:

- a. Expansion of dedusting plant amounting to Lm27,900 exclusive of VAT (€64,989);
- b. Primary feeder conveyor installed in pit amounting to Lm5,150 exclusive of VAT (€11,996);
- c. Baler by-pass with mobile conveyor amounting to Lm3,950 exclusive of VAT (€9,201); and
- d. An additional personal computer for Lot IV (not priced in correspondence).

2.3.62 On 5 November 2007, WSM sought DoC approval in relation to changes in the payment schedule. The request would see the payments schedule change from the original schedule of payments for eight different items to a milestone-based payment system. WSM justified this change as follows:

- a. That the complexity involved in the original schedule, was more appropriate for classic civil engineering, whereby percentage measurement of progress attained was less complex than in the case of machinery and equipment provision; and
- b. That the complexity of the original payment schedule might result in conflict that could delay the project.

In addition, WSM indicated that GCC had already approved such a request in relation to Lot III.

2.3.63 NAO is of the opinion that contract beneficiaries are to refrain from adopting measures that lead to situations that, apart from requiring an Addendum to the contract, would also require GCC and DoC approval. Similar to the case of Lot III, WSM quoted 'industry practice' as justification for this request. NAO questions why the original payment schedule did not follow such 'industry practice'. Eventually, WSM presented two Addenda to Atzwanger S.p.A., one for Lot II and the other for Lot IV. This was indicative of flaws in the payment schedules for all Lots, except for Lot I. WSM presented justification in this regard, which NAO presented in the text relating to Lot III (paragraph 2.3.42 refers).

2.3.64 On 20 December 2007, WSM sought DoC approval to enter into a negotiated procedure for the supply of spare parts, without prior publication of an EU notice. This common request encapsulated Lots II, III and IV. Following approval by GCC, WSM recommended to DoC the procurement of the spare parts from the Contractor of Lot IV, for the value of €201,862 (excluding VAT). DoC approved this request on 27 March 2008, with WSM issuing the letter of acceptance in relation to this contract on 30 April 2008. Again, WSM presented justification in this regard, which NAO presented in the text relating to Lot III (paragraph 2.3.31 refers).

2.3.65 NAO questions the possibility of including the provision of spare parts in the scope of Lots II, III and IV in the corresponding contract, and then omitting such items from the EU refunding system. By including all the costs, including spare parts, the real cost (factoring in the capital and recurrent components of such expenditure) would have formed part of the evaluation criteria. Refraining from including spare parts in the evaluation process could have exposed WSM to a situation where the cost of spare parts offered by the selected bidder exceeded the cost of spare parts offered by other bidders, thereby eroding the financial advantage of the preferred bid.

- 2.3.66 The Contractor conducted commissioning tests for the MRF plant during the period 26 to 28 March 2008. IGM, the Project Supervisor, was present throughout the commissioning tests. The plant passed all of these tests. Following such tests, IGM issued the relevant 'Hand-over Certificate Lot IV (MRF – plant)' on 17 May 2008. In this certificate, IGM detailed and provided the conditions and circumstances governing this certificate, including the commencement of use of the plant, which was set at 11 February 2008.
- 2.3.67 One of the conditions under which IGM issued the certificate was that all required construction, assembly and commissioning works under the Lot IV contract would have been finalised by 25 March 2008, with the exception of pending variations for the hall ventilation. On 17 June 2008, IGM informed the Lot IV Contractor of the approval of variations for the installation of an exhaust air collection system in the MRF-hall. The value of this variation, as authorised by WSM, amounted to €45,800 (excluding VAT).
- 2.3.68 Following a request by WSM, on 27 November 2008, Ecomaster Atzwanger S.p.A. presented it with an offer for the following services relating to remote diagnosis and problem solving for the automation system of the Lot II and Lot IV plants:
- a. Lump sum service up to five hours per calendar month at €375/month exclusive of VAT (if applicable); and
  - b. Service in excess of five hours per calendar month at €80/hour exclusive of VAT (if applicable).
- 2.3.69 Ecomaster Atzwanger S.p.A. presented this offer subject to a number of conditions forming part of the same document.
- 2.3.70 On 1 December 2008, Ecomaster Atzwanger S.p.A. provided WSM with an offer costing €394,057 for the design, supply and installation of a mobile bag opening system to be used in the MRF of Lot IV. The offer included an introduction, system description, system performance, equipment specifications, scope of supply, price and payments, exclusions, guarantee, time schedule, proposal validity.
- 2.3.71 On 3 July 2009, WSM made its case with DoC for the approval of variations resulting from upgrades to the MRF plant. WSM sought DoC approval to contract such variations under the negotiated procedure. The Lot IV Contractor nominated for the process was Ecomaster Atzwanger S.p.A., whereby the Contractor was to provide for short-term and long-term solutions. The short-term solution recommended by WSM consisted of the supply of a mobile bag opener and other minor ancillary equipment, bearing an estimated value of €700,000. On 16 September 2009, the Contractor presented a discounted quotation for a mobile bag opener system that was proposed for use in Lot IV, valued at €384,057 (excluding VAT). This quotation included a €10,000 discount on the previous quotation dated 1 December 2008. On 18 September 2009, WSM sought DoC approval for the negotiated procedure in relation to the upgrading of the MRF plant at the Sant' Antnin Waste Treatment Plant. In addition, on 6 October 2009, the Contractor forwarded information in relation to the further upgrading of the MRF plant, at a cost of €17,838 (excluding VAT).
- 2.3.72 The contract for the delivery of a mobile bag opener in connection with improvements undertaken at the Sant' Antnin waste treatment plant, and MRF, valued at €384,057 (excluding VAT), was signed by the Lot IV Contractor and DoC (on behalf of WSM) on 15 December 2010. On 22 January 2010, the Contractor informed WSM that the mobile bag opener was completely installed. Both parties signed the declaration dated 21

January 2010 asserting that, following testing, the mobile bag opener exceeded the throughput capacity stipulated in the contract.

**2.3.73** NAO was of the opinion that WSM followed the due process in relation to this negotiated procedure, with the necessary approvals sought from DoC. However, this Office reserves notable concern as to how a plant required upgrades of €384,057 within its first year of operation, even more so, when such upgrades resulted from changes in the design of the operating process. In this regard, WSM indicated that the tender was originally designed to treat recyclables collected from bring-in sites. At the time of commencement of plant operation, Government introduced the collection of recyclable waste through the grey bag system, indicating that such waste was to be treated in the MRF. WSM claimed that this changed the operations of the MRF and that a bag opener subsequently became necessary. Given such changes, WSM argued that such upgrades were not envisaged in the original contract scope.

**2.3.74** WSM issued a completion report for the improvement of the Sant' Antnin waste treatment plant and MRF, dated 1 July 2010. This report indicated that the contract was executed on time, carried no penalties, with the Contractor achieving satisfactory performance. The report also included a detailed explanation of the variations incurred, covered under the contract contingency and under variations. In total, the contingencies utilised amounted to €168,467 and €45,800 was expended as variations, thereby resulting in a final price of €1.98 million.

#### *Overview of Variations*

**2.3.75** NAO acknowledges that in certain circumstances, accurate departmental estimates can be difficult to establish. Therefore, without prejudice to the pertinent legislation, this Office concedes that some variations may be inevitable. In addition, the complexity of some projects may result in variations that exceed the five per cent threshold stipulated in the public procurement regulations. In such cases, the contracting authorities are bound to obtain prior approval for such variations from DoC. With specific reference to Lots I to IV, NAO noted that on the basis of documentation analysed, WSM had sought and obtained such approvals.

**2.3.76** In addition, this Office further acknowledges that in situations characterised by unforeseen circumstances coupled with urgency and other situations leading to variations of major/substantial additions to the project, following the prescribed procurement process may result in delays in project completion. Therefore, in such cases, as also permitted through public procurement regulations, contracting authorities may resort to direct contracts or negotiated procedures. However, the resort to direct contracts or negotiated procedures should be undertaken on an exceptional basis, with contracting authorities exercising due caution on the frequency and magnitude of such contracts. The resort to such procurement mechanisms should invariably be reserved for cases of genuine expediency and not be utilised as a safety net necessitated by poor planning and disguised as unforeseen circumstances.

**2.3.77** Determining the validity of such contracts falls beyond the scope of an audit focused on determining adherence to procurement regulations, especially since WSM obtained the required approval for such variations, negotiated procedures and direct contracts.

**2.3.78** NAO acknowledges that at times projects may require a certain level of PAN and/or variations. Furthermore, this Office is not particularly concerned with the administrative process in relation to such variations since, on the basis of documentation reviewed,

WSM followed the required 'request and approval' procedure. However, NAO's concern lies in the frequency, magnitude and nature of such variations. In this respect, NAO looks askance at the fact that this tender was subject to such considerable levels of variations, even more so when considering that such variations arose due to changes in design and were not related to unforeseen events encountered during the implementation phase. Such direct contracts, negotiated procedures and variations indicate that an element of poor planning persisted throughout the various Lots.

2.3.79 This Office strongly recommends that prior to tender launch, contracting authorities are to ensure that plans are robust enough to avoid major changes, save those resulting strictly from unforeseeable events, thereby avoiding situations necessitating the resort to direct orders/negotiated procedures/variations that may hinder the competitive process and which ultimately defy the scope of an open tendering process.

#### *Value for Money*

2.3.80 In conducting procurement activities, contracting authorities are to ensure that value for money is invariably ascertained. The first step in ascertaining such value for money entails the establishment of accurate and reliable estimates. NAO acknowledges that forecasting estimates on the price criterion alone is less complex than establishing estimates based on multiple variables. In the latter case, complexities arise due to the various options that may be available and how best to benchmark such options. However, efforts undertaken towards greater refinement and precision of estimates will later in the process facilitate evaluation and benchmarking, thereby contributing towards the attainment of greater value for money.

2.3.81 A key stage in the procurement process bearing relevance to value for money concerns is the evaluation of offers submitted. As provided for in the public procurement regulations, evaluation methods need not be restricted to price considerations only, yet are to also encompass other criteria. In the application of such evaluation criteria, contracting authorities should not only award according to the ranking, but also factor in the initial estimates, thereby safeguarding the contracting authority's interests against abusive pricing practices.

2.3.82 In the case of the four Lots, WSM adopted the Pairwise method to determine the most economically advantageous offer.

2.3.83 The comprehensive estimate drawn up by WSM encompassing Lots I to IV amounted to €22.9 million (excluding VAT), with an award of €24.7 million (excluding VAT). Following the numerous variations and direct/negotiated contracts that ensued, the total project cost amounted to €30.3 million (excluding/including VAT).<sup>6</sup>

2.3.84 NAO is of the opinion that the discrepancy that subsequently arose between the project's estimate and its actual cost was largely attributable to the deviations in project design instigated by WSM. This argument is substantiated and corroborated by the deviation that arose between WSM's estimate and actual expenditure, as opposed to the deviation between WSM's estimate and the initial contract value. WSM indicated that it was not in total agreement with NAO's views on such shortcomings, maintaining that most variations were the result of circumstances arising during execution, not least the interaction between the various lots.

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<sup>6</sup> A considerable number of claims and counter-claims were still deemed to be pending as at the time of reporting (end March 2014), and therefore, the total project cost indicated is provisional and subject to further change.

## Conclusion

- 2.3.85 To the best of our knowledge, WSM provided all of the pertinent documentation in relation to Lots I to IV, with such documentation provided in a timely and effective manner. WSM provided records that were filed correctly, containing proper minutes and fully documented. Such documentation facilitated the case study review and was essential in the conduct of this audit.
- 2.3.86 The main audit concerns of this tender revolved around the high level of variations and direct/negotiated contracts. Given that such variations and direct/negotiated contracts stemmed from changes in project design, NAO considered WSM's resort to such a level of variations and deviations from the original tender cost/estimate and final project cost as unacceptable.
- 2.3.87 NAO is of the opinion that contracting authorities are to ensure robust project planning and cost/estimates, rather than issuing a tender and simply requesting approval for changes in design and/or cost variations during the implementation phase. In this case, this shortcoming was persistent throughout the project, indicating that WSM failed to appropriately and comprehensively ensure robust project planning. Furthermore, WSM's actions conditioned DoC's vetting process, constraining the latter's endorsement to avoid jeopardising the project's funding and implementation.
- 2.3.88 In this case, NAO cannot ascertain that such variations impinged on the ranking merit or the final project cost, but can neither discredit that such variations impinged on these factors. However, such actions, especially given the substantial variation of approximately 23 per cent does cast doubt on the pre-tender activity involving project design and cost/estimates.<sup>7</sup>

## 2.4 Case Study 4: Negotiated Contract for the Supply, Delivery, Installation and Maintenance of Play Equipment for Children and Cast In-situ Safety Rubber Surfacing at the Family Park, Marsaskala (CT 5000/2012)

### *Tender Model, Costing and Timing*

- 2.4.1 On 8 November 2012, WSM requested permission to enter into a negotiated procedure for the Supply and Installation of Playing Field Equipment, Dog Park Equipment and Synthetic Turf in Football Ground at Marsaskala Family Park. This project was co-funded by the EU under the Cohesion Policy 2007-2013 and EAFRD. Following discussions at GCC level, DoC granted the approval for such a procedure on 21 November 2012.
- 2.4.2 From the documentation provided to NAO, it transpires that within the request, WSM put forward an itemised estimate of €293,982 (excluding VAT), which WSM presented to DoC as part of its request for the negotiated procedure. Furthermore, WSM indicated that, *"... the contractor shall be under strict instructions to maintain the value of the procured play equipment and ancillaries within the financial estimates declared by the Contracting Authority...rounded up to a maximum of €300,000.00 exclusive of VAT."*
- 2.4.3 The Contractor - Elbros Construction Limited - presented three options, all within this maximum limit, which are reproduced in tabular form (Table 4 refers).

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<sup>7</sup> A considerable number of claims and counter-claims were still deemed to be pending as at the time of reporting (end March 2014), and therefore, the total project cost indicated is provisional and subject to further change.

**Table 4: Options Submitted by Elbros Construction Ltd**

Option	Dated	Value € (excluding VAT)
Option 1	6 December 2012	290,836
Option 2	10 December 2012	296,802
Option 3	18 December 2012	293,960

2.4.4 Upon further analysis of the quotations presented in Table 4, NAO found no actual evidence of different options or solutions proposed, but simply minor changes involving replacement of one item and variations in the quantities of two items.

2.4.5 On 10 December 2012, WSM issued the letter of acceptance at the offered price of €290,836 (excluding VAT), indicating that the delivery and full installation shall not exceed seven weeks from the date of the letter of acceptance. On 9 January 2013, an addendum to the letter of acceptance was issued by WSM, with a revised contract of €294,773. This revision was due to a change in quantities in Item 3 - Turf for Playing Ground.

#### *WSM's Role*

2.4.6 WSM drew up the required estimate, presented justifications and sought DoC approval prior to engaging in the negotiated procedure. Therefore, NAO deems that by requesting DoC approval, WSM followed the regulative norms required in adopting the negotiated procedure.

2.4.7 However, this Office maintains notable reservations on the validity of the justification for entering into a negotiated procedure, namely due to the nature of the procured items. In addition, NAO holds further reservations as to how WSM entered into a negotiated process with a Contractor whose core business activity is not the supply of such equipment. In seeking to justify such a course of action, WSM claimed that the Contractor was undertaking major civil works in the area and the introduction of a third party could have jeopardised the timely completion of the contract. Moreover, WSM opted for this procurement method to ensure that the same Contractor was held liable for all works carried out within this site.

#### *Value for Money*

2.4.8 As indicated in the previous subsection, prior to filing a request to enter into the negotiated procedure, WSM drew up an itemised estimate. According to WSM, prior to contracting the equipment in question *“WasteServ consulted with the Works Division towards establishing the technical specifications and requirements considering that the Works Division had developed such play areas and outdoor gym equipment at Sliema and Ta’ Qali. Catalogues of play equipment manufacturers were also consulted over the internet. The estimates were derived largely from similar equipment used in the Works Division tender, supplemented by budgetary estimates from local play equipment suppliers.”*

#### *Conclusion*

2.4.9 WSM indicated that its initial intention was to issue three separate departmental tenders for the supply, delivery, installation and maintenance of the play equipment. Due to timeframes, potential inflation of prices by tenderers and the fact that the necessary funds had only then been allocated to WSM by the Ministry, WSM decided to incorporate these as a variation to contract CT 3040/2011 - Rehabilitation of the Marsaskala landfill. However, WSM refrained from requesting such a variation, largely

due to the fact the main contract was EU funded and play equipment was being separately funded by MRRA – hence a completely separate contract. Instead, on 8 November 2012, WSM sought DoC approval to adopt the negotiated procedure. NAO noted that in its request, WSM indicated that the source of urgency stemmed from MRRA, whereby the Ministry required that the procurement and relative installation was to be completed by the inauguration date scheduled for mid-December 2012. This indicated that WSM did not encounter any unforeseen circumstances, and that the Ministry triggered the urgency.

**2.4.10** The main audit concern of this contract was WSM resorting to a negotiated contract, and the fact that this process involved only one contractor. This concern does not arise from a compliance aspect, as WSM did obtain the required authorisation. The concern arises from the justification presented, since the nature of the procurement clearly did not warrant the claimed urgency. WSM justified its position stating that *“apart from the financial and time considerations, the primary consideration in negotiating with the main contractor executing the works related to Contract CT 3040/2011 consisted of the need to ensure that the installation of the play equipment was to be co-ordinated with the programme of works, ensure unrestricted access to the site, whilst respecting in full the occupational health and safety and security considerations owing to the presence of lifting and heavy plant equipment manoeuvring in the area”*. Despite the justifications provided, NAO is of the opinion that the procurement of these items should have followed the normal procedure for contracts of such value.

**2.4.11** NAO deems that contracting authorities should only request and obtain authorisation to bypass the normal open procurement procedure in exceptional cases, exclusively reserved for projects warranting such urgency. Examples including cases such as: national disasters, urgency from unforeseen circumstances that might impinge on timeliness and cause delay charges, disruption of civil activities, serious public inconvenience or other situations of national interest. This project did not satisfy the conditions that one would normally justify as urgent and certainly did not arise from unforeseen circumstances. Had WSM and MRRA engaged in better planning, whereby both parties established attainable targets for project completion, such a situation might have been avoided.

**2.4.12** Although the documentation provided by WSM lacks evidence of the inauguration date, media coverage of the inauguration indicates that the site was inaugurated on 24 February 2013. Given that the seven-week period from the acceptance letter expired on 28 January 2013, *prima facie*, the Contractor appears to have abided by the contract conditions. In addition, the execution of this contract only resulted in minor variations, amounting to 1.4 per cent of the contract value.

## **2.5 Case Study 5: Period Contract for the Removal and Export of Filter Cake and Boiler Dust generated from the Marsa Thermal Treatment Facility (WSM 41/2012, WSM 287/2012 & WSM 36/2013)**

### *Introduction*

**2.5.1** The Marsa Thermal Treatment Facility (MTTF) accepts a wide range of waste fractions for treatment. This incinerator treats abattoir waste, clinical waste, refuse-derived fuel and other waste such as industrial sludge. The commissioning of this facility had made it possible to decommission the old incinerators, including that at St Luke’s Hospital and at the Gozo General Hospital. The facility is managed and operated by WSM.



- 2.5.2 The MTTF incinerated just under 6,000 tonnes of hazardous and non-hazardous waste in 2012, down by 7.5 per cent over 2011. Waste originating from public and private slaughterhouses and by-products of animal rearing was predominant, accounting for 90.3 per cent of the total inputs into this facility.
- 2.5.3 The plant produces various waste streams, some of which are hazardous. Filter cake and boiler dust generated during the process of incineration are considered as such. These are routinely removed and exported for treatment and/or disposal at a licensed facility in an EU country.
- 2.5.4 WSM had issued a number of period contracts for the removal and disposal of these wastes.

#### *Period Contract 1 – WSM 41/2012*

- 2.5.5 In December 2011, an internal tender funds commitment form was raised by WSM for a period contract for the removal and export of filter cake and boiler dust generated from MTTF. The estimated cost of the contract was €119,600 (excluding VAT). According to the commitment form, the contract was to be operative for a period of twelve months on an 'if and when required' basis, or until the value of €120,000 (excluding VAT) - the threshold for departmental tenders - was exhausted, whichever the earlier. The rate per tonne for the export of waste was estimated at €650 (excluding VAT), and the quantity for export was calculated at 184 tonnes. The contract was to be awarded after an open call for tenders.
- 2.5.6 An advert for the period contract was duly published on the Government Gazette on 27 January 2012 and in every subsequent issue up to the closing date, originally 24 February 2014, which was later extended to 2 March 2012. In compliance with the tender document, the provision of standard tenderer details were to be supplemented by a statement on conditions of employment together with a schedule of rates/prices. Bidders were also required to complete a 'tender form' confirming that their offer would not be retracted or withdrawn for a period of five months from the closing date of the offer. Furthermore, tendering parties were required to produce a MEPA Waste Carrier Registration for the carriage of filter cake and boiler dust with respect to the vehicles that were to be used as part of this tender. Tenderers were also to submit an export permit issued by MEPA as per Waste Shipment Regulations for both types of waste since this was to be exported for treatment and/or disposal at a licensed facility in an EU country. Rate/price was to be the sole award criterion once the other tender conditions were satisfied. Clarifications were duly circulated among all potential bidders.
- 2.5.7 An Evaluation Committee, composed of a non-voting Chair and Secretary as well as three voting members, was appointed and duly approved by CEO WSM. A declaration of impartiality and confidentiality was signed by all members on the Committee. Two offers were received by the closing date of 2 March 2012.
- 2.5.8 The Committee initially reviewed the offers against an administrative compliance grid to assess the compliance of the offers with the essential requirements of the tender dossier. This included the completion and submission of a schedule of rates/prices, proof of purchase of tender document, data on joint ventures and sub-contracting, a statement on the conditions of employment, training certificates and curricula vitae, waste broker registration for filter cake, the MEPA waste carrier registration and export permit for the filter cake and boiler dust, as well as relevant plans relating to organisation and methodology. On the basis of this compliance grid, the Evaluation

Committee concluded that one of the offers was administratively compliant and was to be considered for technical evaluation. The other offer was not compliant as the tenderer submitted an export permit for one waste code only, whereas the tender required that bidders submit an export permit for both codes (wastes).

2.5.9 The Evaluation Committee used a technical evaluation grid to assess the compliance of the only administratively compliant tender offer submitted with the technical requirements of the tender dossier. Technical specifications/requirements included details of the (foreign) licensed facility for the treatment or end disposal process, the monitoring of particulate matter in the air surrounding the working area during re-packing, transfer, cleaning and removal of filter cake, the requisite MEPA permits, the weighing of each trailer/container load, the storage of waste at the contractor's facility prior to export and the decontamination of the storage area at the MTTF after collection. Since this tender, submitted by Messrs PT Matic Environmental Services, was compliant to the administrative and technical requirements, and the financial offer, at €495 per tonne (excluding VAT) was considered to be fair and reasonable when compared to the tender estimate of €650 per tonne (excluding VAT), the Committee recommended the award of contract.

2.5.10 On 26 March 2012, a letter of acceptance was issued to Messrs PT Matic Environmental Services Ltd for a period contract, operative for twelve months, on an 'if and when' basis or until the value of €120,000 (excluding VAT) was exhausted, whichever was the earlier. In the event where the value of €120,000 was not exhausted by the end of the contract period, WSM reserved the right to extend the validity of the contract for a further period of up to six months after termination date. The rate per tonne was €495 (excluding VAT) and included labour, taxes, discounts and all other charges. Payments of 50 per cent of the total invoice(s) was to be made to the Contractor within 60 days of presentation of bill; the remaining 50 per cent was to be paid by WSM once a certificate of disposal/treatment of the waste was provided. The requisite bank guarantee was made by the Contractor and the order to start works was issued on 28 March 2012.

2.5.11 The contract was exhausted in November 2012, with the removal of 242.42 tonnes of waste for a total value of €199,998.

2.5.12 On the expiration of the contract, WSM raised a 'Supplier/Contractor Evaluation Form' where assessment on the quality of service provided, delivery and variations were made. According to WSM's Technical Officer in charge of the contract, the quality of service was 'very good' with no delays or setbacks or variations to the contract.

#### *Period Contract 2 – WSM 287/2012*

2.5.13 On 23 July 2012, a tender estimate for a period contract for the removal and export of filter cake and boiler dust generated by the MTTF was raised. The estimated tender value was €119,840 (excluding VAT), at €560 per tonne and an anticipated quantity of 214 tonnes. An open call for tenders was duly placed in the Government Gazette of 3 August 2012 and in every subsequent issue up to the closing date, 24 August 2012, which was extended till 31 August 2012. Clarifications were circulated among all potential bidders.

2.5.14 An Evaluation Committee was nominated and approved by CEO WSM. A declaration of impartiality and confidentiality was signed by all members. Two offers were received by the closing date.

2.5.15 Both offers were compliant to the administrative compliance grid, whereby administrative requirements and the completion/submission of requisite documentation were reviewed. Offers were then assessed against a technical compliance grid, whereby compliance with specifications and tender requirements, organisation and methodology, as well as permits were assessed. Both offers were technically compliant and were therefore considered for financial evaluation. The Committee deemed the cheapest compliant offer, at €389 per tonne, to be under-budgeted in comparison to WSM's estimate of €560. The Committee, although recommending the award, added that the letter of acceptance should emphasise that the services were to be provided as per tender requests and conditions.

2.5.16 No objection to the recommended award was filed.

2.5.17 A letter of acceptance was issued to Messrs PT Matic Environmental Services Ltd on 16 October 2012 for a period contract of twelve months, on an 'if and when' basis or until the value of €120,000 (excluding VAT), was exhausted, whichever was the earlier. In the event where the value of €120,000 was not exhausted by the end of the contract period, WSM reserved the right to extend the validity of the contract for a further period of up to six months after termination date. The rate per tonne was €389 (excluding VAT) inclusive of labour, taxes, discounts and all other charges. Payments of 50 per cent of the total invoice(s) was to be made to the Contractor within 60 days of presentation of bill; the remaining 50 per cent of the total invoice(s) was to be paid by WSM once a certificate of disposal/treatment of the waste was provided. The requisite bank guarantee was made by the Contractor and, as per order to start works, these were to commence on 15 December 2012.

2.5.18 The contract was exhausted in November 2013. On expiration of the contract, WSM raised a 'Supplier/Contractor Evaluation Form', where assessment on the quality of service provided, delivery and variations was made. According to WSM's Technical Officer in charge of the contract, the quality of service was 'very good' with no delays or setbacks or variations to the contract.

#### *Period Contract 3 – WSM 36/2013*

2.5.19 A tender originators form was raised on 19 April 2013 for a period contract for the removal and export of filter cake and boiler dust from the MTF. The estimated value of the tender was €119,680 (excluding VAT). The rate per tonne was estimated at €440 (excluding VAT), and the quantity of waste to be exported was anticipated at 272 tonnes.

2.5.20 A public call for tenders was published on the Government Gazette on 23 April 2013 and in every subsequent issue up to closing date, that is, 21 May 2013.

2.5.21 Clarifications were, as required, circulated among all prospective bidders.

2.5.22 An Evaluation Committee was nominated following the approval of CEO WSM. A declaration of impartiality and confidentiality was duly signed by all members. A non-voting external technical adviser was also nominated. One offer was received by the closing date.

2.5.23 The offer was compliant with the administrative compliance grid, whereby administrative requirements and the completion/submission of requisite documentation was assessed. The offer received was then assessed against a technical compliance grid. Since only one offer was received, the Committee compared the

offer of €345 per tonne (excluding VAT), with the tender estimate of €440 per tonne (excluding VAT) that was inclusive of all other charges. Since the offer complied with tender requirements and was below WSM's estimate and within its budget, the award was recommended. In this case, the approval of DoC was also obtained.

2.5.24 No objection to the recommended award was filed.

2.5.25 A letter of acceptance was issued to Messrs PT Matic Environmental Services Ltd on 20 September 2013 for a period contract of twelve months, on an 'if and when' basis or until the value of €119,680 (excluding VAT) was exhausted, whichever was the earlier. In the event that the contract value was not exhausted by the end of the contract period, WSM reserved the right to extend the validity of the contract for a further period of up to six months after the termination date of the contract. The rate per tonne was €345 (excluding VAT) inclusive of labour, taxes, discounts and all other charges. Payments of 50 per cent of the total invoice(s) was to be made to the Contractor within 60 days of presentation of bill; the remaining 50 per cent of the total invoice(s) was to be paid by WSM once a certificate of disposal/treatment of the waste was provided. The requisite bank guarantee was made by the Contractor and as per order to start works, these were to commence on 11 November 2013.

2.5.26 The contract was still underway during the course of this audit.

#### *Audit Concerns*

2.5.27 Although there may be certain advantages to a contracting authority when contracting services for a shorter period - such as more flexibility and competitiveness and therefore potential savings to the contracting authority - such advantages may be eroded when one takes into consideration the costs involved in repeat tendering processes.

2.5.28 It is evident that, unless radical changes are made to the current process of treating certain types of waste, by-products produced through incineration will continue to be generated. It is highly unlikely that such massive changes will be undertaken in the foreseeable future; it is therefore likewise highly improbable that the service for the removal and export of filter cake and boiler dust will imminently be no longer required. It is in this context that NAO questions the resort to period contracts rather than a longer term tender. In response, WSM indicated that a longer-term contract, as suggested by NAO, might now be opportune as a market price has been established and other economic operators may be attracted given their basic knowledge of the terms and conditions pertinent to such contracts.

2.5.29 The last three period contracts awarded by WSM for the removal and export of filter cake and boiler dust had all been awarded for a period of twelve months or until the value of €120,000 (excluding VAT), was exhausted, whichever was the earlier. Of the contracts reviewed, the two that were exhausted had been expended within a period of nine months or less. A new period contract then came into force.

2.5.30 It was also noted that the value of these period contracts were invariably kept to just within the threshold for departmental contracts, therefore avoiding the need to resort to DoC.

2.5.31 The estimated rate per tonne of waste removed as calculated by WSM was significantly higher than the actual contracted price. The estimated cost was €650, €560 and €440 per tonne (excluding VAT) for the three period contracts respectively. The contracted

rate per tonne was €495, €389 and €345 (excluding VAT). This is a 24, 31 and 22 percentage difference between the estimated rates when compared to the contracted rates per tonne respectively. It is in this sense that NAO noted that the decrease in estimated costs set by WSM were mirrored by corresponding decreases in tendered rates.

- 2.5.32 Although WSM did revise downwards its estimated rate as calculated in the first contract to reflect the lower rate contracted when estimating the cost of subsequent contracts, WSM's estimated rate remained significantly higher than that actually contracted. This could indicate that the calculations of the estimated rate made by WSM were inadequate. According to WSM, such a trend was indicative of the fact that an estimate can never anticipate the tenderer's commercial decision in pricing for such services.
- 2.5.33 On the other hand, it was noted that the Contractor had also tendered significantly lower prices in subsequent offers than that initially tendered in the first period contract. This could indicate an inflated cost per tonne and a high profit margin to Contractor in the initial period contract awarded.
- 2.5.34 Article 6.4.1(xi) of the contract requires 24-hour sampling to measure the levels of PM 10 (particulate matter) particles during the removal of fly ash waste in order to verify that these are within those stipulated in Legal Notice (LN) 224 of 2001 and EC Directive 2008/50/EC. The legislation specifies that the scope of PM 10 monitoring is not that of quantifying PM 10 levels at source, which may be in relatively high levels, but to quantify the PM 10 levels in the proximity of the source. As such, airborne micro-particle dispersion patterns are subject to weather conditions, notably rainfall and wind direction. In view of this, the PM 10 sampler is ideally set up on an aerated roof of the closest building, which is situated downwind of the predominant wind direction on the day of sampling. Sampling points that are a considerable distance away are not encouraged, due to potential interference in the result from emissions by sources other than the one of interest.
- 2.5.35 Reports by the Air Quality Consultants engaged to carry out this monitoring indicated that airborne PM 10 levels were often either below or slightly exceeded the stipulated limit. However, the airborne PM 10 monitoring on 28 November 2012 indicated levels of total concentration of PM 10 ( $\mu\text{g}/\text{Nm}^3$  daily average of 110.02 as against the EU limit of 50), which is 120 per cent above stipulated limit values. High levels were also registered on 11 June 2013 (59 per cent), 4 March 2013 (17 per cent) and 7 February 2013 (18 per cent). According to the reports, however, these occurrences could be due to the not ideal location of the sampler and weather conditions on the day of sampling. Other contributions could be coming from other operations carried out in the MTFF yard throughout the working day, such as diesel engine vehicular movement.



## Chapter 3 - Case Study Commonalities

- 3.0.1 The preceding chapter presents a case-by-case account of the selected five case studies, delving into the specific findings relating to procurement undertaken by WSM. This chapter provides a cross-sectional review, identifying trends NAO deemed relevant to WSM's procurement practices. This analysis presents a comprehensive overview of the good practices and shortcomings identified by NAO.
- 3.0.2 The framework of analysis utilised by this Office in conducting this review was based upon a number of key issues bearing critical importance in any procurement process. These comprised the following:
- a. Tender model, costing and timing;
  - b. Tendering process;
  - c. Liaison with DoC;
  - d. WSM's Role;
  - e. WSM's Evaluation Committees;
  - f. Tender award and appeals;
  - g. PAN; and
  - h. Variations.
- 3.0.3 Each of the above-quoted key issue is discussed in relation to the relevant findings with respect to the five tendering processes examined.

### 3.1 Tender Model, Costing and Timing

- 3.1.1 As indicated in section 1.5, where the audit's methodology was outlined, the selected tendering processes consisted of a mix of open and negotiated tenders, period contracts, and single-package and three-package tenders. The case selection process also took into account funding parameters, ensuring a representation of local and EU co-funded projects. Additionally, the selected case studies entailed the procurement of works, supplies and services.
- 3.1.2 The total project cost corresponding to the five case studies reviewed amounted to €34.6 million (excluding VAT)<sup>8</sup>. Successful bidders included local and foreign contractors, individual companies and consortia. The procurement activity audited spanned from 2006 to 2012. Through the method employed in the selection of these

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<sup>8</sup> A considerable number of claims and counter-claims (Case Study 3) were still deemed to be pending as at the time of reporting (end March 2014), and therefore, the total project cost indicated is provisional and subject to further change.

case studies, NAO addressed a broad spectrum of tendering activity, particularly in terms of their materiality and nature.

## 3.2 The Tendering Process

3.2.1 With reference to the five case study tenders under evaluation, the following procedures within the tendering processes were analysed:

- a. Tender document characteristics;
- b. Departmental estimates and assurance of value for money; and
- c. Extension of closing dates.

Hereunder is an overview of each.

### *Tender Document Characteristics*

3.2.2 NAO was of the opinion that WSM appropriately documented the milestones and key events appertaining to each of the tenders reviewed. Barring an exceptional case (commented upon in case study 1), NAO deemed that the tender documents in relation to the case studies contained all the necessary information and provisos/clauses. In the majority of instances, pre-launch vetting undertaken by DoC triggered the proposal of required amendments to the draft tender. WSM accepted such proposals and included the relevant amendments in the tender documents as published.

### *Departmental Estimates and Assurance of Value for Money*

3.2.3 In line with requirements and fundamentally important in terms of effective project management is the formulation of a reliable and methodical project cost estimate. Such estimates are critically required when contracting authorities draft business plans for internal control purposes, as well as external review and approval by line ministries and the Ministry for Finance.

3.2.4 As rendered evident in the Tenderers Originator Form, WSM drew up such departmental estimates. NAO noted varying degrees of accuracy with respect to such estimates, ranging from estimates that were very close to and others that differed significantly from the contracted amount. Table 5 depicts WSM’s estimates, the respective contracted amounts and the percentage variance for all five case studies.

3.2.5 As illustrated in Table 5, the estimates in three of the cases varied substantially (case studies 1, 3 and 5). NAO considers such substantial differences attributable to two possible factors. First, such discrepancies may be indicative of poor estimate compilation, with insufficient attention directed towards the sourcing of essential market intelligence. Second, discrepancies of this magnitude may also have resulted from vast changes to project scope and/or design.

**Table 5: Contracted Amounts relative to WSM Estimates**

Case Study	WSM Estimate (€)	Contracted Amount (€)	Percentage Difference
Case Study 1	1.85 m	1.07 m	(42)
Case Study 2	7.19 m	8.24 m	15
Case Study 3	22.85 m	24.67 m	8
Case Study 4	0.30 m	0.29 m	(3)
Case Study 5	650/tonne	495/tonne	(24)
	560/tonne	389/tonne	(31)
	440/tonne	345/tonne	(22)



- 3.2.6 The assurance of value for money in public procurement is contingent upon a reliable initial estimate outlining project cost, which should serve as a benchmark aiding the eventual selection. From the case studies reviewed, WSM adopted two main methods for the ranking of offers - either the cheapest technically compliant offer, or the most economically advantageous tender (MEAT)<sup>9</sup>.
- 3.2.7 Given the substantial discrepancy between WSM's estimate and the contract value, NAO is unable to ascertain beyond reasonable doubt whether value for money was assured. This source of doubt is attributable to three factors. First, that if WSM's estimate was not accurate, it would be impossible to evaluate the offers against a reliable benchmark in order to determine whether the first ranked bid was actually representing a fair deal. Second, irrespective of whether WSM's initial estimate was accurate or not, considerable changes to project scope/design during the tender process rendered the estimate superfluous and therefore value for money could not be measured. Finally, that the estimate was correct, yet WSM accepted offers that significantly diverged from such estimates. Under each of these scenarios, value for money is at risk.
- 3.2.8 A far more detailed analysis, specifically focusing on the micro-level formulation of the estimate and how this relates to the contract value, would have been required to determine which of the three scenarios applies to the cases under review where significant differences were encountered. As rendered amply evident in this audit's scope, such an analysis was geared towards the macro-level review of the procurement process.

#### *Extension of Closing Dates*

- 3.2.9 In tendering processes for complex projects, the pertinent milestone plan would comprise a multitude of deliverables, delivery dates and phased levels of completion. While in the planning stage the contracting authority would have attempted to forecast, with a high degree of accuracy, the time bidders would require to complete each phase and to meet the set delivery dates, instances when such a forecast needs adjustment occur.
- 3.2.10 WSM extended the tender submission date of offers for three of the case studies under review. In case study 1, following revisions to the M&E plans, WSM conceded an extension effectively postponing the submission date from 4 August 2011 to 25 August 2011. Case study 2 was also subject to two time extensions, the first extending the submission date from 28 April 2011 to 19 May 2011, while the second further extending it to 2 June 2011. Such extensions stemmed from requests raised by the bidders for an extension of the submission date due to the extensive requirements necessary for tender preparation. In case study 3, following a request put forward by bidders, WSM extended the closing date from 20 December 2005 to 17 January 2006. In granting such extensions, WSM requested prior approval from DoC.
- 3.2.11 NAO deemed that while the request for extension to closing dates from bidders either followed changes in design, or was attributable to the complex nature of the project, the frequency of such extensions casts doubt on the timeframes initially set by WSM. Such restrictive timeframes may hinder the competitive aspect sought from tender activities as some bidders may opt to refrain from participating due to such restrictive parameters.

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<sup>9</sup> With respect to the case studies reviewed, MEAT was applied in case study 3, through the application of the Pairwise method.

### 3.3 Liaison with DoC

- 3.3.1 NAO confirmed that out of the five case studies reviewed, WSM corresponded with DoC as necessitated by the procurement activity, with the former requesting vetting and endorsements. DoC furnished WSM with advice, which WSM invariably adopted. Furthermore, WSM circulated all clarifications and notices to bidders through DoC. In addition, WSM sought DoC authorisation in respect of variations.
- 3.3.2 NAO deemed that such a level of communication was paramount in ensuring and preserving a level of transparency, in that bidders perceive that they are competing on a level playing field. Moreover, DoC, apart from being the regulator of public procurement activity, is also a source of expertise in procurement that contracting authorities may refer to. The level of communication between WSM and DoC indicated that WSM not only sought DoC approval as and when required, but also drew upon such expertise.

### 3.4 WSM's Role

- 3.4.1 Following the review of the tendering activities within the five case studies, NAO confirmed that WSM followed the required preliminary procurement phases of identifying the initial need for procurement, establishing and determining specifications, and conducting estimates. WSM proceeded to the pre-tender launch stage by issuing the tender originators form, compiling and forwarding the draft tender document to DoC, revising the draft tender document following DoC review, and seeking endorsement once finalised. In addition, following the tender publication, WSM sought DoC endorsement with respect to the proposed Evaluation Committee, replied to bidder clarifications, evaluated tender offers and sought DoC endorsement of the adjudication results. WSM circulated tender adjudication results among bidders, and attended to any resulting appeals, following which the contract was signed. During the implementation stage, WSM sought DoC approval for any variations that ensued, at times even when such variations were below the stipulated threshold requiring DoC approval.
- 3.4.2 NAO deemed that WSM holistically fulfilled its role; however, this Office questioned the manner by which WSM executed certain aspects of such a role. Given the variations that ensued in most of the cases, doubts emerged on the accuracy of the estimates as compiled by WSM. In addition, considering that most of the variations resulted from major changes in project design, DoC was constrained in terms of its vetting and approval function, since refusal might not have been in the best interest of the project, while approval might have jeopardised value for money. In such instances, doubts also emerged on the validity and robustness of project design, especially since such changes in project design appeared to stem from an element of poor planning rather than unforeseen circumstances.
- 3.4.3 In addition, WSM sought DoC's approval for a negotiated procedure and an accelerated procedure, citing urgency considerations in both circumstances. NAO deemed that claims citing urgency may be genuine, induced, or not urgent at all. In case study 4, featuring a negotiated procedure, the justification WSM presented to DoC revolved around the request by the then MRRA to enhance the project and bring forward the completion date to mid-December 2012. Therefore, the 'urgency' appears to originate from MRRA's instructions rather than an unforeseen and warranted circumstance. Such a circumstance resulted in negotiations with only one supplier, which on the basis of documentation reviewed, exposed WSM to an element of risk in relation to the attainment of value for money. In case study 1, the accelerated procedure

followed the abortion of a tender, which was re-launched following a change in its scope and design, presumably in order to compensate for lost time. Again, had WSM engaged in robust planning at the design stage, the need to revise the design would not have followed, thereby avoiding the abortion and re-launch process.

3.4.4 Essentially, from a strictly compliance perspective, WSM followed the prescribed procurement practices and obtained DoC approval. However, NAO cannot but stress that the role of WSM, and any other contracting authority, should not be limited to ensuring adherence to relevant regulations, but should extend beyond such an understanding. Contracting authorities should do their utmost to prevent creating situations of poor practice, perceived or factual, notwithstanding their adherence to the regulatory framework. In this audit, WSM's poor practices were manifested in the large variations that were resorted to, conflicting instructions in tenders, and drastic post-award revisions to project design. NAO is of the opinion that contracting authorities should be guided by a sense of maximising the benefits of tendering activities and minimising purchase risk, by adhering to the spirit of the procurement regulations and not find ways to circumvent such requirements while remaining compliant.

### 3.5 WSM's Evaluation Committees

3.5.1 Following the submission of tenders, WSM had to rank offers either according to the lowest priced technically compliant method, or according to the MEAT method. Evaluation can follow a filtering process, whereby a shortlisting committee identifies administratively compliant offers, an evaluation committee then evaluates remaining offers on their technical merit, while an adjudication committee evaluates and ranks the technically compliant offers according to financial criteria. Alternatively, an evaluation committee may assume all of these roles.

3.5.2 Considering that the level of participation in each of the five case studies did not necessitate the appointment of a shortlisting and adjudication committee, WSM entrusted the evaluation committee with all of these roles. To this extent, the evaluation committee screened offers for administrative, technical and financial compliance, finally ranking the technically compliant offers according to the pre-established criteria. From the documentation provided, NAO confirmed that the evaluation committee decided according to the pre-established criteria and accordingly drew up the required reports.

3.5.3 WSM selected and proposed the corresponding evaluation committee and sought DoC approval. The evaluation committee members, signing the 'declaration of impartiality and confidentiality', evaluated and ranked offers, and supplied DoC with the evaluation and adjudication report indicating decisions reached. Such a procedure was not followed in case study 5, since the value of the period contracts was below the applicable departmental threshold of €120,000.

3.5.4 However, from the documentation provided to this Office, there appears to have been no formal documentation relating to letters of appointment, indicating the terms and conditions (tasks, duties, roles and responsibilities) governing such an appointment.

### 3.6 Tender Award and Appeals

3.6.1 Following DoC endorsement of the evaluation committee decision, the contracting authority informs bidders of the outcome and issues the tender award notice. In the case of EU co-funded projects, a notification of award is submitted to the European

Commission, which is subsequently published in the Official Journal of the European Union.

- 3.6.2 Documentation made available to this Office lacked copies of the tender award notice. However, NAO confirmed that in all of the five cases, WSM informed all bidders of the tender evaluation outcome within the timeframes stipulated by the public procurement regulations.
- 3.6.3 Following the publication of results, the procurement regulations grant aggrieved bidders the possibility to lodge an appeal contesting the adjudication results. In the case studies under review, appeals were lodged in three cases, namely case studies 1, 2 and 3. Through the appeal process relating to case study 1, PCRБ exposed a level of ambiguity in the tender document instructions. This resulted in the reinstatement of all bidders, subject to the submission of fresh samples, following which WSM re-evaluated the offers (Section 4.6 refers). In the second case, the appeal was upheld since the elimination of the bidder on grounds of non-compliance was rejected. In the third instance appertaining to Lot I of case study 3, the appeal was turned down by PCRБ. Therefore, out of five case studies, involving seven evaluations, three appeals were filed, with one being turned down and two being upheld.
- 3.6.4 It is worth noting that in case study 4, the contract was awarded through a negotiated procedure without prior notice, involving only one economic operator. Hence, the possibility of an appeal being lodged to such an award was remote.

### 3.7 Post Award Negotiations

- 3.7.1 At a conceptual level, the procurement process entails three major stages, namely:
  - a. Pretender activity and tendering activity;
  - b. Evaluation and award; and
  - c. Contract signing and implementation.
- 3.7.2 NAO is of the considered opinion that, by default, contract beneficiaries ought to refrain from PAN. However, this Office acknowledges that in complex projects, or when the procurement activity involves the purchase of dynamic and continuously evolving technology, some level of PAN may arise. This situation may be further compounded by the time lapse that inevitably exists between tender submission and contract signing.
- 3.7.3 In essence, PAN should aid the procurement process, creating benefits for the bidders and the contract beneficiary. In complex projects, bidders experience a reduction in the administrative burden associated with the compilation of tender offers, as only in the eventuality of securing the tender are detailed plans requested. On the other hand, the contract beneficiary benefits from PAN as negotiations entered into at this stage ensure that its needs are being addressed.
- 3.7.4 Hence, whilst acknowledging that some cases warrant resorting to PAN, contract beneficiaries ought to be judicious, particularly with respect to the basis and frequency of PAN. Furthermore, when resorting to PAN, the contract beneficiary must refrain from effecting major changes that may impinge on the evaluation/adjudication ranking, or on the offers submitted by other bidders.
- 3.7.5 On the basis of documentation reviewed with respect to the case studies, it transpired that WSM did not engage in PAN. However, NAO noted substantial variations to contracts during implementation, duly presented in the following section.

### 3.8 Variations

3.8.1 Variations differ from PAN in that these occur during the project implementation stage. Such variations materialise either due to unforeseen circumstances or from changes in project design. Procurement regulations dictate that should the value of such variations, individually or collectively, exceed five per cent of the contract value, the contract beneficiary is to request authorisation from DoC. For variations below the five per cent threshold, the contract beneficiary may refrain from requesting such authorisation.

3.8.2 Chapter 2 provided a detailed account of the variations incurred with respect to the case studies reviewed. Such variations, on a case-by-case basis, are reproduced in Table 6 for ease of reference.

**Table 6: Final Project Cost relative to Contracted Amount**

Case Study	Contracted Amount €	Final Project Cost €	Percentage Difference
Case Study 1	1.07 m	1.64 m	53
Case Study 2	8.24 m	n/a*	n/a*
Case Study 3 <sup>10</sup>	24.67 m	30.31 m	23
Case Study 4	0.29 m	0.29 m	1.35 **
Case Study 5	495/tonne	495/tonne	0
	389/tonne	389/tonne	
	345/tonne	345/tonne	

\* The project is currently in abeyance, therefore the final project cost is, as yet, undetermined.

\*\* Figures for contracted and actual costs were €290,836 and €294,773, respectively.

NB. Figures provided in table may not tally or be used in computations due to rounding up.

3.8.3 WSM sought and obtained DoC approval for variations above the five per cent threshold. From a strictly compliance perspective NAO deemed that WSM adhered to the procurement regulations. However, the excessive level of variations identified in the case studies raised NAO's concern. When considering that variations arose from major changes in project design, as opposed to variations arising from unforeseen circumstances, this is indicative of an element of poor planning, with WSM seeking to rectify such shortcomings through variations.

3.8.4 NAO is of the considered opinion that variations tend to weaken the bargaining position of the contract beneficiary. When faced with variations, for reasons attributable to project continuity and practicality, the negotiation takes place with the engaged contractor – possibly at rates and conditions that may be unfavourable to the contract beneficiary. Should negotiations fall through, the contract beneficiary is either to do without the variations or risk interfacing problems if engaging other parties. For such reasons, NAO deems that WSM, and for that matter, any other contract beneficiary, should avoid reliance on variations and be more methodical at the project design stage.

<sup>10</sup> A considerable number of claims and counter-claims were still deemed to be pending as at the time of reporting (end March 2014), and therefore, the total project cost indicated is provisional and subject to further change.



## Chapter 4 - Public Contracts Review Board Cases relating to WasteServ Malta Limited

### 4.1 The Evaluation/Adjudication Process

4.1.1 In addition to the five case studies subjected to in-depth analyses, NAO reviewed the award decisions made by WSM, which were subsequently followed by an appeal process. The decision to analyse PCRB proceedings in this respect was triggered following NAO's analysis of the appeal process identified in case study 1.

4.1.2 Data made available by PCRB indicated that during the period 2011-2012, WSM faced fifteen appeal cases in relation to contract award decisions. Of these fifteen cases, the PCRB ruled seven times in favour of the appellant, rejected six appeals cases, and recommended the cancellation and reissuance of one tender. In the remaining case, the PCRB found both the appellant and the recommended tenderer to be non-compliant. Therefore, from these fifteen PCRB hearings, nine cases indicated erroneous evaluation by WSM .

4.1.3 The findings that emerged with respect to the PCRB reports analysed vary from one case to another. The scope of this aspect of NAO's audit was not to specifically identify the source of shortcomings with respect to the administrative, technical and financial evaluations undertaken by WSM. Rather, this exercise served to highlight instances of general shortcomings of the evaluation process. Hereunder is a case-by-case account of the more salient points of the upheld appeals.

### 4.2 Case No. 256: Period Contract for the Supply and Delivery of Sodium Bicarbonate to the Marsa Thermal Treatment Facility (WSM/189/2010)

**Table 7: Profile of Case No. 256**

<b>Case No. 256: Period Contract for the Supply and Delivery of Sodium Bicarbonate (NaHCO<sub>3</sub>) to the Marsa Thermal Treatment Facility (WSM/189/2010)</b>	
Publication Date of Tender	24 August 2010
Closing Date	14 September 2010
WSM Estimate	€120,000
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	18 November 2010
Date of PCRB Hearing	31 January 2011
Date of PCRB Recommendation	16 February 2011

- 4.2.1 This case revolved around the technical compliance, or otherwise, of the Appellant’s bid, and the ambiguity regarding whether the solubility of the sodium bicarbonate met the requirements of WSM. The issue arose due to the different solubility determination methods, one denoted by the weight/volume method and the other being denoted by the weight/weight method.
- 4.2.2 In this case, WSM requested sodium bicarbonate with a solubility of 96g/1000g, whereas the Appellant indicated a solubility of 89g/1000g. The Appellant’s representative, a chemist by profession, stated that with regard to sodium bicarbonate, it was either a weight/volume solubility of 96g/1000ml at 20oC, or weight/weight solubility of 89g/1000g at 20oC. Such solubility characteristics were determined by the sodium bicarbonate’s physical properties, which could not be altered. In this regard, a member of the Evaluation Committee indicated that WSM had requested a solubility of 96g/1000g, whereas the Appellant indicated a solubility of 89g/1000g. Furthermore, the WSM representative added that “*there might have been a question of interpretation of the solubility given by the contracting authority because, effectively, 1g = 1ml of water.*” During the hearing, WSM and the Evaluation Committee conceded that the product offered by the Appellant corresponded to what WSM had requested in the tender, yet they also argued that the product description submitted by the Appellant with respect to solubility did not tally with what was requested in the tender. In addition, WSM maintained that it was not appropriate for them to ask for a clarification on a requirement that was clearly stated in the tender.
- 4.2.3 During the course of the appeal, PCRB noted that the discrepancy in the solubility as required by WSM and as indicated by the Appellant was indeed present. However, as per the appeal hearing report, “... the same contracting authority’s representatives claimed that the product offered by the appellant company represented what the contracting authority [WSM] was requesting in the tender document ...”, and therefore, the PCRB considered such as sufficient grounds to recommend that the Appellant’s offer be reintegrated in the adjudication process.
- 4.2.4 NAO deemed that WSM could have avoided the appeal process by not disqualifying the Appellant and requesting a clarification, thereby confirming whether the Appellant would be supplying sodium bicarbonate as per the requested solubility, instead of establishing such during the PCRB case. Moreover, this Office is of the opinion that the Departmental Contracts Committee (DCC) could have anticipated and possibly avoided the appeal process by enquiring as to the apparent difference in solubility prior to endorsing the WSM recommendation. It is worth noting that the appeal delayed the tendering process by approximately three months.

### 4.3 Case No. 315: Service Tender – Transport Services of Municipal Solid Waste and Recyclables from Gozo to Malta (CT 2593/2009)

**Table 8: Profile of Case No. 315**

Case No. 315: Service Tender – Transport Services of Municipal Solid Waste and Recyclables from Gozo to Malta (CT 2593/2009)	
Publication Date of Tender	18 December 2009
Closing Date	9 February 2010
WSM Estimate	€725,000 (excluding VAT)
Number of Tenderers	Two
Number of Appellants	One
Date of Objection to Award Recommendation	18 April 2011
Date of PCRB Hearing	20 July 2011
Date of PCRB Recommendation	01 August 2011



- 4.3.1 The appeal in this case focused on the following, that:
- a. DoC, despite not having awarded the contract within the stipulated five months from the tender submission closing date, refrained from extending the validity of the tender; and
  - b. DoC failed to notify the Appellant with the details of the public opening session (save for the opening of the bid bond).
- 4.3.2 During the course of the appeal hearing, the Appellant's defence cast doubt on the experience of the recommended tenderer, citing clause 3(g)(ii) under '*Selection Criteria*' "*Proof of number of similar projects completed and operative by Tenderer*". It was further indicated that, the recommended tenderer was not in a position to prove such experience and lacked the required vehicles, but would acquire them in the eventuality of winning the contract, therefore inferring that employees lacked experience in operating these vehicles. The legal representative of the recommended bidder indicated that his client had been operating in waste transport services since 1982, thereby having the required experience since, as per the tender instructions, bidders were expected to have similar and not identical experience.
- 4.3.3 The Appellant's legal counsel also cited clause 4.1.1 of the tender document "*Tenderers are obliged to provide all the facilities for inspection of the vehicles and plant being offered. All vehicles to operate under this contract shall be inspected simultaneously in one single session*". A WSM representative indicated that the tender document did not specify that such a condition had to be satisfied prior to the tender award, but that WSM reserved the right to inspect the vehicles prior to the signing of the contract. Should the vehicles not meet the required specifications, the contract would be cancelled and awarded to the next ranked tenderer. The Appellant's defence counsel objected, indicating that the term 'tenderer' applied to the pre-award stage, while the term 'contractor' is used following award; therefore, the vehicles had to be made available for inspection prior to the tender award stage.
- 4.3.4 The conclusions arrived at in the PCRB appeal report identified a number of concerns related to the manner by which WSM awarded this contract. In relation to the availability of vehicles, PCRB was of the opinion that the tender document created ambiguity. The tender document issued by WSM referred to registration of vehicles and the inspection of such vehicles. During the appeal stage, A WSM representative indicated that the vehicles would have had to be registered and inspected prior to contract signing. In view of the tender instructions and the submissions during the hearing, PCRB concluded that "*the Evaluation Report dated 2nd July 2010 – Annex III, namely 'Vehicles to be inspected prior to the opening of Package 3' contradicts what has been stated during the hearing.*"
- 4.3.5 With reference to an email dated 29 September 2010 that served as a notification, PCRB did not uphold the Appellant's claim, namely, that its representatives were not informed of the tender opening session. However, the timeframe of sixteen months was deemed unacceptable for the tender to reach the award stage. Tied to this, PCRB deemed that it was, "*...ironic if one were to place major emphasis on the relevance of expertise and CVs in view of the time frame...*", further indicating that such a lapse in time would have, "*...rendered all reference made in the tender submission relating to expertise and CVs superfluous.*" On this basis, PCRB recommended that "*...due to the timeline involved between original publication and the recommendation for award of this tender, the scope of this tender has been rendered ineffective...*", and to this effect PCRB "*recommends that this tender be cancelled and reissued within three (3) months.*"

4.3.6 In line with the PCRB findings, NAO deemed that the timeframe resultant in this tendering process was unacceptably long. In addition, due to the appeal process, the tender incurred further delays. It is worth noting that in such cases, the time-lapse between the expiry of the first contract and the implementation of the replacing contract, implied that WSM de facto extended the expired contract, as this was an essential service that had to be sustained. Such a situation resulted in a time-lapse during which WSM needlessly placed itself in a position of uncertainty as to whether or not the service procured was equivalent to competitive tender prices.

#### 4.4 Case No. 327: Period Contract for the Provision of Land Surveying Services (WSM/03/2011 & WSM/12/2011)

**Table 9: Profile of Case No. 327**

<b>Case No. 327: Period Contract for the Provision of Land Surveying Services (WSM/03/2011 &amp; WSM/12/2011)</b>	
Publication Date of Tender	14 January 2011
Closing Date	4 February 2011
WSM Estimate	€120,000 (excluding VAT)
Number of Tenderers	Three
Number of Appellants	One
Date of Objection to Award Recommendation	26 April 2011
Date of PCRB Hearing	12 September 2011
Date of PCRB Recommendation	30 September 2011

4.4.1 The award of this period contract became subject to an appeal process when the Appellant contested the award decision. The ensuing discussions held by PCRB focused on:

- a. The alleged non-compliance of the Appellant due to missing information relating to the rate of an item (which the appellant opted to indicate with the acronym TBD 'to be discussed/determined' in the bid submitted);
- b. The Appellant's claim in relation to the recommended tenderer's compliance to tender instructions (the lack of proof of professional qualifications); and
- c. The alleged conflict of interest in relation to the commercial/family ties between the recommended tenderer and the Contractor, which the recommended tenderer was to survey.

4.4.2 During the course of the appeal, the PCRB took note of the main contentions raised by the Appellant and the counter-objections raised by the preferred bidder. In so doing, PCRB concluded that the Appellant failed to comply with the tender instructions. The fact that in previous tender submissions such information had been equally withheld and discussed upon tender award did not in itself indicate compliance with the tender instructions. The PCRB indicated that, despite any difficulty in the provision of an item price, the tenderer could not refrain from providing the pricing of an item. In such situations, the appropriate remedy to such a difficulty should result in the tenderer requesting clarification.

4.4.3 In relation to the Appellant's claim with regard to the proof of professional qualifications, PCRB found that the recommended tenderer had only provided CVs. The PCRB interpreted the fact that the recommended tenderer had provided no supporting proof of professional qualifications as a breach of conditions.

4.4.4 The Appellant also claimed that a conflict of interest existed with respect to the recommended bidder tasked with providing surveying services and the contractor whose works were to be surveyed. This alleged conflict of interest emanated from

business ties that the recommended bidder formerly held with a family member of the Contractor. The PCRB refuted the claim of alleged conflict of interest.

- 4.4.5 In conclusion, PCRB turned down the appeal; however, in addition, the Board also found the recommended tenderer to be non-compliant. The reason for this rested on the findings of the appeals case in which both the recommended tenderer and the Appellant had provided tenders that contained missing information. Given such a finding, PCRB recommended the reimbursement of the deposit paid by the Appellant.
- 4.4.6 In NAO’s opinion, which is largely based on the above-quoted PCRB report, this appeal exposed a situation where DCC failed to address the issue of missing information in relation to the recommended tenderer. In so doing, the tender was awarded to a non-compliant economic operator. Had the Appellant refrained from challenging the recommendation made by DCC, the case would have remained undetected. It is inconceivable that a contracting authority should issue a tender document, requesting certain information, such as the proof of qualifications, fail to detect that a tenderer did not provide such information, and in addition, recommend the tenderer for contract award. In this case, apart from exposing WSM to the risk factor of having tenderers without proof of qualifications, this also delayed the award due to the resultant appeal. DCC could have avoided such a situation through the better vetting of tender submissions.
- 4.4.7 WSM indicated that delays accruing as a result of the appeal process were significant, with the appeal lodged in April 2011 and eventually concluded in September 2011. The five-month interim period was deemed excessive by NAO.

#### 4.5 Case No. 328: Period Contract for Multi Point-to-Point Connections between All Premises Managed and Operated by WasteServ Malta (WSM/22/2011)

**Table 10: Profile of Case No. 328**

Case No. 328: Period Contract for Multi Point-to-Point Connections between All Premises Managed and Operated by WasteServ Malta (WSM/22/2011)	
Publication Date of Tender	25 March 2011
Closing Date	15 April 2011
WSM Estimate	€81,559
Number of Tenderers	Three
Number of Appellants	One
Date of Objection to Award Recommendation	19 May 2011
Date of PCRB Hearing	12 September 2011
Date of PCRB Recommendation	30 September 2011

- 4.5.1 In this appeal, the case revolved around WSM’s decision to disqualify the Appellant’s offer as technically non-compliant and recommend tender award to another bidder. Of note is the fact that the disqualified offer was lower than that of the recommended bidder.
- 4.5.2 Defence for the Appellant contested this decision, indicating that its client had proposed two options, one as requested by WSM (indicated in the Specification Form) and an additional option that provided greater security (indicated in the Additional Information sheet). Therefore, according to the appellant, the encryption method indicated in the tender submission, denoted as ‘encryption depends on the terminating equipment capabilities’, did not in itself render the tender bid non-compliant, as the appellant gave further options, one of which was as requested by WSM. In addition, the appellant stressed the point that under such circumstances,

wherein WSM had doubt over whether the tenderer offered a two-layer solution or a three-layer solution, WSM could have resorted to clarifications.

4.5.3 During the course of the appeal, the Appellant, in defending the position of the disqualified offer, took to task the drafter of the tender document and alleged a rather serious claim. The following extract refers;

*“It was evident that the drafter of the tender document based the requirements on the system operated by the current provider, [name redacted] (the recommended tenderer), in terms of AES or 3DES encryptions and that, besides unfairly favouring the current contractor, it did not make sense because it, unnecessarily, limited the choice to those two alternatives.”*

The Board dismissed this claim.

4.5.4 Following the submissions of the Appellant, and counter claims presented by the recommended tenderer and WSM, PCRb reached a series of conclusions based on the evidence submitted and eventually upheld the appeal. The Board recommended that the appellant was to be reinstated in the tendering process and reimbursed the deposit paid for the initiation of the appeal.

4.5.5 With reference to the PCRb findings, NAO is of the opinion that:

- a. In not only the interest of the contracting authority, but also in ensuring a fair, transparent and competitive tendering process, the contracting authority is to evaluate tender submission on ‘perfect information’, that is, with all information at hand being interpretable and comprehensible.
- b. When faced with information containing any ambiguity, the contracting authority must seek clarifications prior to evaluating the submission. In as much as tenderers are to seek clarifications on the pre-submission of offers, the contracting authority is to seek clarity (when required) prior to evaluating and eliminating tenderers. In particular, the absence of such action by WSM resulted in the elimination of a tenderer, only to be later reinstated in the tendering process.
- c. Considering that, the appeal process took (approximately) four months, the procurement activity was unduly delayed.

## 4.6 Case No. 367: Tender for the Construction of a Leisure Area at the Marsaskala Family Park (CT/3054/2011)

**Table 11: Profile of Case No. 367**

Case No. 367: Tender for the Construction of a Leisure Area at the Marsaskala Family Park (CT/3054/2011)	
Publication Date of Tender	30 June 2011
Closing Date	11 August 2011
WSM Estimate	€2,188,522
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	25 November 2011
Date of PCRb Hearing	18 January 2012
Date of PCRb Recommendation	06 February 2012

- 4.6.1 The defence for this appeal hinged on the administrative compliance of the recommended tenderer. Legal counsel, on behalf of the Appellant, claimed that its offer was the only administratively compliant offer, with the other bidders either not providing the required samples or not providing them in the stipulated manner. To this end, the Appellant's legal counsel deemed that the, *"the recommended tenderer should have been disqualified at administrative compliance stage and the tender awarded to his client."*
- 4.6.2 The ambiguity surrounding the samples resulted from contradictory information in the set out in the tender document. As per clauses 175 and 176, of the General Requirements, WSM requested the submission of technical literature and samples. Such samples were not requested in the instructions to tenderers. WSM's representative indicated that the cited clauses of the General Requirements should not have featured in the tender document, but were included due to an oversight. The issue rested on which of the clauses gained precedence, that is whether it was the General Requirements, which were mandatory, or the Instructions to Tenderers. In feedback provided by WSM, attention was drawn to the fact that in one clarification circulated among all bidders, WSM had clearly stated that no literature or samples were being requested. According to WSM, this should have superseded the requirement of samples stated in the General Requirements.
- 4.6.3 PCRB concluded that despite the vetting carried out by DoC, a number of inconsistencies were noted in the tender document, resulting in contradictory instructions. Furthermore, PCRB concluded that *"...the onus for a tender document to contain the right and proper information, instructions and so forth rests on the contracting authority"*, which in this case was WSM.
- 4.6.4 Moreover, PCRB, in its conclusions, also indicated that in this case, WSM was not correct in relaxing the rules by accepting to reduce the standards initially set, in order to render tenderers compliant with the tender conditions. Ideally, when all tender bids are noncompliant, the contracting authority should cancel the tender and issue a fresh call, possibly under the negotiated procedure should circumstances so warrant. In support of this, the Board maintained that, *"...a level playing field did not mean that because all tenderers were deficient one could lower the standards to render them compliant."*
- 4.6.5 NAO is unconvinced by the level of vetting exercised by DoC and by the fact that, despite the uncertainty over the requirement, or not, to provide samples, WSM opted to proceed with the tender adjudication notwithstanding this ambiguity. Further to this, by endorsing WSM's recommendation, DoC assumed responsibility in part for such a deficiency. As recommended by PCRB, given the ambiguity, the process warranted the readmission and reevaluation of bids following the submission of samples (in the case of the Appellant, fresh samples). Furthermore, PCRB recommended that the samples were to be more comprehensive, better reflecting the requirements established in the bill of quantities.
- 4.6.6 In conclusion, PCRB recommended the reimbursement of the deposit paid by the Appellant.

#### 4.7 Case No. 396: Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environmental Monitoring Programme (WSM/231/2011)

**Table 12: Profile of Case No. 396**

Case No. 396: Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environmental Monitoring Programme (WSM/231/2011)	
Publication Date of Tender	6 September 2011
Closing Date	4 October 2011
WSM Estimate	Lot 1 - €400 per sample; Lot 2 - €400 per sample
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	17 December 2011
Date of PCRB Hearing	12 April 2012
Date of PCRB Recommendation	02 May 2012

4.7.1 On publication of the tender award, the Appellant noted a discrepancy between the price listed in the ‘schedule of offers received’ (quoted at €2,904) and that on the ‘notice of award’ (set at €363). This led the appellant to enquire (with WSM) the reasons behind such a discrepancy. The aggrieved tenderer remained unsatisfied with the information furnished by WSM, and thereby sought to pursue the case further by lodging an appeal.

4.7.2 During the appeal hearing, the Appellant’s defence counsel referred to this mismatch in prices, and the reasons furnished by WSM, indicating that such reasons were deemed unacceptable.

4.7.3 WSM and the Chairperson of the Evaluation Committee justified the discrepancy. The PCRB subsequently analysed the tender submission of the recommended tenderer and “noted that the figure of €2,904 referred to a per quarterly sample which was made up of 8 samples, i.e. 4 monitoring stations in total as per clause 6.3.4 and then, as per clause 6.3.9, two replicate samples needed to be collected from each monitoring station. As a result, the figure of €2,904 had to be divided by 8 to produce the rate per unit of €363.”

4.7.4 In conclusion, the WSM’s legal representative indicated the following;

*“...although the appellant company had lodged its appeal on reasonable grounds, once it did not have access to all the information, on the other hand, given the exhaustive and transparent explanation furnished by the contracting authority [WSM]..., in taking into account all the information made available in the recommended tender submission, the contracting authority [WSM] had acted correctly and with the aim of safeguarding public funds.”*

4.7.5 Following the consideration of the submissions made by all parties, PCRB gave its reasons as to why it was in disagreement with the position taken by WSM. In so doing, PCRB upheld the appeal, thereby recommending the reinstatement of the Appellant in the tendering process and the reimbursement of the deposit paid for the appeal. Further to this, PCRB concluded that the recommended tenderer’s bid was not administratively compliant and hence could not have been evaluated as was the case.

#### 4.7.6 NAO is of the opinion that:

- a. WSM is to be commended for its attempts at safeguarding public funds and endeavouring to reduce costs by analysing which tender resulted in the cheapest offer.
- b. The rate indicated by the tenderer should not have been altered, irrespective of the motivation for such action, even if in this case there seems to have been no doubt as to the genuine reason for such changes. As indicated by PCRB, such changes could cast doubt and be perceived as constituting vested interest.
- c. In such circumstances, WSM should exercise caution when engaging in such initiatives, and ensure the conformity of such action with public procurement practices. One has to appreciate that even though acting in good faith, WSM had, by exceeding its boundaries, halted the process for over four months. Such a delay may result in temporary extension of current contracts through direct orders that may not always be conducive to value for money.

4.7.7 According to WSM, the primary concern of any evaluation is to compare like with like. In this case, based on the additional pricing information submitted by the recommended tenderer in his tender submission, WSM maintained that the comparison of prices was not like with like. WSM insisted that the corrections undertaken by the Evaluation Committee were totally transparent and auditable. Finally, WSM contended that the end-result of the appeal decision was that it had to award a contract while fully aware that the awarded prices were inflated.

#### 4.8 Case No. 397: Works Tender for the Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at Tal-Kus I/o Xewkija, Gozo (CT/3004/2010)

**Table 13: Profile of Case No. 397**

Case No. 397: Works Tender for the Design, Build and Operate of the Gozo Waste Treatment and Transfer Facility at tal-Kus I/o Xewkija, Gozo (CT/3004/2010)	
Publication Date of Tender	4 March 2011
Closing Date	2 June 2011
WSM Estimate	Lot 1 - €500,000 (excluding VAT); Lot 2 - €6,263,255 (excluding VAT); Lot 3 - €423,076 (excluding VAT)
Number of Tenderers	Four
Number of Appellants	One
Date of Objection to Award Recommendation	16 January 2012
Date of PCRB Hearing	12 April 2012
Date of PCRB Recommendation	30 May 2012

4.8.1 Following the evaluation of the tender submissions, the Appellant received notification of elimination on grounds of administrative non-compliance. WSM indicated that the appellant submitted various documents in Italian without adequate translation into English, namely; the Board resolution giving Power of Attorney, Audited Accounts, Credit Facilities declaration from Banca Nazionale di Livori (Italy), Experience as Contractor and CVs of Key Personnel. Given that as per Clause 14 – Language of Tenders of Volume 1 – Instructions to Tenderers and the relative sub-clauses, indicated the use of the English language, the bidder failed on grounds of administrative compliance.

4.8.2 The Appellant contested such elimination. The defence counsel of the Appellant referred to the new procurement regulations, specifically to Note 2 to Clause 16.1, which states the following, “Tenderers will be requested to either clarify/rectify any incorrect and/or incomplete documentation, and/or submit any missing documents within two working days from notification.” In addition, the legal representative

indicated that both European Court of Justice case law and practice by DoC, permitted rectification of the submitted documents.

- 4.8.3 The case evolved on legal grounds, with the preferred bidder contesting the Appellant’s interpretation, raising a different understanding of what the clause essentially covered and its applicability to this case.
- 4.8.4 Having heard the submissions of all the interested parties, PCRB upheld the objection and recommended the reinstatement of the Appellant in the tendering process and the reimbursement of the deposit paid for lodging the appeal.
- 4.8.5 NAO is of the opinion that since the new procurement regulations (LN296/2010) permit the rectification of submitted documents and/or the submission of missing documents, contracting authorities have a tool at their disposal, which if utilised correctly, may aid by enhancing competition. While the rectification mechanism has an inbuilt level of discretion (‘may’ and ‘will’), it is imperative that contracting authorities make judicious use of this tool and refrain from unnecessarily hindering the level of competition due to non-compliance that is after all rectifiable.
- 4.8.6 WSM agreed with NAO’s interpretation of the rectification guidelines in accordance with DoC provisions. However, WSM noted that NAO’s position implied a wide interpretation of the rectification guidelines as applied at the time. According to WSM, and as expressly indicated by Note 2, it was practice that rectifications were allowed in respect of documents that were not part of the technical submission. In this case, the missing translations related to technical literature, which was submitted in the Italian language only. WSM maintained that the Evaluation Committee strictly followed these provisions. Moreover, Clause 14 is distinctly different to Clause 16.1 and the Evaluation Committee would have been acting beyond its remit if it made such decisions on its own. WSM noted that acting in such a manner would have risked being reprimanded by the GCC. In fact, based on this decision and given such developments, evaluation committees at WSM have since then been guided to act accordingly in such circumstances. Finally, WSM insisted that the Evaluation Committee should not be criticised for having acted correctly, even if the PCRB decided otherwise.
- 4.9 **Case No. 432: Period Contract for the Hire of One Truck Mounted Hydraulic Excavator and One Eight Wheel Tipper Truck including Standbys and Operators for the Separation Site at Għallis Landfill/Magħtab Rehabilitation Project (WSM/58/2012)**

**Table 14: Profile of Case No. 432**

<b>Case No. 432: Period Contract for the Hire of One Truck Mounted Hydraulic Excavator and One Eight Wheel Tipper Truck including Standbys and Operators for the Separation Site at Għallis Landfill/Magħtab Rehabilitation Project (WSM/58/2012)</b>	
Publication Date of Tender	7 February 2012
Closing Date	28 February 2012
WSM Estimate	€120,000 for 12 months (excluding VAT)
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	19 April 2012
Date of PCRB Hearing	26 July 2012
Date of PCRB Recommendation	31 July 2012



4.9.1 This tender, for which five tenderers submitted their offers, consisted of an ‘if and when required’ basis as per clause 6.2.1 of the tender document,

*“The Contract shall be operative for a period of twelve (12) months on an ‘if and when required’ basis, or until the value of €120,000 exclusive of VAT is exhausted, whichever is the earlier. In the event where the €120,000 are not exhausted by the end of the contract period, the Chief Executive Officer reserves the right to extend the validity of the contract for a further period, up to six (6) months, after termination date of the contract.”*

4.9.2 The appeal process of this tender ensued the disqualification of a tenderer at the financial evaluation stage. WSM justified the disqualification on the basis that the financial offer was too high and that this would result in WSM availing itself of fewer hours or else having to incur a higher cost. However, WSM failed to specify the maximum rates applicable for this tender. This left tenderers in a position to compete openly among one another with no predetermined benchmark.

4.9.3 The defence counsel for the Appellant focused on the disqualification on grounds of financial non-compliance and gave reasons for its divergence in opinion. The contestation revolved around conditions stipulated in the tender, indicating that the contract was on an ‘if and when required’ basis and that the maximum contract value was €120,000 for 12 months, with no maximum rate being quoted by WSM. Therefore, the Appellant contested the validity of the disqualification, as the offer could never exceed the financial allocation established by WSM since the contract had an upper limit set at €120,000 (excluding VAT). Furthermore, the defence counsel indicated that the submitted rate was lower than the rate of the ongoing contract supplied by the same appellant.

4.9.4 To this end, PCRB concluded that the tenderer essentially abided by the tender conditions when submitting the offer. Given such a position, PCRB upheld the appeal and instructed WSM to reinstate the tenderer in the tendering process and reimburse the deposit paid for the appeal.

4.9.5 NAO is of the opinion that in such situations, where the contracting authority must safeguard its interests by guaranteeing a baseline number of units (for example, hours, tonnes, etc.) within the financial allocation for the tender, the contracting authority has to indicate the maximum unit rate in the tender document. The establishment of a maximum price policy would guarantee a minimum level of units over the contract’s lifetime. In this case, such an omission resulted in WSM having to either reduce the number of hours availed of, or increase its cost outlay. Moreover, by omitting a maximum rate, WSM relinquished a safeguard over its financial allocation for which disqualifying the tenderer did not constitute a justifiable remedy. In essence, following the issuance of the tender, WSM had to abide by its instructions and could not eliminate a tenderer on criteria that were unknown to the tenderers.

4.9.6 WSM indicated that such a policy was, at the time, favourably considered by WSM’s Tenders Committee and the concept of establishing a maximum rate in such tenders was agreed to in principle. Alternative approaches could be considered instead of establishing a maximum rate. For example, one could indicate the number of hours of anticipated use within the maximum €120,000 value of the contract; this would notionally have a similar effect to the setting of the maximum rate, albeit indirectly.

4.9.7 NAO strongly emphasises the importance of the concept that contracting authorities are to avoid unnecessarily delaying the tendering process. In this particular case, in which the aggrieved tenderer held the rights over the current period contract, a delay

in the award implied that WSM was sourcing under the previous contract, the same services from the same Contractor, at a higher price than if the tender had to be awarded.

#### 4.10 Case No. 433: Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environment Monitoring Programme – Lot 2 (WSM/231/2011)

**Table 15: Profile of Case No. 433**

<b>Case No. 433: Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environment Monitoring Programme – Lot 2 (WSM/231/2011)</b>	
Publication Date of Tender	6 September 2011
Closing Date	4 October 2011
WSM Estimate	€120,000 (Lots 1 and 2 over 24 months (excluding VAT))
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	15 June 2012
Date of PCRB Hearing	26 July 2012
Date of PCRB Recommendation	

**4.10.1** The proposed award for this tender resulted in an appeal case as an aggrieved bidder filed an objection to WSM’s decision to eliminate the offer on grounds of financial non-compliance. This tender, for which five offers were submitted, was on an ‘if and when required’ basis or until the value of €120,000 (excluding VAT) was exhausted, whichever was the earlier, as per clause 6.2.1 of the tender document. In the event that the €120,000 limit was not exhausted by the end of the contract period, WSM reserved the right to extend the validity of the contract for a further period of up to six months after the termination date of the contract.

**4.10.2** The appeal process of this tender was initiated following the disqualification of a tenderer at the financial evaluation stage. WSM justified the disqualification on the grounds that the financial offer was too high as the estimates drawn up by WSM placed the highest acceptable price at €400 per unit. However, WSM did not specify maximum rates applicable for this tender, simply stating that Lots 1 and 2 are subject to a maximum of €120,000 (excluding VAT). This left tenderers in a position to compete openly among each other with no predetermined benchmark.

**4.10.3** The defence counsel for the Appellant focused on the disqualification on grounds of financial non-compliance and gave reasons for its divergence in opinion. The contention revolved around conditions stipulated in the tender, indicating that the contract was on an ‘if and when required’ basis with a maximum contract value of €120,000 for 24 months, with no maximum rate being quoted by WSM. Therefore, the Appellant contested the validity of the disqualification of the submitted offer as no maximum unit rate was indicated, save for a total maximum encapsulating both lots over the whole contract period.

**4.10.4** To this end, PCRB concluded that the tenderer essentially abided by the tender conditions when submitting the offer, as WSM had failed to indicate a maximum rate against which the tenderers could compete. In addition, PCRB upheld the appeal and instructed WSM to reinstate the tenderer in the tendering process and reimburse the deposit paid for the appeal.

4.10.5 As indicated in paragraph 3.9.5, NAO is of the opinion that contracting authorities may better safeguard their financial allocation through the imposition of a maximum rate policy, thereby ensuring that the desired level of service is provided. Such a maximum rate per unit must be clearly stipulated in the tender document. In this case, such an omission resulted in WSM having to either reduce the number of hours availed of, or increase its cost outlay. Moreover, by omitting a maximum rate, WSM relinquished a safeguard over its financial allocation for which disqualifying the tenderer did not constitute an acceptable remedy. In essence, following issuance of the tender, WSM had to abide by its instructions and could not eliminate a tenderer on criteria that were unknown to the tenderers.

4.10.6 Given the similarity between case 432 and 433, there appears to be an element of commonality between deficiencies noted with respect to the period contracts operating on an ‘if and when required’ basis. To this end, NAO recommends that contracting authorities should act in the spirit of such appeal rulings when issuing such tenders.

#### 4.11 Case No. 477: Period Contract for the Sampling, Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environmental Monitoring Programme (WSM/231/2011)

**Table 16: Profile of Case No. 477**

Case No. 477: Period Contract for the Sampling Analysis and Reporting of Results for Seawater and Sediment as part of the Għallis Non-Hazardous Waste Engineered Landfill Environmental Monitoring Programme (WSM/231/2011)	
Publication Date of Tender	6 September 2011
Closing Date	4 October 2011
WSM Estimate	Lot 1 - €400 per sample; Lot 2 - €400 per sample
Number of Tenderers	Five
Number of Appellants	One
Date of Objection to Award Recommendation	24 August 2012
Date of PCRB Hearing	26 October 2012
Date of PCRB Recommendation	

4.11.1 This appeal hearing is the third case under review involving the same subject matter originating from the same period contracts (Case 396 and Case 433 refer). In this context, a request for the establishment of a new PCRB was made; however, this was eventually withdrawn.

4.11.2 The appeal was triggered following the cancellation of the tender by WSM on the basis of clause 5.2.1 (a) of the tender document, namely, “*the Tender procedure has been unsuccessful, namely where no qualitatively or financially worthwhile tender has been received or there has been no response at all.*” The appellant, not in agreement with such an interpretation, sought to appeal against this cancellation.

4.11.3 The defence counsel for the Appellant tenderer indicated that, “*the contracting authority could not bring up this reason for rejection, namely not ‘financially worthwhile’, at the stage of the third appeal.*”

4.11.4 The PCRB Chair observed that deliberation on the financial aspect had taken place during the hearing of case 433, where the appellant company, having abided by the tender conditions, was re-instated in the tendering process. In the hearing of case 433, PCRB also exhausted clause 5.2.1, “*all technically compliant tenderers exceed the financial resources available.*”

- 4.11.5 During the hearing, WSM, through its legal advisor, indicated that tender cancellation is a right that the contracting authority holds, further indicating that, in so doing, the contracting authority was not obliged to communicate the reason for such cancellation. However, in this case, WSM had indicated the reason. In addition, WSM's legal representative indicated that out of five tenderers, three tenderers were disqualified due to technical or administrative non-compliance, while the remaining two tenderers were disqualified because their offers were *"not worthwhile as per clause 5.2.1 (d)"*. Although WSM was aware that the appellant company had a right to claim any damages sustained throughout the tendering process, *"the contracting authority still retained the right to cancel a tender."*
- 4.11.6 Following the submissions made by the WSM legal advisor, another WSM official presented further arguments in defence of the original evaluation decision. In turn, the Appellant company's director counter argued the issues raised by the WSM official.
- 4.11.7 Following the submissions put forward by both parties, PCRB gave its ruling. In this case PCRB ruled in favour of the appellant, recommending the re-instatement into the tendering process. Moreover, should following *"further evaluation carried out within the parameters of this decision and of the tender's terms and conditions (not as perceived by the contracting authority but as documented), its offer turns out to be administratively and technically compliant – considering that it is the only offer which remained in contention following the disqualification of all the other bids – then it should be awarded the tender."* In addition, PCRB recommended the reimbursement of the deposit paid by the appellant for the initiation of the appeal process.
- 4.11.8 In relation to this appeal case, this Office is of the opinion that WSM may have been bound by a budgeted estimate and may have opted to defend such an expenditure outlay in order to safeguard public funds; however, due to its actions, WSM only postponed the inevitable that ensued due to shortcomings in the tender document.
- 4.11.9 This Office further considers that such tender deficiencies are bound to resurface at a later stage and only lead to delays and costly litigation. Therefore, if contracting authorities such as WSM want to safeguard their expenditure outlay, they should invest in efforts directed at ensuring that tender documents contain all the requirements required to safeguard their interests, including the adoption of a maximum price policy not only in total, but also per item.

## 4.12 Conclusion

- 4.12.1 Out of the 15 appeals lodged against WSM during the period 2011-2012, 10 of these objections were upheld by PCRB. In NAO's opinion, this situation leaves much to be desired, particularly so when one considers that DCC, GCC and DoC would have endorsed the recommended tender result. Notwithstanding this three level process of review, numerous shortcomings emerged with respect to these award decisions. In effect, there may exist other disqualified tenderers who may feel aggrieved by their elimination from a tendering process, or the award decision by WSM, yet opted to refrain from appealing such decisions. Therefore, in reference to the reviewed cases, NAO considers such records as not representing a maximum figure, but an at least figure.
- 4.12.2 From the cases reviewed, it transpired that PCRB overturned WSM's award decisions for a variety of reasons. Most notable were the instances where WSM awarded the contract to a non-compliant bidder, the award of a contract despite ambiguity in tender

instructions, a lack of adherence to the stipulated evaluation criteria, and the case where an appellant had to lodge three appeals with respect to the same contract.

- 4.12.3 In two of the cases (PCRB Case 327 and PCRB Case 367) WSM awarded the tender to non-compliant bidders. In the first instance, faced with non-compliance by the majority of bidders, due to the non-provision of samples, WSM intentionally slackened the rules and evaluated the offers. During the appeal process not only did this fact come to light, but also that the bidders were not entirely responsible for their shortcomings in compliance, since the tender document contained conflicting instructions governing the supply of samples. In the second instance of awarding a tender to a non-compliant bidder, WSM awarded a tender to a bidder who had not provided proof of qualifications as requested in the tender document.
- 4.12.4 NAO appreciates the difficulties faced by evaluation committees in seeking to faithfully adhere to relevant regulations while simultaneously seeking to exercise a degree of flexibility and practicability in order to better ensure value for money. The challenge posed in seeking to establish the correct balance between the two is in fact onerous, and must be taken into account as relevant context to shortcomings identified by PCRB and NAO's findings.
- 4.12.5 The case involving three separate appeals encapsulated multiple deficiencies. The deficiencies primarily originated from unfavourable tender conditions, where WSM failed to indicate a maximum price per unit. WSM subsequently sought to safeguard its interests through the award process, by rectifying the schedule of prices of the recommended bidder. PCRB concluded that the recommended bidder was administratively non-compliant and should not have been evaluated in the first instance. Moreover, PCRB recommended the reinstatement of the appellant into the tender process. Following this reinstatement, WSM eliminated the appellant on the claim that the offer exceeded the financial allocation for the tender in question. However, in the second appeal, PCRB ruled that since the tender document lacked a clause indicating the maximum price WSM was willing to accept, the elimination was not valid. At this stage, WSM cancelled the tender. The appellant reopened an appeal, contesting WSM's right to cancel the tender. PCRB upheld the appeal and recommended the reinstatement of the appellant and the award should the appellant qualify as administratively and technically compliant. In essence, PCRB found WSM as having operated outside of its remit by adjusting the prices and of not adhering to the stipulated tender conditions.
- 4.12.6 In all cases involving appeals, an amount of delay in tender award is inevitable. Delays are undesired since information may expire, as in the case of CVs that may, over time, become irrelevant due to changes in experience and qualifications. In addition, a contracting authority may have to bridge the gap between the appeal and award stages with direct contracts. To this extent, WSM, or any other contracting authority, should seek to reduce the incidence of appeals through the implementation of sound award processes. Moreover, the time lapse between the tender submission and the award result should not exceed a reasonable period. In one of the appeal cases, the time lapse between the submission closing date and the award was so excessive that PCRB ruled that the requested information was no longer valid. NAO is, however, cognisant of the fact that an element of delay with respect to the appeals process is attributable to PCRB.
- 4.12.7 NAO is of the opinion that in some of the cases, the appeal process may have been avoided had WSM been better informed of the procurement regulations and applied better judgment when evaluating bids. GCC could have been instrumental

in reducing the number of appeals through more rigorous vetting of disqualified and recommended tenderers at the award endorsing stage.

4.12.8 Given the level of upheld appeals, tenderers may perceive the procurement mechanism to be characterised with inherent obstacles that may increase the administrative burden required to secure a tender. Therefore, tenderers may refrain from participating in the tendering activity due to such hurdles, and should such a situation materialise, the reduction in competition may work against the anticipated benefits from such competitive tendering processes.

4.12.9 In relation to the review of the PCRB cases, WSM was of the opinion that PCRB decisions with respect to upheld appeals did not necessarily imply that the evaluation committees acted incorrectly. WSM maintained that PCRB decisions were at times based on interpretations outside of the established evaluation guidelines issued by DoC. WSM sought to back such an opinion by referring to PCRB Case 397, where PCRB had upheld the appeal and instructed the reinstatement of the Appellant subject to the submission of duly translated technical literature.







## Appendix A – Improvement of the Sant’ Antnin Waste Treatment Plant and Material Recovering Facility (CT 2089/2005): Lot III Claims and Counter-claims

Claims raised by Contractor				
NAO Reference	Date	Claim Source	Details	Claim Value
1	03/12/2007	Cost for storage of material and equipment	Contractor claimed that due to delay in possession of the site and the foundations, and the instruction to deliver the material and equipment items (pulpers, sandtrap, other equipment MTP, CHP's, all of which have to be stored until possession of the site is obtained), it is entitled for: Storage cost, overheads for administration of storage, costs of crane and lifting tools.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. Invoice dated 10/08/2008 indicates a cost of €185/month (excluding VAT) for storage of the chemical scrubber with accessories. Invoice dated 30/11/2009 indicates a storage cost of €35/week and a charge of €250 for cleaning the stack before collection. Correspondence dated 8/12/2009 relating to the particulars to claim no. 1 storage of material and equipment, provides a breakdown of the costs, that amount to €79,622. Through Correspondence dated 8/12/2009 the contractor claimed for €79,622 and an adjustment in the contract amount by an additional €1,770/month starting from 01/01/2010.
2	15/05/2009	Forwarding of the obstruction notice received from subcontractor Kuerner KTA Kunststofftechnik und Anlagenbau GmbH, Germany. The employer has failed to give the possibility to assemble the equipment of the pipe work without interruptions	Cost for return flight and transfer, one way (€6,500), Rental cost of Merlot (€825/week), Rental cost of containers (€490/week), Rental cost of tools (€7,500/week), Rental cost for Ford Transit (€975/week), Rental cost of flat (€950/week).	€6,500 per flight and transfer (one-way) €10,740/week. Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. Invoice dated 04/11/2009 totals €29,160 and indicates the costs as follows: (1) rent for merlo forklift truck, €7,425, (2) rent cost of containers, €4,410, (3) rent for service car Ford Transit, €8,775, (4) rent for the flats/accommodation, €8,550.

3a	28/05/2009	Structural change of gas pipe 4310 L25	Claim in relation to the structural change of the gas pipe 4310 L25	Material €5,112, Engineering & Design €1,664, Manufacture and Installation €1,939, Transport €500, Profit of 15% €1,382. Total claim value €10,598. On 8 December 2009, the Contractor indicated a claim value of €10,837. On 10 December 2009, the Contractor indicated a claim value of €10,598.
3b	28/05/2009	The Interruption of assembly regarding access to the Wet MTP	This claim relates to the interruption of assembly regarding access to the Wet MTP	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. On 8 December 2009, the Contractor indicated a claim value of €1,553.
3c	28/05/2009	Height of stack RTO	The claim relates to the impossibility to dimension the height of the stack RTO	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time.
3d	28/05/2009	Access to site Wet MTP	This claim concerns the Access to Site regarding the wet MTP for failure to obtain possession of the foundations.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. Particulars to Claim No 04 Access to site wet MTP indicate a cost of €6,530.
3e	28/05/2009	Access to site for blower station	This claim concerns the Access to Site regarding the Blower station for failure to obtain possession of the foundations.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time.
4a	04/06/2009	Erection all risk insurance	The claim concerns the period of the Erection all risk insurance.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. On 18 December 2009, the Contractor indicated a claim value of €60,543.
4b	04/06/2009	Warranty	The claim raised by the contractor concerns the period of warranty.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. On 8 January 2010, the Contractor indicated a claim value of €582,180 and a further claim value of €17,641/month

4c	04/06/2009	Rental costs for flat in Malta	This claim related to the rental costs for a flat, which were to be paid during the time of assembly and commissioning.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time.
4d	04/06/2009	Interruption of assembly regarding gantry crane	This claim concerns the interruption of assembly regarding gantry crane.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time. Particulars to Claim No 15, Gantry crane wet MTP indicate a claim value of €1,843. On 8 December 2009, the Contractor indicated a claim value of €3,481.
4e	04/06/2009	Access to Site for pipe bridges and pumps	This claim concerns Access to Site regarding the pipe bridges and pumps for failure to obtain possession of the foundations.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time.
4f	04/06/2009	Access to site for CHP	This claim concerns the Access to Site regarding the CHP for failure to obtain possession of the foundations.	Contractor indicated that a detailed consolidated amount for all such costs, including profit, will be submitted in time.
5a	23/06/2009	Claim Notice No. 22/06/2009-1 EOT for failure to obtain possession of the foundations	Contractor indicated that due to slow progress and delay it is not in able to start the works as scheduled, therefore the time for completion will be delayed accordingly.	Contractor indicated that this claim has continuing effect.
5b	23/06/2009	Claim Notice No. 22/06/2009-2 concerning Cost and Profit for failure to obtain possession of the foundations	Contractor listed a number of items comprising such claim.	Contractor indicated that a detailed consolidated amount representing the total of financial charges will be submitted in time, further to this indicating that this claim has continuing effect. On 21December 2009, the Contractor indicated a claim value of €218,357 and an additional €22,508/month.
5c	23/06/2009	Claim Notice No. 22/06/2009-3 concerning EOT/Cost for legal prevention	Notification of the Contractor's intention to claim for additional cost and/or compensation of damage.	Contractor indicated that this claim has continuing effect and shall give further monthly notices. On 9 July 2009, Contractor provided a Clarification in relation to this claim.

6	23/06/2009	Claim No. 1: Default interest/financial charges have been suffered	Contractor claimed for 27 days of delay in the payment of spare parts for Lot III (2nd partial invoice No. 9500040).	Contractor indicated that notwithstanding this claim notice, the according financial charges shall be included in the next Payment Certificate - Final Invoice No 810049 (30/04/2009).
7	15/07/2009	Claim Notice No. 15/07/2009-1	Contractor raised claim in relation to bird droppings, indicating costs as: costs for cleaning work, costs for paintings (Work and material), additional expenditure in view to the claim-management, headquarters costs, costs in correlation caused by the running out of guarantees given by the suppliers, and additional costs caused by materials becoming obsolete (requiring replacement).	Contractor indicated that a detailed consolidated amount representing the total of financial charges will be submitted in time, further to this indicating that this claim has continuing effect.
8	22/10/2009	Claim Notice No. 28/09/2009-1 Concerning EOT/COST for sand loading container	The construction of the loading was already planned, agreed and carrier out on site, due to changes the new construction must become anew planned and designed. Due to this, a list of the additional costs was drawn up by the Contractor, with costs claimed indicated as: engineering, the construction drawings must be changed, the changed construction must be checked and be confirmed by the supplier, the delivered steel construction must be changed on site, and new adjustment on site with the companies is necessary.	Contractor indicated that a detailed consolidated amount representing the total of financial charges will be submitted in time, further to this indicating that this claim has continuing effect. On 8 December 2009, the Contractor indicated a claim value of €526.

9	22/10/2009	Claim Notice No. 28/09/2009-1 Concerning EOT/COST for renewal foundation inside pit	Contractor claimed for an extension of Time and the Costs for Completion, indicated that not all foundations correspond to the specifications of HAASE. Some can still be used. However, others must be reworked by Lot I (Contractor). The works are controlled and supervised by HAASE. Claims were raised in relation to: engineering, protection or completely demounting the pumps, supervision on site, travel costs, the foundation drawings must be changed, the changed construction must be checked and confirmed, and new adjustment on the site with the companies is necessary.	Contractor indicated that a detailed consolidated amount representing the total of financial charges will be submitted in time, further to this indicating that this claim has continuing effect.
10	22/10/2009	Claim Notice No. 28/09/2009-1 Concerning EOT/COST for the use of parts of the works (steel construction)	Contractor (HAASE) indicated that another contractor has mounted its cable duct and switchboard on its (HAASE) steel work inside the dry MTP hall, without its approval nor agreed by HAASE. Following which the Contractor compiled a list of possible results of such action. The Contractor claimed an entitlement to additional extension of Time for Completion and Costs which shall be included in the Contract Price (including entitlement to profit).	Contractor indicated that this claim has continuing effect.

11	22/10/2009	Claim Notice No. 01/10/2009-1 Concerning EOT/COST for the missing foundation earthing	Contractor indicated that as a result of missing earthing (as described in its claim) it is entitled to an EOT/ Costs; listing such costs under property damages and damage to persons. The Contractor claimed an entitlement to additional extension of Time for Completion and Costs, which shall be included in the Contract Price (including entitlement to profit).	Contractor indicated that this claim has continuing effect. On 8 December 2009, the Contractor indicated a claim value of €376.
12	08/12/2009	Particulars to claim No. 06 Access/Possession of tanks erection areas		With reference to this claim, the contractor provided a claim calculation indicating a claim value of €65,869.
13	08/12/2009	Particulars to claim No. 07 Dimensions wet MTP		With reference to this claim, the contractor provided a claim calculation indicating a claim value of €3,672.
14	21/12/2009	Particulars to Claim No. 02 - Extension of Time	The Contractor presented a claim in relation to Extension of Time calculated upon a fix cost and cost with continue effect.	The claim stood at €168,652.
15	18/01/2010	Claim Notice No. 34 Concerning EOT for failure to comply access in relation to the programme	The Contractor presented a claim in relation to Extension of Time calculated upon a fix cost and cost with continue effect.	NA, claim relates to a request for an extension of time.
16	02/02/2010	Claim Notice No. 35 concerning EOT/Cost/ Profit Accident Digester	The claim arose due to accidental damage, by Lot I Contractor, to one of the tanks, (Digester 2).	Contractor indicated that a detailed consolidated amount representing the total of financial charges will be submitted in time, further to this indicating that this claim has continuing effect. On 4 February 2010, the Contractor indicated a claim value of €13,306 and an extension of time.

17	08/02/2013	Contractor's Claim	Total claims raised by the Contractor.	Total claim value indicated as €1,923,699.
<b>Claims raised by WSM</b>				
<b>NAO Reference</b>	<b>Date</b>	<b>Claim Source</b>	<b>Details</b>	<b>Claim Value</b>
18	11/01/2013	Employer's Claim	Delay damages relating to a project delay amounting to 153 days.	Claim value indicated at €950,703.

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