



Performance Audit: Landscaping maintenance
through a Public-Private Partnership

September 2017



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Table of Contents

List of Abbreviations	5
Executive Summary	6
Chapter 1 - Terms of reference	14
1.1. Introduction	14
1.2. PPP arrangements sought to embellish landscapes by optimizing the utilization of Government's resources through private sector management and expertise	14
1.3. The original Contract evolved through two subsequent Addenda	16
1.4. Audit focus	17
1.5. Methodology	18
1.6. Report structure	19
Chapter 2 – Service delivery	20
2.1. Introduction	20
2.2. The PPP Agreement obliged the Contractor to deliver a range of landscaping services	21
2.3. Contractual provisions are not comprehensive and impinge on assessing service delivery	23
2.4. Parties' documents do not reconcile on various aspects of service delivery	23
2.5. Over four fifths of the randomly inspected sites were well maintained but various other service delivery concerns emerged	27
2.6. In recent years landscaping maintenance improved significantly	30
2.7. During 2014 to 2016, Government did not allocate around 42 per cent of funds relating to upgrading works and new projects	31
2.8. Works on the four projects to be carried out by the Contractor as a sign of goodwill towards this Partnership are yet to commence	32
2.9. Limited Contractors' incentives for the promotion of activities within public gardens resulted in €43,223 being generated during 2016	32
2.10. MELP are not aware if the Contractor has met the contractual obligation related to the delivery of in-house training for students	33
2.11. Conclusion	34
Chapter 3 – Value for money considerations	36
3.1. Introduction	36
3.2. Competition among potential suppliers was stifled as the 2002 Contract and its subsequent Addenda were awarded through direct orders	37
3.3. Government's lack of knowledge of the Contractor's financial input is not conducive to a balanced Partnership	38
3.4. Contract rates are higher than other landscaping agreements signed by Governmental Entities	42
3.5. In cases, ELC was awarded separate contracts despite the spare capacity available through the existing PPP Agreement	46
3.6. Conclusion	47

Chapter 4 – Contract review	49
4.1. Introduction	49
4.2. The deliverables expected from the different maintenance levels established through this PPP Agreement were not clearly defined	49
4.3. The PPP Agreement did not clearly specify applicable VAT exemptions on payroll costs	50
4.4. Contractor non-compliance impinges negatively on Government’s interests	51
4.5. Conclusion	55
Chapter 5 – MELP’s monitoring function	56
5.1. Introduction	56
5.2. MELP’s administrative capacity is not adequate to ensure a broader and more effective contract monitoring function	56
5.3. MELP’s on-site inspection and subsequent reporting is hampered due to severe staffing and procedural limitations	60
5.4. Conclusion	62

List of Tables and Figures

Table 1: PPP Agreement between Government and ELC	16
Table 2: Deliverables expected from the PPP Agreement between Government and ELC	22
Table 3: Footprint of landscaped sites listed in the Second Addendum versus declarations by MELP and ELC during December 2016	26
Table 4: Overall state of maintenance and upkeep of randomly selected sites (March and April 2017)	28
Table 5: Upgrading of Existing Landscaped Areas and New Projects (2014 to 2016)	31
Table 6: Revenue generated in terms of the Garden Fund (2015 and 2016)	33
Table 7: Monthly maintenance cost per square metre for Contracts signed with other Governmental Ministries and Entities	44
Table 8: Estimated changes in the average PPP Agreement rates for each maintenance level under the three scenarios	45
Table 9: Spare capacity available through the existing Agreement as at December 2016	47
Figure 1: Maintenance related issues identified through the random sample of sites reviewed (March and April 2017)	29
Figure 2: Comparison of issues noted through the repeated monitoring of a number of landscaped sites (2015 and 2017)	30
Figure 3: Government’s and ELC’s respective contribution to this PPP Agreement	39
Figure 4: MELP’s organizational structure (December 2016)	57

List of Abbreviations

ELC	Environmental Landscapes Consortium Limited
EoI	Expression of Interest
MCAST	Malta College of Arts, Science and Technology
MELP	Malta Embellishment and Landscaping Project Monitoring Unit
MFSA	Malta Financial Services Authority
MIMCOL	Malta Investment Management Company Limited
MESDC	Ministry for the Environment, Sustainable Development and Climate Change
MTIP	Ministry for Transport, Infrastructure and Capital Projects
NAO	National Audit Office
NoI	Notification of Improvement
PPP	Public-Private Partnership
SOP	Standard Operating Procedure
URLS	Urban and Rural Landscaping Section
VAT	Value Added Tax

Executive Summary

Introduction

1. The Public-Private Partnership (PPP) between Government and the Environmental Landscapes Consortium Limited (ELC) was in many ways instrumental in bringing about a change in the environmental landscape of the Maltese Islands. Through this nearly 15 year-old Partnership, Malta's public open spaces have to varying degrees undergone major embellishment and upgrading through soft and hard landscaping as well as regular maintenance of sites. Over the span of this period, Government's expenditure relating directly to the 2002 Agreement and its two subsequent Contract Extensions amounted to over €100 Million. The Malta Embellishment and Landscaping Project (MELP) Monitoring Unit (hereafter referred to as MELP) is responsible for the implementation and monitoring of this PPP Agreement.

2. In view of the complexities involved in managing PPP relationships and the material expenditure, this performance audit's primary concern related to the extent to which Government benefitted from value for money opportunities emanating from this PPP arrangement. This audit mainly focused on 2015 and 2016. Against this backdrop, this audit's objectives sought to determine the degree to which:
 - a. service delivery was provided in accordance with the terms and conditions stipulated in the Contract;
 - b. the PPP arrangements and relative contractual agreements fulfilled value for money criteria;
 - c. contractual provisions are conducive to their effective implementation; and
 - d. the appropriate mechanisms are in place to ascertain that Governmental Entities are in a robust position to manage and monitor the implementation of this PPP Agreement.

Service delivery

3. The PPP Agreement provides for a range of services to be delivered by the Contractor. Contractual deficiencies, however, did not always clearly define deliverables. Consequently, assessments in this regard entailed evaluations against criteria based on best practices and industry standards.

4. A representative random sample comprising 76 out of a population of 1,682 landscaped sites across Malta and Gozo showed that 62 (82 per cent) were well maintained. The main problems with the remaining sites related to littering and over-grown weeds. This audit also noticed that the quality related to the maintenance of landscaped sites improved considerably over the past two years. Upgrading of existing landscaped areas and new

projects, involving costs of around €400,000 annually, were delivered, generally, in accordance with contractual obligations and MELP's approval.

5. The following issues, however, detracted from the fulfillment of all contractual provisions:
 - a. Parties' documents did not reconcile on various aspects of service delivery. There were significant variances with respect to areas serviced and sites' designated maintenance levels. In part, these variances are subject to two litigation cases between the signatories of this PPP Agreement.
 - b. The four projects to be carried out by the Contractor at no additional cost to Government have not yet commenced. The PPP Agreement stipulates that these works are to be completed by end 2017, however, there are no contractual references defining the scope of such projects. Government requested that related works were not to be undertaken at the Nigret roundabout in Rabat following the ensuing change in the status of this site. Additionally, a joint project has recently commenced at Ġnien L-Għarusa tal-Mosta. The Contractor's role in this project relates to soft landscaping works.
 - c. The PPP Agreement provides for activities organised by ELC at the 15 public gardens covered by this Contract. In 2016, these activities generated €43,223 towards the Garden Fund managed by MELP. This figure illustrates that the use of public gardens is not being promoted in accordance with existing potential. During 2016, ELC organised 56 events in seven of these public gardens. Moreover, mechanisms are not in place to enable better coordination between MELP and ELC with respect to the increased utilization of public gardens within the permissible legal limits.
 - d. MELP has not been kept abreast by ELC on the status of fulfilling the contractual clause whereby the Consortium agreed to finance an in-house training course for students following horticulture studies at Malta College of Arts, Science and Technology (MCAST) and the College of Agriculture.

Value for money considerations

6. On a macro-level, this PPP Agreement led to various social benefits. The Consortium's management exploited better the potential of 301 former Urban and Rural Landscaping Section (URLS) employees in terms of technical ability and efficiency. Similarly, the better utilization of Wied Inċita Nursery through the Consortium's investment and management lifted the status of this site to that of a commercial production-house.
7. The extensive footprint subject to landscaping services under the terms of this PPP Agreement results in significant costs per square metre. In terms of service delivery effectiveness, it is clear that this PPP Agreement brought about an environmental

enhancement to many public areas within Malta and Gozo, which in turn provides an array of social benefits. Nevertheless, the issues reported in the preceding Section of this Executive Summary detract from the full exploitation of the range of benefits intended by this PPP Agreement.

8. The non-availability at MELP of the Consortium's management accounts hindered analysis of the economy with which this PPP Agreement is being implemented. Nonetheless, a number of issues emerged which indicate that this Partnership did not always embrace economic considerations. The following refers:
 - a. The PPP Agreement was not derived through competitive tendering procedures. In view of the specific and innovative nature of this PPP arrangement, Government awarded this Contract through direct negotiations with ELC following a call for an Expression of Interest (Eoi). The Contract Extensions through two direct orders also deviate from the spirit of competition promoted by the Public Procurement Regulations, wherein it is stipulated that material contracts are to be subject to a European Union wide call for tenders.
 - b. Financial and operational information gaps, such as investments carried out by the Contractor at Wied Inċita Nursery and the non-availability of ELC's management accounts, makes it unclear on the extent to which contract negotiations led to a balanced Partnership where both Parties benefit – preferably equally - from value for money opportunities. Documentation confirming the degree to which the 120 tumoli of land at the Wied Inċita Nursery, which were to be utilized by the Contractor for the purpose of this PPP Agreement and other commercial ventures, featured during the financial aspects of Contract and Addenda negotiations, was lacking.
 - c. Benchmarking exercises showed that contractual rates for landscaping maintenance services are weighted heavily in favour of ELC. These exercises noted that the PPP Contract rates are significantly higher than other landscaping agreements signed by Government, in cases with the same Contractor. Moreover, ELC is further increasing revenue streams through exploiting the commercial potential of the Wied Inċita Nursery.
 - d. Government did not fully exploit contractual clauses relating to the Agreement's footprint capping. Notwithstanding this state of affairs, a number of Governmental Entities, including the Ministry for Transport, Infrastructure and Capital Projects (MTIP) awarded other Contracts to ELC, where the possibility existed that some of these works could be catered for through this PPP Agreement.

Contractual lacunae and non-compliance

9. A number of contractual lacunae and generic clauses within the 2002 Contract as well as the two subsequent Addenda signed in 2007 and 2012 were the main factors which influenced service delivery and the business relationship between the Parties. Within this context, the Contract has not appropriately served its purpose of ensuring the efficient and cost-effective implementation of this PPP. Two arbitration cases between the Parties that have been ongoing for the last two years, in part, support this assertion.
10. The introduction, revocation and/or updates to contractual clauses through multiple Addenda render the Agreement more cumbersome to manage and enforce. In addition, such a situation also deviates from the principles of transparency and accountability.
11. Contractual lacunae and generic definitions did not provide an appropriately robust legal framework to establish clear operating parameters for both Parties. These shortcomings were mainly evident with respect to the deliverables expected from the different maintenance levels established within this PPP Agreement.
12. Other opaque issues within the Contract relate to the applicability of Value Added Tax (VAT) exemptions on payroll related costs incurred by ELC. While the Contract recognizes that payments related to the former URLS employees are outside the scope of VAT, the Agreement does not refer to circumstances relating to the services provided by employees engaged directly by the Contractor. While the number of former URLS employees has declined by around 200 persons, the Contractor's VAT computations with respect this PPP Agreement remained the same.
13. Contractor's non-compliance remains evident on a number of issues. In some cases, deviations from contractual clauses that date back to 2002, impact negatively on Government's direct and broader interests. The following refers:
 - a. MELP are not informed whether the Contractor has fulfilled contractual obligations related to the payment of insurance premium regarding the coverage of around €2.5 million;
 - b. ELC did not satisfy contractual obligations regarding the deposit of a bank guarantee of €582,344; and
 - c. The Contractor has in most instances not sought the necessary approvals from MELP prior to affecting any variations in expected deliverables.
14. The above contractual non-compliance prevailed in the face of Government's limited enforcement action. In the prevailing circumstances, Government's position shifted from one where action could be initiated to dissolve this PPP Agreement, to one where

prolonged weak enforcement implied tacit consent. Non-compliance regarding financially related reporting obligations by the Contractor is conducive to a lack of transparency as well as a contractual breach.

MELP's monitoring function

15. Despite MELP's best efforts, a number of contract management and monitoring shortcomings prevailed at both the technical and administrative levels. Consequently, Government's position as a partner within this PPP Agreement is not appropriately safeguarded.
16. The major contributory factor relates to a weak correlation between administrative capacity and the value of the PPP Agreement in monetary, environmental and social terms. Since its inception, the Monitoring Unit has been hampered with staffing constraints. On the operational and technical level, one person cannot cope with the scope of works involved within this PPP Agreement. Similarly, administrative capacity related issues hinder better control and enforcement of contractual provisions, including those relating to financial matters. This situation is further exacerbated by the non-functioning of the Project Management Committee, which brought together the major stakeholders within this PPP Agreement. The foregoing leads to the following contract monitoring weaknesses:
 - a. MELP is not monitoring regularly operational reports when submitted by the Contractor. These reports enable MELP to monitor better contract implementation, including works.
 - b. MELP's on-site inspection and subsequent reporting is hampered due to severe staffing and procedural limitations. It is physically problematic for the sole official assigned at MELP to verify and certify landscaping maintenance as well as capital projects carried out in Malta and Gozo. In the circumstances, MELP does not perform site inspections in accordance with any systematic plan, as works verification tend to be a reactionary result to prevailing circumstances. Moreover, inspection related documentation is limited to exceptional reporting.

Overall conclusions

17. This performance audit acknowledges that over a span of almost 15 years, the PPP Agreement between Government and ELC brought about a change to the environmental landscape of the Maltese Islands. The main concerns elicited through this performance audit relate to the Public Sector's administrative capacity to negotiate, implement and monitor this Contract to ensure a balanced PPP.
18. The general principles and spirit of this PPP Agreement was to improve the efficient use of Government-owned assets as well as the output of employees on its payroll. Although,

largely, this has been attained, questions arise regarding the financial and economic considerations revolving around this Agreement.

19. This audit was not presented with detailed documentation showing that prior to engaging in this Partnership, Government conducted detailed financial workings on various aspects of this PPP Agreement. This situation has the potential to influence negotiations with suppliers since financial parameters would not have been firmly established. While in 2002, lack of experience in such ventures can be contended, this argument does not fully hold with respect to the two subsequent Addenda signed between the Parties. As a result, as shown by benchmarking exercises, the contractual rates negotiated are not favourable to Government. In this respect, matters could have been exacerbated since neither the original Agreement nor the two subsequent Contract Extensions were awarded through competitive tendering.
20. Despite the improvements in Malta's environmental landscape, aspects of service delivery pertaining to the Contract remained problematic. The foregoing is mainly due to contractual lacunae as well as monitoring and enforcement weaknesses.
21. The PPP Agreement uses broad and generic terms to define contractual deliverables. Consequently, the Agreement cannot serve as the primary source of reference in cases of litigation. Such circumstances culminated in two disputes between the Parties being referred for arbitration. These contractual deficiencies caused administrative uncertainty and were not conducive to a stronger business relationship between the Parties.
22. Government also exhibited monitoring and enforcement weaknesses throughout the duration of this PPP Agreement. MELP, Government's monitoring arm, is understaffed and cannot cope with the administrative and operational burdens associated with this material PPP. As a result monitoring is reactionary and Government's enforcement is weak. In circumstances, Government's position shifted from one where action could have been initialized to dissolve this PPP Agreement, to one where prolonged weak enforcement implied tacit consent.

Recommendations

23. In view of the foregoing, the NAO proposes the recommendations listed hereunder. The recommendations address the strategic level, contractual and operational issues.

The strategic level

- a. Ministries, departments and Governmental Entities embarking on new or contract extensions pertaining to PPPs are to present comprehensive studies for the Ministry for Finance's review and approval prior to any engagement with potential contractors. Such studies are to include financial evaluations estimating Government's inputs towards the partnerships, expected third party inputs, prevailing market rates as well

as key performance indicators that quantify major outputs and outcomes. Such project appraisals contribute towards ensuring more favourable terms for Government.

- b. Governmental organisations are to embrace the Ministry for Finance guidelines issued in 2005 when seeking PPP Agreements. These guidelines contribute towards mitigating the broad and financially material risks related to PPP Agreements.
- c. PPP Agreements should, as far as possible, embrace the principles of a competitive environment. This approach is conducive to more favourable rates and transparency. Additionally, Governmental Entities are to give due consideration to ensuring that the PPP Agreement contributes to a competitive market rather than be a factor which indirectly may encourage dominant positions within the market to emerge.
- d. Mechanisms are to be in place whereby Parties to the Agreement regularly plan, review and find solutions within the parameters of the Contract to prevailing problems. Within this context, of the PPP Agreement under review, the reactivating of the Project Management Committee to perform such functions would be a step in the right direction.
- e. Implementing and monitoring units representing Government's interests in PPP agreements, such as MELP, are to be adequately resourced. Investing in such resources strengthens agreement implementation, monitoring and enforcement possibilities, all of which contribute towards the better safeguarding of Government's position.

Contractual issues

- f. Subsequent agreements in relation to landscaping maintenance services are to define deliverables comprehensively. A case in point relates to the expected deliverables associated with the different maintenance levels of landscaping envisaged by the PPP Agreement. Clearer definitions will not only establish operational parameters but will also ascertain that the Contract is the primary source of reference in cases of disagreements between the Parties. Within this context, MELP's input is considered as critical.
- g. Numerous updates or revocations of contractual clauses through multiple addenda are to be avoided. In circumstances where significant updates to the PPP Agreement become necessary, a new contract is to be drafted to enable more clarity which in turn implies smoother implementation and monitoring.
- h. Matters concerning VAT exemptions included in the Contractor's monthly invoices are to be reviewed, in terms of both the PPP Agreement as well as VAT obligations. This will clarify the current situation concerning the amount of VAT due by the Contractor with respect to services provided.

- i. Government is to enforce contractual provisions relating to Contractor's obligations to furnish MELP with the Consortium's management accounts. The non-submission of these documents constitutes a contractual breach. Moreover, until such time that these financial documents are submitted, Government's position as a partner within this PPP Agreement remains jeopardised.

Operational issues

- j. MELP are to step up their efforts to ascertain that their list of works carried out under the terms and conditions of the PPP Agreement fully agrees with that submitted by ELC. Parties are encouraged to address immediately any variations arising in their respective monthly returns. This approach ensures Parties' transparency and avoids disagreements culminating into legal litigations.
- k. As the monitoring and certification unit, MELP is to extend its reporting and documentation of all site inspections undertaken. The detail of documentation should at least match that of MELP's current approach towards non-compliant sites, where site details are recorded and supported by photographs. More comprehensive reporting will increase monitoring transparency.
- l. MELP is to seek specialist assistance to ascertain that footprints to all sites are accurately measured. Resulting variations are to be communicated to ELC for information and perusal. The determination of footprint areas is critical to contract management and monitoring.
- m. MELP is to ascertain that all financial and operational information submitted by the Contractor is reviewed in a timely manner. To this end, the receipt of documentation is no longer viewed as an end in itself, but rather the vehicle to strengthen the monitoring function of this PPP Agreement.

Chapter 1

Terms of reference

1.1. Introduction

- 1.1.1. The Public-Private Partnership (PPP) between Government and the Environmental Landscapes Consortium Limited (ELC) was in many ways instrumental in bringing about a change in the environmental landscape of the Maltese Islands. Through this nearly 15 year old Partnership, Malta's public open spaces have to varying degrees undergone major embellishment and upgrading through soft and hard landscaping as well as regular maintenance of sites. Over the span of this period, Government expenditure relating directly to the PPP Contract and two subsequent Contract Extensions amounted to over €100 million. In view of the complexities involved in managing PPP relationships and the material expenditure, this performance audit's primary concern related to the extent to which Government benefitted from value for money opportunities emanating from this PPP arrangement. Towards this end, unless otherwise indicated, this audit will mainly focus on 2015 and 2016.
- 1.1.2. The purpose of this introductory Chapter is twofold. Firstly, it is to outline the key arrangements and instruments, which together with the key players representing the Parties' interests provide the operational and control framework of this PPP venture. Secondly, it seeks to provide the context within which this performance audit's objectives were derived. To this end, the ensuing Sections within this Chapter will outline the:
- a. principal arrangements governing this PPP;
 - b. milestones leading to the latest Contract Extension;
 - c. main provisions of the PPP Agreement that outline Parties' responsibilities; and
 - d. audit focus, methodology and report structure.

1.2. PPP arrangements sought to embellish landscapes by optimizing the utilization of Government's resources through private sector management and expertise

- 1.2.1. In line with its policy, Government opted to execute embellishment and landscaping projects through a PPP. This venture implied shifting from the traditional modus operandi of works being undertaken solely by a Government Entity, namely the former Urban and Rural Landscaping Section (URLS). Following a call for Expression of Interest (EoI) in October 2001, Government entered into a contractual relationship with the Environmental

Landscapes Consortium Ltd in October 2002. The shareholders of this Consortium namely include Peter Calamatta Garden Shop and Nursery Ltd, Dr Adrian's Garden Centre Co Ltd, Green Suppliers Ltd and Polidano Enviros Ltd.

- 1.2.2. This audit did not find sufficient evidence to show that Government carried out comprehensive financial studies to determine the cost-effectiveness of engaging in this PPP venture with respect to the original Agreement and later within the inclusion of sites in Gozo during 2010.
- 1.2.3. Nevertheless, documentation relating to funding and project approval highlighted that the principal drivers of the PPP Agreement were issues relating to the underutilization of around 300 workers who were at the time employed by the Department of Agriculture within the former Ministry of Agriculture and Fisheries. A similar mind-set and approach applied with respect to Government assets deemed to be underutilized. Such assets included Government owned plant, machinery and motor vehicles, which at the time were valued at €414,843 together with the use of Wied Inċita Nursery. This Nursery, which was estimated to comprise an area of approximately 120 tumoli that is equivalent to 134,895 square metres, poses significant commercial potential. Further to these inputs to the PPP, Government was to incur annual costs in accordance with the financial arrangements stipulated in the Contract. In 2016, Government's expenditure for landscaping maintenance as well as the carrying out of upgrading of existing landscaped areas and other new projects amounted to around €7.9 million.
- 1.2.4. The sparse information available shows that this venture sought to draw on the competencies of both the public and private sectors to improve the delivery and value for money of public services, through private sector investment, better management and resource utilization without the inherent constraints of the Public Service, while enhancing the potential of Public Service employees.¹ ELC was delegated the responsibility to manage Government's landscaping operations, utilize specified Government sites for commercial purposes (namely Wied Inċita Nursery) and undertake other gardening, landscaping and embellishment functions.
- 1.2.5. Within this context, the Contractor's input towards this Partnership mainly related to exploiting the commercial potential of Wied Inċita Nursery through investment at its own expense. However, neither the Ministry for Transport, Infrastructure and Capital Projects (MTIP – formerly known as the Ministry for Transport and Infrastructure) nor the Malta Embellishment and Landscaping Project (MELP) Monitoring Unit, the Governmental Entity entrusted to administer this Agreement since 2002, were able to provide information on the extent of investment undertaken at the Nursery by the Consortium.² Additionally, ELC was responsible for managing the Government resources, which were made at its disposal

¹ Source: PPP Unit, Management and Personnel Office, Office of the Prime Minister, 2001, Call for Expression of Interest to enter into a PPP Agreement: Landscaping and Embellishment.

² In this legislature, the Ministry for the Environment, Sustainable Development and Climate Change (MESDC) has been delegated responsibility for MELP.

to deliver the landscaping projects in accordance to the terms and conditions stipulated in the Agreement.

1.3. The original Contract evolved through two subsequent Addenda

1.3.1. Government opted to extend this Contract twice, namely in 2007 and 2012. The latter Contract Addendum expires in 2019. Table 1 portrays an outline of the timeline, signatories as well as the value of the respective Agreements.

Table 1: PPP Agreement between Government and ELC

Agreement	Contract signatory	Date of signing	Contract duration	Government allocated funding
Contract Agreement between the Government and Environmental Landscapes Consortium Ltd	Ministry of Finance	October 2002	November 2002 - October 2007 (5 years)	€42,409,437
Addendum to the Agreement entered into on 31 October 2002 between Government and Environmental Landscapes Consortium Ltd	Ministry for Rural Affairs and the Environment	August 2007	November 2007 - December 2012 (5 years 2months)	€ 37,746,000
Second Addendum to the Contract Agreement between the Government and Environmental Landscapes Consortium Ltd	Ministry of Finance, the Economy and Investment	November 2012	January 2013 - December 2019 (7 years)	€ 62,100,000

1.3.2. The original Contract between Government and ELC, signed in 2002, established the operational framework intended to ascertain that this joint venture leads to the embellishment of public areas at reasonable rates whilst ensuring that Parties' interests are appropriately safeguarded. To varying degrees, the provisions in the subsequent two Addenda evolved to correct some contractual gaps and to update the terms and conditions therein.

1.3.3. The Contractor's obligations emanating from this PPP Agreement³ cover two main functions, namely:

- a. the ongoing maintenance works on all existing landscaped areas, covering a footprint of around 597,382 square metres as at December 2016, in accordance to records maintained by MELP. This maintenance coverage constitutes an increase of 38 per cent over the footprint noted in the 2007 Addendum.⁴ To this end, the Contract defines landscaping in three categories depending on the expected level of maintenance and stipulates the respective rates.
- b. the design and implementation of upgrading of existing landscaped areas and new projects in accordance to detailed proposals submitted by the Contractor. These proposals include cost estimates and implementation plans for consideration and eventual endorsement by Government.

1.3.4. On the other hand, MELP Monitoring Unit's (hereafter referred to as MELP) responsibilities mainly relate to the following:

- a. Monitoring, measuring and verifying works undertaken as well as certifying payments to the Contractor.
- b. Reporting regularly to MTIP and the Ministry for Finance on the degree of progress achieved.

1.4. Audit focus

1.4.1. This performance audit sought to evaluate the extent to which landscaping services provided through this PPP Agreement between Government and ELC represent value for money. To this end, the audit's objectives sought to determine the degree to which:

- a. service delivery was provided in accordance with the terms and conditions stipulated in the PPP Agreement;
- b. this PPP arrangement and relative contractual agreements fulfilled value for money criteria;
- c. contractual provisions were conducive to their effective implementation; and
- d. the appropriate mechanisms are in place to ascertain that Governmental Entities are in a robust position to manage and monitor the implementation of this PPP Agreement.

³ For the purpose of this audit, the term PPP Agreement incorporated the 2002 Contract between Government and ELC, as well as the two subsequent Addenda that were signed in 2007 and 2012 respectively.

⁴ The total area covered by landscaped sites was not established in the original 2002 Agreement.

1.5. Methodology

1.5.1. The attainment of the above objectives entailed a number of methodological approaches. These included the following:

- a. **Documentation review** – This included evaluating the potential impact of a number of contractual clauses within the original PPP Agreement and the two subsequent Addenda. For this purpose, the National Audit Office (NAO) engaged the services of two legal advisors. Moreover, the documentation review also encompassed financial and administrative records maintained by Governmental Entities.
- b. **Semi-structured interviews** – These interviews enabled the collation of qualitative data, which in turn was used to corroborate information arising from other sources and approaches. To this end, NAO interviewed key officials within MELP, MTIP and ELC.
- c. **Data analysis** – This entailed reconciling data relating to works undertaken maintained by MELP on spreadsheets with similar records forwarded to this Unit by ELC for works certification and payment purposes.
- d. **On-site inspections** – Through a representative sample of sites, NAO determined the extent to which service delivery was in accordance with the provisions stipulated in the Contract. To this end, the NAO engaged the services of a consultant to assist in the inspection of randomly sampled sites.
- e. **Benchmarking** – This involved comparing the rates outlined in the Contract under review with those stipulated in other agreements pertaining to similar works entered into by Government. In some cases, ELC were also signatory to such agreements. Despite some methodological limitations, this exercise provided appropriately robust indications on value for money aspects.

1.5.2. This performance audit was mainly concerned with the situation as at 2015 and 2016. For this purpose, this study primarily considered the Second Addendum, which was in force as at this date. Nonetheless, where necessary the original Contract and the first Addendum were referenced since a number of clauses therein remain effective. Additionally, NAO assessed the delivery of services provided by ELC with respect to landscaping services in Malta and Gozo during March and April 2017.

1.6. Report structure

1.6.1. Following this introductory Chapter, the Report proceeds as follows:

- Chapter 2 evaluates the degree to which ELC delivered its services in accordance with contractual obligations and generally accepted standards. The discussion mainly revolves around the assessments elicited through the on-site inspections undertaken.
- Chapter 3 assesses value for money issues. The focus therein is on the extent to which the PPP resulted in a balanced relationship between the Parties involved. Other value for money issues under discussion relate to the extent to which rates payable by Government under the terms of the Agreement are considered favourable. Moreover, this Chapter questions whether additional landscaping contracts awarded to ELC by Government could have been incorporated within the existing Contract.
- Chapter 4 reviews the PPP Agreement between Government and ELC. Therein, the principal issues under discussion relate to the extent to which the 2002 Contract and the subsequent two Addenda represent an effective reference point for both Parties as well as the degree to which contractual provisions were complied with.
- Chapter 5 discusses MELP's management, including monitoring, of the Contract. Towards this end, the Chapter focuses on the adequacy of MELP's organizational structure as well as the processes and procedures in place to ascertain the effective implementation of the PPP Agreement.

1.6.2. The performance audit's overall conclusions and recommendations are included in the Report's Executive Summary on pages 10 to 13.

Chapter 2

Service delivery

2.1. Introduction

- 2.1.1. This Chapter has shown that around four fifths of the randomly inspected sites resulted to be in a good state of landscaping maintenance and upkeep. Litter and over-grown weeds constituted the major issues encountered with respect to the remaining sites, as maintained by Environmental Landscapes Consortium Limited (ELC) and monitored by the Malta Embellishment and Landscaping Project (MELP) Monitoring Unit. This state of affairs reinforces observations that over the past two years, there was a considerable improvement in the maintenance of landscaped sites.
- 2.1.2. Despite the evidently improved landscaped environment, a number of factors detracted this Office from fully ascertaining that service delivery by ELC complied with contractual obligations and generally accepted industry practices. These issues mainly related to contractual as well as monitoring and enforcement related deficiencies, which ultimately led to litigations between Parties. Within this context, in 2012 the National Audit Office (NAO) had already highlighted various contractual and administrative weaknesses through an audit focusing on MELP's monitoring operations of this PPP Agreement.
- 2.1.3. Against this background, this Chapter discusses the extent to which service delivery complied with the terms and conditions of this PPP Agreement. For the purpose of this review, service delivery criteria include that the Contractor delivered landscaping maintenance, upgrading of existing landscaped areas and new projects in accordance with contractual provisions and generally accepted practices. The evaluating criteria adopted included the quality of works, footprint covered by sites, adherence to established landscaping maintenance levels, timeliness and respective charges.

2.1.4. In view of the foregoing, this Chapter mainly discusses the following issues of concern:

- a. Non-comprehensive contractual provisions that impinged on assessments undertaken with respect to service delivery;
- b. Parties' documents did not reconcile on various aspects of service delivery;
- c. Around one fifth of the randomly sampled landscaped sites were not adequately maintained, despite the noticeable improvement in recent years;
- d. During 2014 to 2016, Government did not allocate around 42 per cent of funds relating to upgrading works and new projects;
- e. The four projects to be carried out by the Contractor at no additional cost to Government are yet to commence;
- f. Only €43,223 were generated in 2016 through activities organized by ELC within the public gardens managed through this PPP Agreement; and
- g. The lack of MELP's awareness in relation to the delivery of in-house training for students by the Contractor.

2.2. The PPP Agreement obliged the Contractor to deliver a range of landscaping services

2.2.1. The 2002 Contract and its two subsequent Addenda highlight the various landscaping related works and services that the Contractor was obliged to deliver. The main thrust of the landscaping works related to the upkeep and maintenance of a number of sites around Malta and Gozo. In 2016, the contracted allocation of this deliverable amounted to €8,650,000. The PPP Agreement, through its latest Addendum also refers to the undertaking of upgrading of existing landscaped areas and new projects where the Contract allocates €400,000 annually from 2014 onwards. Additionally the Agreement also outlines various other deliverables. These include the undertaking of four medium-sized projects at the Contractor's expense as a sign of co-operation and collaboration towards the PPP, the delivery of a training programme aimed at students following horticultural studies as well as the promotion and revenue generation through the utilization of public gardens maintained by the Contractor. Table 2 refers.

Table 2: Deliverables expected from the PPP Agreement between Government and ELC⁵

Service delivery	Contract 2016 allocation (€)	Actual 2016 cost (€)	Scheduled delivery	Conditions stipulated in the PPP Agreement
Landscaping maintenance works	8,650,000	7,488,026	On-going	Sites are classified into three broadly defined maintenance levels
Upgrading of existing landscaped areas and new projects	400,000	399,990	On-going	Based on detailed proposals submitted by the Contractor for consideration and eventual endorsement by Government
Four medium-sized projects	At the Contractor's expense		By the first five years of this Agreement (31 December 2017)	Although sites were identified, works and the respective maintenance level were not declared
Holding of activities within Public Gardens (Garden Fund)	Not specified since it is based on the amount of activities held in Public Gardens	Income generated €43,223 / Upgrading works in Gardens €6,925	On-going	PPP Agreement provides only a broad description of the Contractor's obligations in this regard
In-house training programme for students following horticultural studies	At the Contractor's expense		Not specified	The generic information provided only relates to the target audience, that is students following horticulture studies at MCAST and at the College of Agriculture, and does not include the frequency and type of training

2.2.2. Table 2 shows that the main deliverables, in terms of financial materiality, as can be expected relate to landscaping maintenance and upkeep. Nonetheless, Table 2 also raises a number of contractual issues whereby the PPP Agreement did not clearly define deliverables. This Report, at various junctures, discusses these contractual weaknesses

⁵ Local Councils' Agreements referred to in this PPP Agreement did not pertain to the scope of this performance audit.

in detail. Such limitations, as outlined in the ensuing Section, also proved problematic in evaluating service delivery.

2.3. Contractual provisions are not comprehensive and impinge on assessing service delivery

2.3.1. Table 2 outlined that the PPP Agreement does not comprehensively define service delivery. The absence of clear definitions of contractual deliverables, apart from their legal implications, impinged on evaluation exercises of service delivery, particularly with respect to contractual compliance.

2.3.2. A case in point, relates to the subjectivity associated with the definition of the three different maintenance levels defined in the First Addendum. Moreover, contractual provisions do not appropriately consider sites' sensitivity, such as is the case with Buskett Gardens – a designated Natura 2000 site. Similarly, issues concerning the size and geographical location of landscaped sites hindered a more detailed verification of service delivery.

2.3.3. Despite the two subsequent Addenda that followed the 2002 Contract of this PPP Agreement, many of the contractual shortcomings relating to service delivery prevailed.⁶ The extent of subjectivity, which materialized in defining service delivery and Parties' obligations, contributed to two cases of litigation being referred for arbitration.

2.3.4. Due to contractual deficiencies, the NAO was constrained to develop more detailed service delivery related criteria based on best practices. To this end, the Office engaged the services of an external Consultant, who together with MELP's technical input contributed towards the compilation of criteria upon which to evaluate service delivery by the Contractor.

2.4. Parties' documents do not reconcile on various aspects of service delivery

2.4.1. The absence of clear definitions relating to service delivery also contributed to a number of variances when reconciling MELP's and ELC's monthly reports on maintenance undertaken by the Contractor. These documents, pertaining to December 2016, did not reconcile in:

- a. 175 cases relating to the landscaped sites to be maintained by the Contractor;⁷
- b. 332 cases relating to the agreed maintenance levels respectively;⁸ and
- c. A net of 23,875 square meters of area of works covered.

⁶ Chapter 4 discusses in more detail contractual shortcomings and their impact on the implementation of this PPP Agreement.

⁷ Based on the 1,682 and 1,671 landscaped sites listed in MELP and ELC records pertaining to December 2016 respectively.

⁸ ELC's list of landscaped sites maintained in Gozo during recent years was not made available to the NAO for review. Hence, for the purpose of this assessment, MELP's and ELC's records for Gozo were assumed to coincide.

Variances resulted between MELP and ELC on the landscaped sites to be managed through this PPP Agreement

- 2.4.2. A reconciliation exercise focusing on December 2016 revealed significant variations between the landscaped sites identified for upkeep by MELP and the sites that were being maintained by the Contractor. Changes in the list of sites as outlined in the Second Addendum are inevitable as the PPP Agreement permits changes to be made in line with infrastructural developments.⁹ According to MELP's records for December 2016, there were 480 new sites added to the list included in the Second Addendum, while 169 sites no longer required landscaping maintenance.
- 2.4.3. However, a reconciliation of the statement of works prepared by ELC for December 2016 and forwarded to MELP for certification purposes, with MELP records, revealed significant variations. The Contractor's claims show that ELC carried out maintenance in 1,671 sites, which is 11 less than the works certified by MELP. Nevertheless, a more detailed analysis revealed that such variation was subject to substantial compensating differences.
- 2.4.4. In 91 cases, comprising a total area of 39,138 square metres and an estimated landscaping maintenance cost of €39,135, MELP contended that such sites should be included in this PPP Agreement but ELC is either not carrying out such maintenance or not claiming their upkeep. The lack of more detailed records, such as MELP's inspection related records, prohibited a more detailed assessment in this regard.
- 2.4.5. On the other hand, ELC claimed the maintenance of 84 sites that were not certified by MELP. The total area covered by these sites amounted to 68,925 square metres, with monthly costs for December 2016 at the maintenance levels established by the Contractor amounting to €111,198. MELP emphasized, that the Unit did not authorize the undertaking of such works in accordance with clause 8 of the First Addendum.
- 2.4.6. Furthermore, a number of inaccuracies also characterized the list of sites noted in Annex 'A' of the Second Addendum with respect to Gozo. MELP uncovered these cases through a reconciliation exercise that was carried out soon after the Second Addendum came into effect in January 2013. MELP's reasons for undertaking this exercise were twofold. Primarily the Monitoring Unit needed to keep abreast of sites included in Annex 'A' as it was not involved in either the drafting or the selection of sites to be included in this Addendum's seven-year extension. Secondly, the Unit felt the need to confirm works being undertaken by the Contractor at the newly included Gozo sites within the PPP Agreement.¹⁰

⁹ MELP was not in a position to divulge information as to the purpose that 192 sites were included in Annex A of the Second Addendum without the respective footprint and maintenance level.

¹⁰ Landscaped sites in Gozo started to be administered through this PPP Agreement in July 2010, as previously such maintenance was carried out by the Department of Agriculture within the Ministry for Gozo.

2.4.7. Through the reconciliation exercise, MELP concluded that errors related to the list of landscaped sites in Gozo resulted in an extra footprint of 13,059 square metres. These circumstances imply that until MELP sought to rectify this situation, Government forfeited the opportunity to include other sites for landscaping maintenance amounting to the area indicated herein. If the PPP Agreements' footprint threshold was exceeded, then the yearly cost of landscaping maintenance for this area, at the stipulated contractual rates, would amount to €282,285.

2.4.8. MELP's 2013 reconciliation exercise of landscaped sites in Gozo revealed that the more material variance related to variations in footprint measurements. Consequently, in view of the issues noted within this Section, the NAO sought to verify the correctness of maintenance levels and footprint measurements of landscaped sites to be maintained by the Contractor.

There is disagreement between the Parties concerning the maintenance levels assigned to 332 landscaped sites

2.4.9. In December 2016, variances in maintenance levels between MELP and ELC were noted with respect to 332 sites. Parties' records for this month showed that ELC provided a lower maintenance level in 23 cases. On the other hand, in 309 cases the Contractor provided a higher maintenance level than that established by MELP. In particular the latter changes constituted a point of contention between the Parties and the case is currently in Arbitration.

2.4.10. A major point of contention in this case was that ELC claimed additional charges with respect to the higher level of maintenance carried out in these sites. On the other hand, Government reiterated that in the first place, these changes were not authorized and secondly, they fall within the financial capping of this PPP Agreement. The divergence in maintenance levels for December 2016 is equivalent to an additional estimated monthly maintenance cost of €143,542.

In cases, variances resulted in Parties' records pertaining to the footprints of landscaped sites

2.4.11. ELC's records forwarded to MELP, relating to the maintenance works undertaken during December 2016 showed that the Contractor provided services with respect to a total of 621,257 square metres. The footprint claimed by ELC constitutes 6.1 and 4.0 per cent more than the 585,562 square metres agreed through the Second Addendum and the 597,382 square metres of works certified by MELP during the same period. Table 3 refers.

Table 3: Footprint of landscaped sites listed in the Second Addendum versus declarations by MELP and ELC during December 2016

Locality	Second Addendum (sqm)	MELP (sqm)	ELC ¹¹ (sqm)
Malta	374,892	404,667	398,023
Gardens	154,603	149,432	179,951
Gozo	56,067	43,283	43,283 ¹²
Total	585,562	597,382	621,257
<i>Percentage Variance based on the Second Addendum</i>	<i>n/a</i>	<i>2</i>	<i>6.1</i>
<i>Percentage Spare Capacity (based on a maximum of 15 per cent variation in footprint)</i>	<i>n/a</i>	<i>13</i>	<i>8.9</i>

2.4.12. Table 3 illustrates the variances emanating between the three sources relating to the areas of landscaping maintenance works. Two main factors may have contributed to the resultant variances. Firstly, variances would result in circumstances where ELC has undertaken works, which were not authorized by MELP as discussed in paragraphs 2.4.5. Secondly, erroneous footprint measurements also contributed to the resulting variance in Parties' records with respect to the footprint of landscaped areas to be maintained under this PPP Agreement.

2.4.13. However, documentation relating to a detailed survey of the sites listed in Annex 'A' to the Second Addendum, including the methodology adopted for such measurements, could not be traced by the Planning Authority and the Environment and Resources Authority. This situation materialized despite that Article 1.1.1 of the Second Addendum referred to such an exercise.

2.4.14. As observed within this Section, particularly at Table 3, in December 2016 ELC claimed to have undertaken 23,875 square metres or 4.0 per cent more works than that shown by MELP records. However, such difference remains within the permissible variation of 15 percent noted in Clause 1.3.1 of the Second Addendum, which stipulates that "*any increase in the indicated footprints above, up to a maximum variation of 15 per cent, shall be absorbed in the abovementioned consideration and the Contractor shall not raise claims for additional payments in this respect.*" While this Clause categorically denotes that no additional payments are due to the Contractor, Government remains at a disadvantage as it is forfeiting the opportunity to maximize the footprint covered by this PPP Agreement in terms of landscaping maintenance. On the other hand, this Office has noted in its Annual Report of the Auditor General (2012) that the 15 per cent threshold was, in instances, exceeded.

¹¹ ELC's footprint of landscaped sites maintained was derived through the 'Statement of changes to Annex A of the Second Addendum' as at December 2016.

¹² ELC records for Gozo were assumed equivalent to MELP's due to the lack of records presented by the Contractor to MELP.

- 2.4.15. Nonetheless, the current findings pertaining to December 2016 note that even when assuming that the footprints declared by both MELP and ELC are correct, the opportunity to utilize the remaining spare capacity emanating through this PPP Agreement is being forfeited. This situation arises since, as shown in Table 3, during December 2016, MELP has not utilized the 13 per cent spare capacity available through this PPP Agreement, while according to ELC records such spare capacity amounts to 8.9 per cent.
- 2.4.16. The inability to maximize the PPP Agreement's landscaping maintenance-related capacity has, in cases, led to additional expense to Governmental Entities. This is evidenced by additional landscaping maintenance related contracts issued by Governmental Entities, which could have been covered through the PPP Agreement. Chapter 3 provides a detailed discussion of this situation.

2.5. Over four fifths of the randomly inspected sites were well maintained but various other service delivery concerns emerged

- 2.5.1. The primary service emanating from this PPP Agreement relates to maintenance with respect to a number of landscaped sites, which as at December 2016 totalled to 1,682 as noted in MELP's records. This Chapter has already discussed issues in terms of maintenance levels and footprint measurements and how these factors affect service delivery. Another critical factor, which will be discussed within this Section, relates to the quality of landscaping maintenance.
- 2.5.2. This audit has revealed that around four-fifths (82 per cent) of the randomly inspected sites were deemed to be adequately maintained. However, other issues of concern emerged, including contractual deficiencies and the lack of effective cooperation between Parties.

Contractual clauses relating to the quality of maintenance services are too broad

- 2.5.3. Within this context, the NAO sought to develop its evaluating criteria of quality through the PPP Agreement itself. However, as shall be further discussed in the ensuing Chapters of this Report, the Contract did not always appropriately define service delivery. Such issues mainly related to the general or very broad description of the expected deliverables. Moreover, the PPP Agreement did not relate to more specific targets and Key Performance Indicators.
- 2.5.4. Consequently, this Office was constrained to develop a set of qualitative criteria in order to evaluate the services provided by ELC for the purpose of this Partnership. This entailed supplementing the sparse information available within the Contract with industry standards. The latter standards were derived through the engagement of a landscaping Consultant to assist the NAO in evaluating the quality of maintenance services delivered by the Contractor. MELP officials agreed with these evaluating criteria. The overall state of maintenance and upkeep was defined for the three different maintenance levels referred to in the PPP Agreement.

- 2.5.5. The NAO assessed sites against the developed criteria through a four-point Likert scale to define the overall state of maintenance and upkeep. This scale ranged from a 'Very Good' to a 'Very Bad' state of maintenance. The quality assessment of sites also entailed determining whether MELP should issue a Notification of Improvement (NoI) indicating unsatisfactory performance by the Contractor. The collation of evidence related to site inspections and the ensuing assessment entailed the taking of photographs and documenting inspection outcomes through a specifically compiled template.
- 2.5.6. NAO and MELP Officials as well as the Consultant carried out site inspections and an ensuing assessment on the randomly selected 76 sites. This implies that results presented in terms of these landscaped sites are to be interpreted at the 95 per cent confidence level with an 11 per cent confidence interval.

Ineffectual cooperation between Parties resulted in four very badly maintained sites

- 2.5.7. Analysis of the 76 sites revealed that 62 (82 per cent) of these sites were well maintained. To this end, more than half, that is 57 per cent (43 out of 76) were classified as having a 'Very Good' overall state of maintenance and upkeep, whilst another 25 per cent (19 out of 76) were deemed to be in a 'Good' state. Table 4 refers.

Table 4: Overall state of maintenance and upkeep of randomly selected sites (March and April 2017)

Overall state of maintenance and upkeep	Area		Randomly selected sample of landscaped sites	
	(sqm)	(%)	(no.)	(%)
Very Good	19,019	64.6	43	57
Good	4,341	14.8	19	25
Bad	4,174	14.2	10	13
Very Bad	1,893	6.4	4	5
Total	29,427	100	76	100

- 2.5.8. However, this exercise also revealed that 18 per cent of the randomly inspected sites, intended to assess the quality of the maintenance service provided by the Contractor, were not adequately maintained. As presented in Table 4, 13 per cent of these sites (10 cases) were classified as being in a 'Bad' state of maintenance and upkeep, whilst the remaining 5 per cent (four cases) were graded as 'Very Bad'. The latter four sites were in Gozo and the Southern Harbour districts. Nonetheless, the same two districts also host the highest number of best-maintained sites.
- 2.5.9. MELP contended that despite its requests, the Contractor did not entertain its demands that two of the four sites referred to in the preceding paragraph, be included in the list of sites to be maintained. Such a situation materialized even though one of these two sites was also listed in Annex 'A' of the Second Addendum. To this end, the Second Addendum

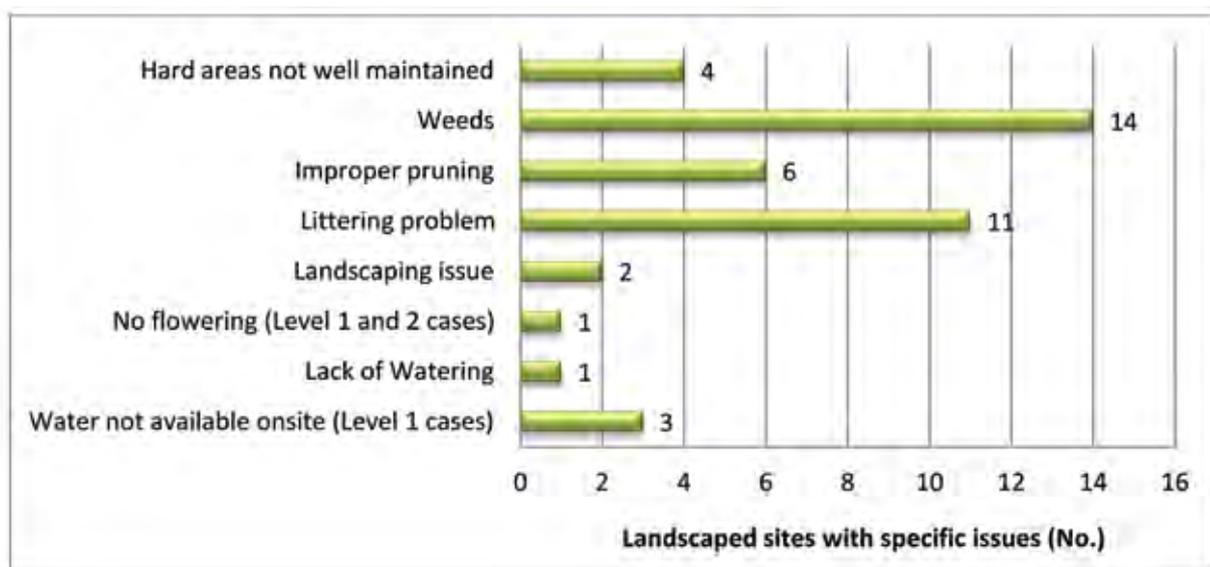
allocated the site in case to the Local Councils and the relative footprint was not declared, hence the objection by the Contractor. The actual footprint covered by this site is 1,388 square metres.

Litter and over-grown weeds constituted the main areas of concern

2.5.10. A more detailed analysis of the various elements that constitute a landscaped site and thus reflect its proper upkeep or otherwise (namely watering, flowering, landscaping, pruning, grass cutting, littering and the maintenance of hard areas immediately surrounding soft ones) revealed that over-grown weeds and litter constituted the two most common issues. It is to be noted that obligations related to litter picking and maintenance of hard areas were specifically introduced in January 2013 through Clause 1.2 of the Second Addendum.

2.5.11. Weeding related concerns surfaced in 14 cases out of the 76 randomly selected sites (18.4 per cent) whilst issues pertaining to littering featured in 11 out of the 76 sites (14.5 per cent) under review. Figure 1 refers.

Figure 1: Maintenance related issues identified through the random sample of sites reviewed (March and April 2017)



2.5.12. Improper pruning and the maintenance of hard areas immediately surrounding soft ones, were the third and fourth most common issues, with six and four out of 76 (7.9 and 5.3 per cent) respectively. Figure 1 also shows that landscaping design was an issue in two instances, whereby the species of plants chosen for the locations in question were characterized by very shallow soil that would not permit such type of plants to subsist. The remaining issues, which related to the lack of watering and flowering, did not constitute major concerns.

2.5.13. MELP and the Ministry for the Environment, Sustainable Development and Climate Change (MESDC) expressed additional concerns regarding the use of pesticides at Buskett Gardens' orchards. The issue raised relates to restrictions concerning the use of chemicals within a Natura 2000 site. MESDC has taken this matter up with the Contractor.

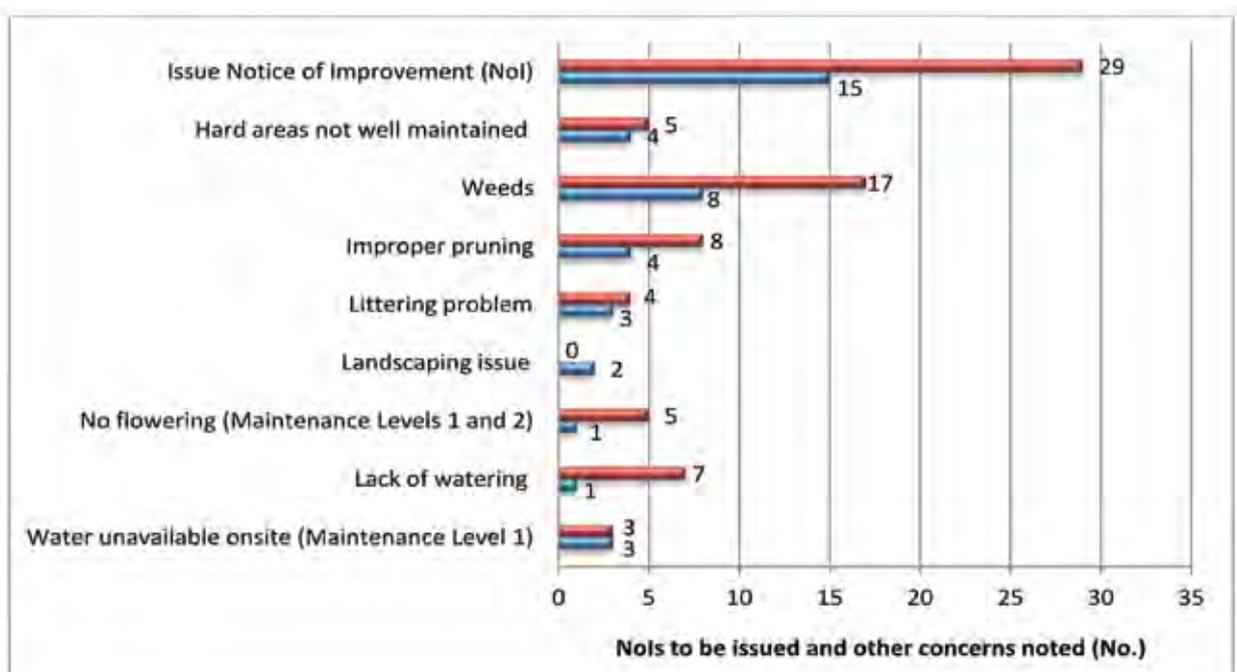
2.6. In recent years landscaping maintenance improved significantly

2.6.1. This performance audit revealed that over the duration of this PPP Agreement there was an improvement in the upkeep of landscaped sites. This was evident particularly during the last two years.

2.6.2. During the preliminary assessments of this performance audit, NAO inspected 69 of the more problematic landscaped sites including gardens in the presence of MELP officials as well as the NAO’s Consultant. The same evaluators reviewed again these sites two years later, in 2017. The major scope of this exercise was to identify any improvement or otherwise, in the quality of maintenance provided by ELC.

2.6.3. Analysis in terms of the various elements comprising landscaping maintenance confirmed the more recent improvement. Figure 2 refers.

Figure 2: Comparison of issues noted through the repeated monitoring of a number of landscaped sites (2015 and 2017)



2.6.4. The number of maintenance-related issues decreased in seven of the eight different elements that characterize landscaped sites. The most common issue of concern noticed during the 2015 inspections was the presence of over-grown weeds, which has now decreased from 17 to eight cases (53 per cent). This was followed by improper pruning, which also decreased by half from eight to four cases, which represents a 50 per cent improvement.

2.6.5. Nonetheless, this exercise revealed that around 20 per cent of the sites inspected for a second time two years later remained sub-standard. The preliminary assessment of 69 sites undertaken two years ago revealed that 29 sites did not comply with contractual

provisions and industry standards. Assessments of the same sites in 2017 showed that 15 sites were not up to the required standard.

2.6.6. In terms of footprint, the preliminary assessment two years ago showed that 70,147 square metres were not compliant, out of which 60,427 square metres (86 per cent) pertained to three gardens. The 2017 follow-up review of these sites noted that 61,998 square metres were substandard, from which 57,002 square metres (92 per cent) were related to three gardens. To this end, it is to be noted that not the entire footprint covered by these gardens was in a bad state of maintenance and upkeep.

2.7. During 2014 to 2016, Government did not allocate around 42 per cent of funds relating to upgrading works and new projects

2.7.1. In accordance with Section 2 of the Second Addendum of the PPP Agreement, Government was to make an annual provision of €400,000 to cover the costs associated with the upgrading of existing landscaped sites as well as new projects. However, this annual allocation was only fully available in 2016. Table 5 refers.

Table 5: Upgrading of Existing Landscaped Areas and New Projects (2014 to 2016)

Year	Upgrading of existing areas and new projects (No.)	Original budgetary allocation (€)	Amended budgetary allocation (€)	Total expenditure (€)
2014	1	400,000	185,000	292,004 ¹³
2015	2	400,000	100,000	
2016	11	400,000	400,000	399,990
Total	14	1,200,000	685,000	691,994

2.7.2. Table 5 shows that the allocation of €400,000 was reduced to €185,000 and €100,000 in 2014 and 2015 respectively. Moreover, no expenditure regarding upgrading works or new projects was incurred in 2014, as the works undertaken during this year, at the cost of €64,448.62, were settled in 2015. The PPP Agreement, unlike the situation relating to landscaping maintenance services, does not refer to budgetary reductions with respect to new projects and upgrading works.

2.7.3. Another issue of concern regarding upgrading works and new projects related to the financial evaluation of the quotations provided by the Contractor. MELP contends that although it is effectively managing the costs related to the supply of trees and plants used in projects, it does not have the expertise to assess other segments of these projects. These mainly relate to irrigation, water features and lighting. Consequently, the Monitoring

¹³ Expenditure relating to works undertaken in 2014, at the cost of €64,448.62 as indicated in MELP's certificate were settled during 2015.

Unit was not in a position to fully assess the estimated Bill of Quantities submitted by the Contractor for approval prior to commencement of works.

2.8. Works on the four projects to be carried out by the Contractor as a sign of goodwill towards this Partnership are yet to commence

2.8.1. Article 2.9 of the Second Addendum states that the Contractor is obliged to carry out four medium-sized projects at no cost to Government, as a sign of cooperation and collaboration towards the continued success of this Partnership. The four projects, that were to be completed by December 2017, included the Cottonera Gardens, Ġnien I-Għarusa tal-Mosta, Nigret roundabout in Rabat and San Martin limits of Għajn Tuffieħa.

2.8.2. Neither the Second Addendum of the PPP Agreement nor other agreements between the Parties stipulate the type of works to be carried out at these specific sites. To this end, MELP is not in possession of documentation defining landscaping design and the respective level of service.

2.8.3. The prolonging of undertaking and finalizing these projects raise two main issues of concern. Firstly, the social benefits associated with these projects are delayed to the detriment of the public. Secondly, the Contractor does not incur any landscaping maintenance costs until project conclusion. MELP contended that despite the numerous reminders regarding these four projects, no reply was received from ELC. When one considers the area of the sites in question, it can be concluded that the financial implications of not carrying out landscaping maintenance would be material. It is to be noted that with respect to Nigret Roundabout in Rabat, in recent years Government has entered into another specific project for this site area, which was changed into a National Centre for Water Conservation. During the course of this audit, MELP officials were not aware of how this development is going to impact on ELC's contractual obligation. Moreover, recently Government announced a joint project concerning Ġnien I-Għarusa tal-Mosta where ELC will assume soft landscaping responsibility.

2.9. Limited Contractors' incentives for the promotion of activities within public gardens resulted in €43,223 being generated during 2016

2.9.1. The Contractor's obligation with respect to the holding of activities within public gardens arises from the 2007 First Addendum. Revenue derived from such activities must be utilized specifically for the upgrading and enhancement of projects determined by MELP, which may be within the garden in case. The PPP Agreement stipulates that these additional works are to be carried out by ELC.

- 2.9.2. ELC's promotion-related efforts for the increased utilization of public gardens would benefit MELP in terms of revenue generation for funding future works. Clause 4.2.1 of the PPP Agreement, however, does not oblige the Contractor to provide details as to the minimum level – in terms of financial outlay – to be made by the Contractor. Additionally, MELP is not kept informed by the Contractor of promotion activities undertaken.
- 2.9.3. As depicted in Table 6, during 2015 and 2016, the use of public gardens generated around €93,000. This state of affairs together with the information presented in this Table raise three main concerns. Firstly, there was a decline in revenue generated of 13.4 per cent in 2016 over the previous year. Secondly, this decrease corresponds with a similar trend in the number of events hosted during the years in question. Thirdly, although there was an increase in the number of venues utilized, the issue surfaces as to whether the opportunity exists to broaden the use of more public gardens for revenue generation purposes within the legally permissible limits. In the absence of information, it cannot be conclusively ascertained the extent to which the Contractor is investing in the promotion of public gardens as event venues.

Table 6: Revenue generated in terms of the Garden Fund (2015 and 2016)

Year	Events (No.)	Gardens (No.)	Revenue generated (€)	Projects undertaken (No.)	Cost of projects (€)
2015	74	5	49,934	9	16,059
2016	56	7	43,223	12	6,925
Total	130	12	93,157	21	22,984

- 2.9.4. Table 6 also shows that 25 per cent of revenue generated through the Garden Fund in 2015 and 2016 were utilized for projects or upgrading works as specified in the Contract. Furthermore, the average cost of each project undertaken in 2016 is significantly lower than that of the previous year. The list of projects undertaken in 2016 included seven cases of 'watering by hand' at the Upper Barrakka Gardens at a total cost of €2,733. These supplementary costs were incurred as the irrigation system in place was damaging national heritage sites. MELP contended that this additional expenditure was beyond the Contractor's obligations that arise through this PPP Agreement.

2.10. MELP are not aware if the Contractor has met the contractual obligation related to the delivery of in-house training for students

- 2.10.1. The Contractor's responsibilities also extend to finance an in-house training programme for students following horticulture studies at Malta College of Arts, Science and Technology (MCAST) and at the College of Agriculture at Għammieri. Article 2.10 of the Second Addendum outlines these obligations.

2.10.2. Despite MELP's reminders, the Contractor has not informed the Monitoring Unit whether the in-housing training for students was actually delivered. Moreover, the Contract does not provide details with respect to the type, content, frequency and the number of students to benefit from such training. The lack of details with regard to the deliverables expected from this contractual obligation hindered more effective monitoring by MELP and subsequent review through this audit.

2.11. Conclusion

2.11.1. Evaluating the extent to which service delivery complied with the terms and conditions of the PPP Agreement proved to be a more complex endeavour than anticipated. Generic contractual clauses, variations in the Parties' respective lists of maintenance services as well as contract monitoring concerns detracted this performance audit from fully covering its scope. Moreover, such limitations, to varying degrees, contributed to two cases of litigation between Government and the Contractor. Despite these limitations, the discussion within this Chapter elicited strong indicators on the level and extent of services delivered by the Contractor.

2.11.2. Over time, there was a notable improvement in the quality of maintenance delivered at various sites. Nonetheless, disagreements between the Parties resulted in situations where a small number of sites remain in a dilapidated state. Moreover, neither Party can fully confirm sites' footprints due to measurement as well as site coordinate's limitations. This situation impinges on the Parties' ability to determine spare capacity within the parameters laid out by the Contract.

2.11.3. Government did not reap the full benefits in terms of sites serviced since the footprint capacity of landscaping maintenance as provided for by the Contract remained not fully utilized. Such a situation implies contract management and monitoring shortcomings, which ultimately led to Government incurring additional expenses as ELC were awarded other contracts where the possibility existed for such works to be undertaken through the PPP Agreement.

- 2.11.4. Disputes over maintenance levels, which in part led to litigation between the Parties, highlights that mechanisms intended to ascertain that service delivery complies with contractual obligations – including MELP’s direction - were not fully operative. At the outset this highlights procedural weaknesses since the Contractor has, at times, changed maintenance levels of sites without the prior formal authorization by MELP. Procedural failures became more exacerbated as the Parties did not find the means to resolve the significant variances, which inevitably resulted.
- 2.11.5. Service delivery concerns also relate to the non-completion of four medium-sized projects, which were to be undertaken at the Contractor’s expense as a sign of cooperation and collaboration towards the continued success of the PPP. The Contractor is contractually obliged to deliver these projects by end 2017; however, unless these projects are taken in hand immediately, it is unlikely that these works will be delivered in a timely manner. To this end, matters could have been resolved more expediently through timely communication and coordination between the Parties.
- 2.11.6. The next Chapter of the Report discusses the extent to which this PPP Agreement constituted value for money. The discussion therein also focuses on the extent to which, Government position as a partner within this PPP Agreement is appropriately safeguarded.

Chapter 3

Value for money considerations

3.1. Introduction

- 3.1.1. The landscaping maintenance cost per square metre, in terms of the Public-Private Partnership (PPP) Agreement with the Environmental Landscapes Consortium Limited (ELC) constituted a significant expenditure. This state of affairs mainly materialized due to the extensive footprint subject to the provision of landscaping services. Although the unavailability of recently audited financial statements and other current financial information posed significant limitations in determining the extent of value for money emanating from this Contract, this review highlighted that the rates charged do not compare favourably when market tested. Moreover, Government did not fully exploit the unutilized capacity within this Agreement, while awarding separate landscaping contracts, in many cases to the same Contractor.
- 3.1.2. This Chapter discusses value for money considerations with respect to the Agreement under review. The main criteria utilized drew on the conclusions derived with respect to the effectiveness of service delivery, as discussed in the previous Chapter of this Report. Value for money considerations also considered whether the Contract embraced economic criteria, namely, whether chargeable rates proved favourable when benchmarked against other landscaping contracts awarded by Governmental Entities. Other considerations related to the extent to which Parties' respective inputs contributed towards a balanced relationship.
- 3.1.3. Against this background, this Chapter discusses the following issues:
- a. the PPP Agreement was not derived through competitive tendering procedures;
 - b. the extent of the Parties' respective inputs does not contribute to a balanced Partnership;
 - c. Contract rates are higher than other landscaping agreements signed by Governmental Entities; and
 - d. ELC was awarded separate contracts despite the spare capacity available through the existing PPP Agreement.

3.2. Competition among potential suppliers was stifled as the 2002 Contract and its subsequent Addenda were awarded through direct orders

- 3.2.1. The Agreement between Government and ELC was among the first of the PPP arrangements in Malta. At the time, in 2002, national guidelines setting out the processes that were to be adopted with respect to PPPs were still to be devised and formalized. Consequently, a robust framework to ascertain that the optimal rates and conditions from PPP Agreements were attained was not in place. Moreover, deviations from the competitive spirit prompted by national financial regulations and generally accepted practices pertaining to the award of contracts are considered as critical factors, which hindered Government from negotiating better contractual conditions.
- 3.2.2. In view of the specific and innovative nature of this Partnership, Government contended that it was more practical to award this PPP Agreement through direct negotiations with the selected Contractor following a call for Expression of Interest (EoI), which was issued in 2001. Nine submissions were received within the stipulated deadline, four of which did not meet mandatory requirements. Further evaluation of the proposals reduced the short-listed consortia to three. Clarification sessions were held with the three consortia, following which the evaluation committee short-listed two of them for consideration by Government, namely ELC and F. Zammit Nurseries & Consultant. On the basis of a report dated 9 April 2002, an adjudication committee set up by Government made a recommendation to Cabinet to select ELC. Further negotiations to conclude the relevant contract documentation with ELC were carried out by a task force under the leadership of the Chief Executive Officer of Malta Investment Management Company Limited (MIMCOL) and in which the Ministry of Finance was represented by its Director of Policy and Planning.
- 3.2.3. Despite that the Public Procurement Regulations do not refer to EoIs, this mechanism constitutes a market scanning research. However, EoIs do not replicate the competitive environment generated by a call for tenders where potential suppliers are formally requested to bid against specific terms and conditions, and where submissions are evaluated within a legally regulated framework.
- 3.2.4. Government also forfeited the opportunity to exploit the advantages of competitive bidding when it exercised its right to extend the original Contract in 2007 and 2012. On both occasions, direct orders were resorted to. The foregoing implies that the PPP Agreement would have been in operation for 17 years without any call for tenders. This approach raises the issue that the incumbent Contractor continued to strengthen a dominant market position, which renders it more difficult for the expansion of the landscaping industry and individual players within it.
- 3.2.5. The Contract Extensions through two direct orders also deviate from the spirit of competition promoted by the Public Procurement Regulations. These Regulations stipulate that material contracts are subject to a European Union wide call for tenders.

3.3. Government's lack of knowledge of the Contractor's financial input is not conducive to a balanced Partnership

- 3.3.1. The success of a PPP primarily depends on the extent to which Parties' inputs, responsibilities, obligations and ultimate rewards are conducive to a balanced Partnership. For the purpose of this audit, a balanced Partnership within a PPP context is considered to be one where the Agreement proves sustainable to both Parties by appropriately allocating operational and financial risks, ascertaining an efficient and effective service delivery as well as ensuring participation by both sides in decision making.
- 3.3.2. This Section sought to evaluate the degree to which a balanced Partnership exists. At the outset, the discussion outlines the limitations encountered in undertaking such an assessment. The second part focuses on the Parties' respective inputs towards this PPP.

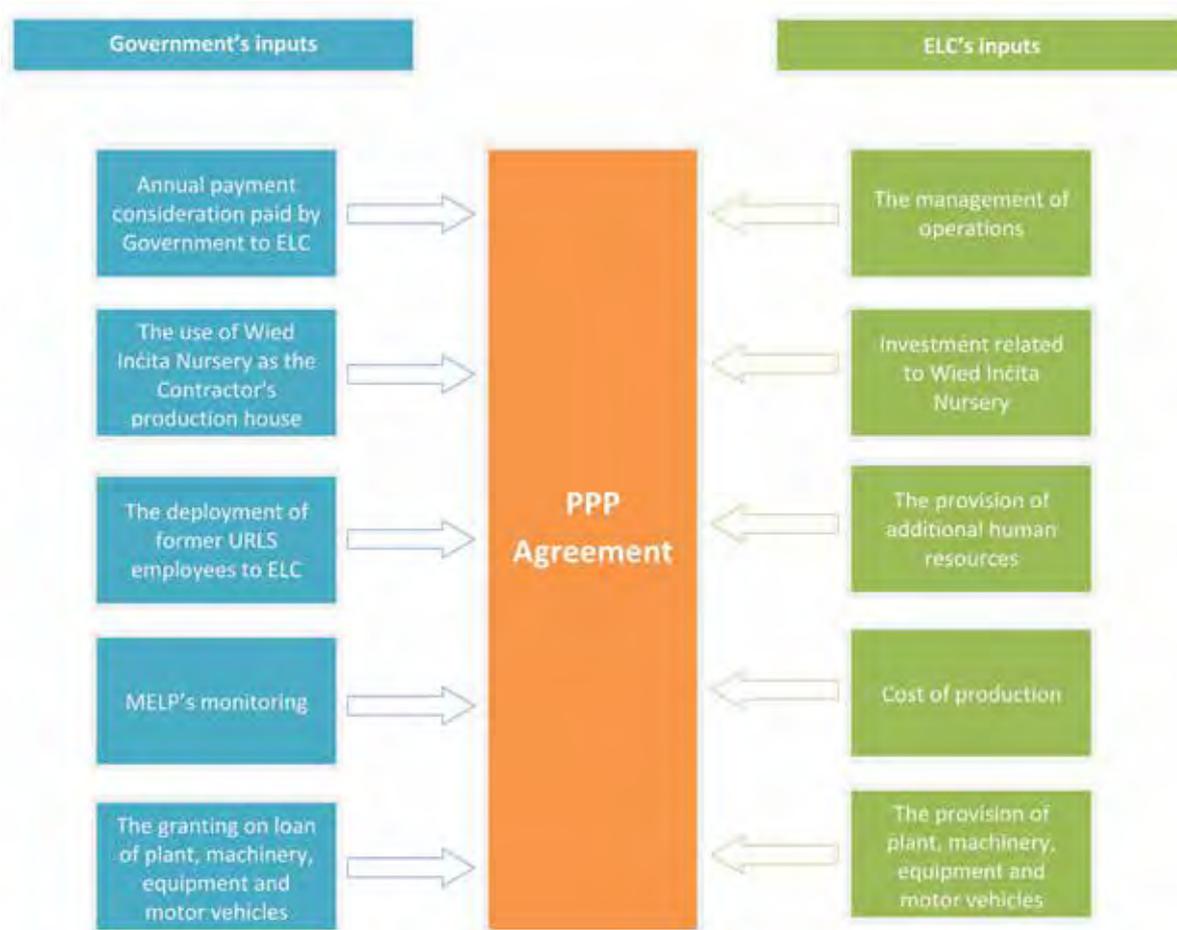
The absence of documentation detracts from a conclusive assessment as to whether the Parties' respective inputs constituted a balanced Partnership

- 3.3.3. The availability of financial and operational information, particularly related to the Contractor's operations and financial investment at Wied Inċita Nursery was limited. Consequently, at best, any attempt to assess the extent to which Parties' respective inputs contributed to a balanced Partnership could only be indicative. This primarily materialized since the last audited financial statements submitted by ELC to the Malta Financial Services Authority (MFSA) related to 2011. Moreover, ELC did not submit its quarterly management accounts to Malta Embellishment and Landscaping Project (MELP) Monitoring Unit as per contractual reporting requirements.
- 3.3.4. Despite a review of relevant files at various ministries and departments as well as subsequent enquires, NAO were not presented with documented evidence of any cost benefit analysis or other preliminary studies undertaken by Government to assess the feasibility of this Partnership. To this effect, negotiations undertaken with the Contractor prior to the commencement of this PPP do not clearly outline how the provision of a number of public assets and resources by Government has affected the chargeable rate of this Agreement. To varying degrees this situation replicated itself when sites in Gozo were included in the PPP Agreement during 2010.
- 3.3.5. Through this PPP Agreement, the two Parties contributed through a number of inputs. Government transferred a number of public assets and resources to the private Contractor. These primarily included the absorption by ELC of the 301 former Urban and Rural Landscaping Section (URLS) employees, the use of Wied Inċita Nursery and the granting on loan of various plant, machinery, equipment and motor vehicles. Without such inputs, it would have been highly unlikely that, at the time, the PPP Agreement could have been operationalized, in particular due to the prevailing difficulties of engaging such a large number of experienced employees. In addition to the transfer of human resources

and assets, Government incurs an annual expenditure for the provision of landscaping maintenance by the Contractor, which at 2016 amounted to around €7.9 million.

3.3.6. On the other hand, ELC's main inputs towards the Partnership comprises the management of operations, service delivery, investment related to the development of Wied Inċita Nursery as the Contractor's production-house, the provision of employees as well as plant and equipment to replace and/or to supplement resources transferred from Government. Figure 3 refers.

Figure 3: Government's and ELC's respective contribution to this PPP Agreement



Government has not fully exploited opportunities to share benefits derived from the commercialization of Wied Inċita Nursery

3.3.7. As outlined in Figure 3, this PPP also sought to exploit the commercial potential of Wied Inċita Nursery, and to maximize its utilization. Depending whether this site is classified as agricultural land or commercial property, the estimated market value of this 120 tumoli Nursery would range from €19 to €1,400 per square meter respectively.¹⁴ It is not clear the extent to which the rent element of Wied Inċita Nursery, has been computed in the chargeable rate stipulated by the Agreement.

¹⁴ Source: Data of actual agricultural property transfers affected between 2013 and 2015 as well as property valuation guidelines issued by the Inland Revenue Department in January 2014.

- 3.3.8. Among the objectives of this transfer, Government sought an investment as well as an upgrading of this Nursery, including its basic equipment. This investment was expected to develop Wied Inċita Nursery into a commercially run and efficient propagation centre. There is no doubt that the Nursery has undergone significant development – as is also portrayed in the Contractor’s website. Nonetheless, there are indications that Government, through this particular Agreement, has not benefitted fully in the sharing of benefits derived from the commercialization of Wied Inċita Nursery. This state of affairs results since the Contractor utilizes the Nursery to furnish plants for sites serviced through other contracts. Moreover, through this site the Contractor retails fruit, plants and logs.¹⁵
- 3.3.9. While contractually the PPP Agreement permits these commercial activities, the question arises as to whether the opportunity existed for Government to have negotiated a better deal where it could have benefitted more through the commercialization of Wied Inċita Nursery. These concerns become more amplified since, as will be discussed later in this Report, Government has not been informed of the level of investment made by the Contractor at this Nursery. Furthermore, this review noted that the Malta Embellishment and Landscaping Project (MELP) Monitoring Unit is not routinely monitoring activities carried out at Wied Inċita Nursery.

The Contractor’s inputs towards the PPP cannot be fully evaluated from a financial perspective

- 3.3.10. As outlined in Figure 3, ELC also contributed towards this PPP through a number of inputs. Financial and operational information related to such inputs, however, was limited (Paragraph 3.3.3 and 3.3.4 refers). In the absence of information at Governmental Entities, including MELP, it remains unclear as to the extent to which the Contractor’s inputs were conducive to a balanced partnership with the former. The following aims to illustrate the level to which inputs by the Contractor contributed to a balanced partnership between the Parties:
- a. **The management of operations** – It is evident that ELC’s input in this regard, over time, generally has resulted in significant improvements and environmental embellishments across Malta and Gozo. Effective operations management necessitates the synchronization of resources and logistical arrangements, which in turn is dependent on technical and administrative expertise. On the other hand, from a PPP’s point of view, ELC did not adhere to the letter and spirit of the Contract promoting partnership between the Parties. To this end, the non-adherence to contractually reporting requirements, particularly the provision of quarterly management accounts detracts from an effective partnership.
 - b. **Wied Inċita Nursery development** – ELC has not kept Government abreast of information relating to the value of development made at this site – even though this

¹⁵ It is to be noted that in this respect up to 2012, the Contractor used to pay Government €11,650 annually. This revenue used to be used for the upgrading works in public gardens. However, this practice was abandoned following the signing of the Second Addendum, which came into force in January 2013.

is a contractual requirement. Nonetheless, it would be expected for Government to be in a position to estimate the level of such an investment to enable it to negotiate better terms and conditions and to assess the extent to which each Party's input contributes to a balanced PPP. The PPP arrangement, however, does not clearly stipulate how this investment is to be treated on the expiry of the PPP Agreement or in the eventuality that the Contractor winds up its operations. Even when assuming that the value of the investment would have depreciated considerably over the contract period, the issue of ownership still remains unresolved.

- c. **Employees directly engaged by ELC to supplement the former URLS personnel** – As at end 2016, ELC documentation submitted to MELP shows that the Contractor employed 273 personnel where 86 of whom pertained to the former URLS employees. In view of the labour intensive nature of operations, the Contractor's input in this regard is significantly material. Other ELC documentation submitted to MELP shows that during December 2016, such an input amounted to 13,807 monthly man-hours. However, MELP has not sought to verify these records (Paragraph 5.2.11 refers).
- d. **Plant, machinery, equipment and motor vehicles** – From the commencement of this PPP in 2002 to date, ELC invested in machinery and equipment to improve its provision of landscaping services. However, similar to previous concerns outlined in this Chapter, Government is not informed on the value of such investment carried out by ELC. Moreover, the last audited financial statements submitted to MFSA in 2011, cannot be used to elicit the amount of capital investment made by the Contractor with respect to the management and operation of this PPP arrangement. This situation arises since financial information included in these statements does not distinguish between the amount of investment made by the Contractor and the investment inputs provided by Government, mainly with respect to Wied Inċita Nursery as well as other machinery and equipment.
- e. **Cost of Production** – The non-submission of management accounts by ELC to MELP as contractually required prohibits Government's ability to assess the Contractor's cost of production. Additionally, the absence of such information further deviates from the Partnership principles implied by PPPs.

3.3.11. This Section discussed aspects of the extent to which the Parties' main inputs towards the PPP contributed to a balanced Partnership. Government's lack of knowledge on the financial value of the Contractor's input is not conducive to a balanced Partnership. Two issues noted during this audit, to varying degrees, corroborate this statement.

3.3.12. Firstly, ELC has generated additional revenue to that generated by the Agreement under review through its separate contracts with other Governmental Ministries and Entities as well as a number of Local Councils. Government accounting records show that during 2016 there were, at least, €255,082 in payments made by Governmental Ministries and

Departments for works undertaken by ELC through these contracts. ELC also generated revenue through other contracts with Local Councils. However, since accounting data pertaining to Local Councils are not consolidated, this Office was not in a position to determine the total payments made to ELC in respect of these contracts. The following implications arise:

- a. While the PPP Agreement caters for such circumstances, the issue arises that the Contractor is deriving additional benefits by utilizing resources that, to varying degrees, form an integral part of ELC's Agreement with Government.
- b. The utilization of Wied Inċita Nursery to generate additional revenue for the Contractor is a case in point, which illustrates that Government – as a partner – is excluded from additional benefits that could be derived through the PPP Agreement.
- c. The foregoing suggests that Government is not exercising and enforcing its contractual rights to have financial and operational information at its disposal. Consequently, Government is forfeiting the opportunity to consider the above-mentioned additional benefits derived by ELC when negotiating new contract extensions.

3.3.13. Secondly, a dynamic and effective Partnership demands regular communication between the Parties. Nonetheless, contractual arrangements do not cater for Government representation within the Partnership. Consequently, Government is excluded from the strategic decision making process concerning the PPP. This scenario is further emphasized when it is considered that MELP, is totally autonomous from the running of the Contractor's Board of Management and its powers extend only to contract monitoring.

3.4. Contract rates are higher than other landscaping agreements signed by Governmental Entities

3.4.1. This Section of the Report discusses the extent to which the chargeable rates within the PPP Agreement between Government and ELC constituted value for money. Despite some methodological limitations, the variances arising from this benchmarking exercise were robustly indicative that the chargeable rates stipulated in the PPP Agreement proved to be less favourable to Government.

The benchmarking methodology adopted sought to mitigate information gaps

3.4.2. Value for money evaluations were hindered due to contentious contractual definitions pertaining to maintenance service levels as well as the non-availability of financial and operational data, which ELC was contractually obliged to submit to MELP. Consequently, value for money assessments centred around the benchmarking of contractual rates with the provision of similar services. This review primarily entailed a comparative analysis of chargeable rates incurred by Government through the PPP Agreement with similar

deliverables procured by Governmental Entities, including Local Councils, through other landscaping contracts. This exercise assumes that all services featuring in the benchmarking exercise embrace industry as well as other generally accepted practices.

- 3.4.3. Due to the limited number of service providers within the landscaping industry, data related to chargeable rates was sparse. Moreover, in cases, the National Audit Office (NAO) selected contracts¹⁶ with which the chargeable rates within the PPP Agreement were being compared to, did not always specifically refer to maintenance rates. NAO derived these rates through the information available within these contracts, which mainly identified the sites' footprints as well as their respective maintenance costs.
- 3.4.4. NAO applied the prudence concept when estimating the footprint of sites used for comparative purposes and consequently, considered the soft landscaping areas in these contracts for its estimates. This approach yielded higher rates than if hard landscaping was also considered. Furthermore, NAO assigned a maintenance level to the sampled sites for benchmarking purposes in accordance with the criteria outlined in the PPP Agreement and complemented with criteria utilized by this Office for site inspections discussed in the previous Chapter. This ascertained that as far as possible the benchmarking exercise was comparing sites of the same maintenance levels.

PPP Agreement rates remain unfavourable to Government under diverse circumstances

- 3.4.5. In accordance with the current Addendum signed with ELC, effective as from January 2013, there are three applicable rates reflecting different levels of maintenance. To this end, level one represents the highest level of performance, level two reflects a lesser intensity of landscaping design and maintenance of works whereas level three refers to the provision of basic and minimum landscaping maintenance services. The monthly chargeable rates per square metre for the three levels respectively amount to €2.68, €1.49 and €0.60. Table 7 shows that on comparison, the PPP Agreement rates exceeded the chargeable rates payable by Governmental Entities and Local Councils through other separate contracts. In many cases, such contracts also included ELC as the service provider.

¹⁶ The selection of these contracts was mainly based on agreements signed by third parties, including ELC with the Ministry for Transport, Infrastructure and Capital Projects (MTIP). Where possible, Contracts pertaining to other Ministries were also reviewed. Moreover, a random sample of 15 Landscaping Agreements relating to Local Councils was also considered. This sample, however, had to be reduced to only two cases as the relevant footprint was not available.

Table 7: Monthly maintenance cost per square metre for Contracts signed with other Governmental Ministries and Entities

Sampled contracts for benchmarking exercise					PPP Agreement
Contract description	Assigned maintenance level	Estimated area (sqm)	Maintenance cost per month (inc. VAT) (€)	Estimated monthly maintenance cost per square metre (€/sqm)	Monthly maintenance cost per square metre (€/sqm)
Mater Dei Hospital	Level 1	24,886	9,145.00	0.37	2.68
Mdina Ditch	Part Level 1 / Part Level 2	4,999	863.50	0.17	2.68 / 1.49
Dock 1 – Xatt ir-Riżq, Bormla	Level 1	2,756	1,829.00	0.66	2.68
Labour Road, Żabbar	Level 2	400	162.25	0.41	1.49
Spinola Palace Garden, St Julians	Level 1	700	1,006.69	1.44	2.68
Xemxija ex-Fekruna Restaurant Site	Level 2	1,000	949.26	0.95	1.49
Ġnien Santa Marija ta' l-Angli, Baħar iċ-Ċagħaq	Level 2	800	387.83	0.48	1.49
Couvre Porte, Birgu	Level 1	1,500	333.33	0.22	2.68
Birgu Ditch	Level 3	4,700	590.00	0.13	0.60
Victoria Bus Terminus Gozo	Level 1	1,285	1,711.00	1.33	2.68
Ċittadella Ditch	Level 1	4,290	4,278.98	1.00	2.68
Naxxar Local Council	Various	15,200	3,208.33	0.21	2.68 / 1.49 / 0.60
Paola Local Council	Various	6,842	1,300.00	0.19	2.68 / 1.49 / 0.60

3.4.6. Table 7 outlines the following:

- The rates stipulated in the PPP Agreement proved to be less favourable than all of the sampled contracts against which the former were benchmarked.
- With the exception of one case, all of the sampled contracts were executed by ELC, which is the same Contractor engaged for this PPP Agreement.
- The vast majority of tender bids submitted along with the landscaping contracts utilized for this benchmarking exercise also proved to be less expensive than the chargeable rates stipulated in the PPP Agreement.

3.4.7. The rates of the PPP Agreement, generally, also remained unfavourable to Government when compared to the sampled contracts against which the former was benchmarked in three separate scenarios, as outlined below and portrayed in Table 8:¹⁷

- a. The first scenario replicates the landscaping maintenance rates as outlined in the Second Addendum and which were applicable for the first year of this Contract Extension, that is, 2013.
- b. The second scenario considers the actual payments and maintenance footprint pertaining to 2016 under the PPP Agreement. During this period, the total footprint increased by around two per cent from 585,562 to 597,382 square metres. On the other hand, during the same year, Government invoked contractual clause 1.3.6 and reduced its contractual allocation by around 13.4 per cent from €8.65 million to €7.49 million. In practice, this implies a change from the applicable rates noted in the preceding paragraph.
- c. The third scenario assumes a hypothetical situation whereby Government fully invokes contractual clauses 1.31 and 1.3.6 of the Second Addendum. These clauses provide for a reduction in the annual financial allocation and an increase in the landscaping maintenance footprint by 15 per cent respectively. The foregoing implies that in practice the monthly cost per square metre of the PPP Agreement would decrease further.

Table 8: Estimated changes in the average PPP Agreement rates for each maintenance level under the three scenarios

	Scenario 1 Second Addendum 2012	Scenario 2 Actual 2016	Scenario 3 Adjustment of footprint and financial allocation by 15% respectively
Footprint (sqm)	585,562.00	597,382.25	673,396.30
Yearly allocation (€)	8,200,000.00	7,488,025.86	7,352,500.00
Monthly allocation (€)	683,333.33	624,002.16	612,708.33
Monthly average rate per sq mtr (€/sqm)	1.17	1.04	0.91
Percentage change in monthly average rate from Second Addendum	-	(10.49)	(22.03)
Monthly maintenance rates per sq mtr (€/sqm):			
Maintenance level 1	2.68	2.40	2.09
Maintenance level 2	1.49	1.33	1.16
Maintenance level 3	0.60	0.54	0.47

¹⁷ The calculations presented in Table 8 assume the same maintenance level distribution that prevailed as at the signing of the Second Addendum.

- 3.4.8. As presented in scenario three, the resultant average rates of the PPP Agreement would decline from €1.17 to €0.91. The decrease in the average rates arising from assuming a best-case scenario for Government and conversely a worst-case situation for the Contractor, also results in unfavourable rates for the PPP Agreement when compared to other contractual rates depicted in Table 7.
- 3.4.9. The situation discussed in the preceding paragraph also holds when taking into account methodological limitations associated with such a comparison. The estimates quoted in Table 8 are heavily weighted in favour of the lowest standard of landscaping maintenance stipulated in the PPP Agreement. On the other hand, the rates emanating from the sampled contracts are biased towards the medium and highest levels of landscaping maintenance. These opposing trends reemphasize the notion that the PPP Agreement rates are unfavourable to Government, particularly when noting that this Contract should benefit from economies of scale considerations.
- 3.4.10. The benchmarking exercise showed that the chargeable rates of the PPP Agreement with ELC were higher than other agreements, which the same Contractor had with other Governmental Ministries and Departments as well as Local Councils. In the absence of financial and operational information, it is not possible to elicit conclusive reasons for such a situation. Nonetheless, a potential justification of this scenario relates to the possibility that the PPP Agreement rates enable the Contractor to cover its fixed costs so that it needs only recover the variable costs when tendering for other works with Governmental Entities and Local Councils.

3.5. In cases, ELC was awarded separate contracts despite the spare capacity available through the existing PPP Agreement

- 3.5.1. The Second Addendum to the PPP Agreement between Government and ELC stipulates that as from January 2013, the total area applicable for the purpose of this Contract amounted to 585,562 square metres. In accordance with clause 1.3.1 of this document, Government can, at its discretion, increase the landscaping maintenance footprint by up to 15 per cent. This clause also outlines that increases exceeding this amount necessitates that Government formally informs ELC. This clause also notes that increases up to the 15 per cent limit will be absorbed in the contracted annual financial consideration and the contractor shall not raise claims for additional payments in this respect. Therefore, the PPP Agreement enables Government to increase the maintenance footprint to 673,396 square metres.
- 3.5.2. Records maintained by MELP and forwarded to ELC on a regular basis show that, as at December 2016, total footprint identified for landscaping maintenance amounted to 597,382 square metres. Therefore, as at this period, the Agreement between Government and ELC for the provision of landscaping maintenance service had an opportunity of being increased by a further 76,014 square metres. Table 9 refers.

Table 9: Spare capacity available through the existing Agreement as at December 2016

Footprint	Square metres
Footprint as per 2012 Second Addendum	585,562
Footprint as per 2012 Second Addendum + 15% increase	673,396
MELP's declared footprint as at December 2016	597,382
Spare capacity	76,014

Source: Second Addendum to the Contract Agreement between the Government and Environmental Landscapes Consortium Ltd (2012) and MELP's list of areas report for December 2016.

3.5.3. The spare capacity availability under the PPP Agreement raises concerns as to the reasons this footprint was not fully utilized by Government. In accordance with the rates quoted in the Second Addendum, by invoking the clauses relating to increasing the maintenance footprint, Government could have gained financial benefits ranging from around €46,000 to €204,000 per month based on the contractually established rates ranging from €0.60 to €2.68 per square meter per month respectively.

3.5.4. Matters become more aggravated since despite this spare capacity, various Governmental Entities and Local Councils awarded ELC specific contracts, which included landscaping maintenance services. Due to financial autonomy issues, this Office acknowledges that legal and administrative issues renders problematic the utilization of the PPP Agreement for landscaping services by Local Councils.

3.5.5. Some of the sites that were covered by separate contracts included Cuvre Porte in Birgu, Mdina Ditch and Labour Road in Żabbar. Previously, these sites pertained to the PPP Agreement. However, upon the need for upgrading works, MTIP issued a call for tenders, which included both the upgrading works and ensuing landscaping maintenance services for a specified period. ELC, were subsequently awarded these additional contracts. MELP contends that it was neither involved in the removal of these sites from the PPP Agreement nor the decision to issue a separate call for tenders for these works. Moreover, the provisions within the PPP Agreement raise the question as to whether the additional contracts outlined in Table 7 could have been amalgamated within the Partnership arrangement.

3.6. Conclusion

3.6.1. Despite methodological and financial information limitations, the issues presented in this Chapter are strongly indicative of the circumstances prohibiting Government from fully exploiting value for money opportunities through this PPP Agreement. Moreover, operational and financial information gaps do not appropriately safeguard Government's position as a partner within this PPP Agreement. A number of factors contribute to this state of affairs.

- 3.6.2. Documentation unavailability makes it unclear on the extent to which contract negotiations considered the value of Government assets and resources, which constituted Government's main inputs towards this PPP. For instance, it remains uncertain whether the Contractor's investment at Wied Inċita Nursery equates with the commercial potential of 120 tumoli of land. To a lesser extent, the same situation exists with respect to ELC's investment in other assets.
- 3.6.3. The circumstances noted in the preceding paragraph should have also influenced the contractual rates in Government's favour. However, benchmarking exercises showed that rates are weighted heavily in favour of the Contractor. Moreover, ELC is further increasing revenue streams through exploiting the commercial potential of Wied Inċita Nursery. Concerns about rates become more emphasized as two subsequent Extensions to the PPP Agreement, were not subject to competitive tendering or a call for an EoI.
- 3.6.4. A number of contractual lacunae also influenced value for money considerations and Government's position as a partner within this PPP. Although discussed in detail in Chapter 4, generic definitions relating to service delivery and broad references to Parties' obligations do not appropriately safeguard Government's interests.
- 3.6.5. Value for money considerations were negatively influenced as Government did not fully exploit contractual clauses relating to the Agreement's footprint capping. Notwithstanding this state of affairs, a number of Governmental Entities, including MTIP, awarded other contracts to ELC, where the possibility existed that such works could be catered for through the PPP Agreement.
- 3.6.6. The next Chapter expands the discussion relating to the extent to which the PPP Agreement appropriately safeguards Parties' interests. The discussion therein also outlines a number of concerns whereby contractual compliance was not evident.

Chapter 4

Contract review

4.1. Introduction

4.1.1. The discussion in this Chapter highlights a number of contractual lacunae and generic clauses within the 2002 Contract as well as the two subsequent Addenda signed in 2007 and 2012. Within this context, the Contract has not appropriately served its purpose of ensuring the efficient and cost-effective implementation of this Public-Private Partnership (PPP). Two arbitration cases between the Parties that have been ongoing for the last two years, in part, support this assertion. The introduction, revocation and/or updates to contractual clauses through multiple Addenda render the Agreement more cumbersome to manage and enforce. In addition, such a situation also deviates from the principles of transparency and accountability.

4.1.2. Contractual deficiencies, such as the lack of detailed service delivery related criteria and opaqueness regarding the applicability of Value Added Tax (VAT) exemptions, characterized this PPP Agreement. Moreover, on a number of occasions, the Contractor failed to implement contractual provisions, some of which have been outstanding since 2002. This situation does not appropriately ensure that Parties' interests are safeguarded or is conducive to avoid cases of litigation.

4.1.3. Against this background, this Chapter discusses the following major concerns:

- a. the lack of details with respect to the deliverables expected from the three different maintenance levels established through this PPP Agreement;
- b. the unclear situation with respect to VAT exemptions applicable to payroll related expenditure; and
- c. the Contractor's non-compliance with a spectrum of contractual obligations.

4.2. The deliverables expected from the different maintenance levels established through this PPP Agreement were not clearly defined

4.2.1. As highlighted in Chapter 2, the PPP Agreement between Government and Environmental Landscapes Consortium Limited (ELC) does not comprehensively define service delivery. The lack of clearly defined deliverables, such as the subjectivity associated with the

definition of the three different maintenance levels, in instances resulted in the Contractor providing a different service from that established in the 2012 Second Addendum or from the ensuing changes as determined by the Malta Embellishment and Landscaping Project (MELP) Monitoring Unit.

- 4.2.2. In addition to the lack of common criteria for all the three levels of maintenance, other concerns emanate from the highly subjective contractual clauses that define service delivery. The 2002 Contract and/or subsequent Addenda did not clearly define what constitutes 'regular' or 'occasional' flowering in terms of the frequency of planting as well as the quantity, type and size of flowers to be utilized. The unclear definition of the deliverables expected through this PPP Agreement does not fully safeguard Government's as well as ELC's interests.
- 4.2.3. Despite the two Addenda signed in 2007 and 2012, these contractual shortcomings prevailed. The extent of subjectivity with respect to the deliverables expected from this PPP Agreement contributed to two cases being referred for arbitration.

4.3. The PPP Agreement did not clearly specify applicable VAT exemptions on payroll costs

- 4.3.1. A review of the requests for payment presented by ELC during 2016 revealed that VAT is only being applied on the Contractor's payroll expenditure pertaining to 'labour management'. Former Government employees deployed to ELC from the Urban and Rural Landscaping Section (URLS) within the former Ministry of Agriculture and Fisheries, who can be considered as being 'on loan', fall beyond the scope of VAT. On the other hand, the contractual rates stipulate that all works are VAT inclusive. Concerns arise as to whether the VAT exemption pertaining to the 301 former URLS employees is to remain as the basis for VAT exemptions when the number of such personnel declined to 86 as at end December 2016.
- 4.3.2. In due course, the retired and/or terminated former URLS employees were replaced with other workers engaged directly by ELC. Consequently, it is questionable whether the VAT exemption, as being claimed by the Contractor, is correct as ELC continued to calculate VAT due on the assumption that the number of former URLS employees remained constant over time.
- 4.3.3. Neither MELP, which receives the Contractor's monthly request for payments, nor the Ministry for Transport, Infrastructure and Capital Projects (MTIP) which processes and makes the payments, have queried ELC's calculations of VAT. These Governmental Entities contended that they base monthly payments on a twelfth of the annual budgetary allocation for the purpose of this PPP Agreement. Consequently, these Entities did not attempt to seek clarifications on the matter with both the Contractor and the VAT Department.

4.4. Contractor non-compliance impinges negatively on Government's interests

4.4.1. A detailed review of the PPP Agreement between Government and ELC revealed that the Contractor has not yet honoured a number of obligations emanating from the 2002 Contract and/or the subsequent 2007 and 2012 Addenda. These contractual provisions, all of which are considered as critical to safeguard Government's interest and to enable more effective monitoring by MELP, primarily relate to the following:

- a. insurance covering all landscaping operations;
- b. bank guarantee intended to serve as a performance bond;
- c. former approvals required from MELP before carrying out any variations in the expected deliverables; and
- d. financially-related reporting obligations including the quarterly extracts from the Management Accounts and details related to any capital investment.

MELP are not informed whether ELC has fulfilled contractual obligations regarding the payment of an insurance premium related to the coverage of around €2.5 million

4.4.2. Clause 26 of the 2002 Contract established the Contractor's insurance related obligations. The insurance, intended to cover the Contractor's liability for any expense, damage, loss, claim or proceeding in respect of personnel, property and equipment, was to be obtained and maintained by ELC for the duration of this PPP Agreement. This contractual obligation, which is still in force in its entirety, was only amended along the years to increase the insurance cover with respect to the Contractor's All Risks Policy from €2,329,377 to €2,500,000 by virtue of the 2012 Second Addendum.

4.4.3. In accordance with Clause 26.7 of the 2002 Contract, ELC is bound to produce documentary evidence of the renewal of all insurance policies within one week from their respective renewal dates. In case of a breach, Clause 29.1 empowers Government with the possibility of terminating this PPP Agreement.

4.4.4. In any case, Clause 26.8 of the Agreement also provides for the possibility that the Government may take out and maintain such insurance policies and deducting all expenses incurred from any monies due to ELC under this PPP Agreement. To this end, this performance audit has not revealed any efforts by MELP or MTIP, to address this Contractor's non-compliance by invoking this specific contractual clause, which is ultimately intended to safeguard Government's interests, including that of the former URLS employees.

4.4.5. Consequently, due to the respective shortcomings by each Party, coupled with the substantial period that elapsed since the initial 2002 Agreement, it is unlikely that this PPP Agreement be considered as null solely because of this breach on the part of ELC. Furthermore, the 2002 Contract was followed by two subsequent Addenda, which implies or is indicative of the tacit consent of such a contractual breach by both Parties.

The Contractor failed to satisfy Contractual obligations regarding the deposit of a bank guarantee of €582,344

- 4.4.6. The Contractor's obligation to submit a performance bond by not later than the commencement date of this PPP Agreement, as established under Clause 28 of the 2002 Contract, was not amended or revoked in the subsequent Addenda. The performance bond of €582,344 was intended to assure the due and proper performance by the Contractor of all its obligations and liabilities in connection with this PPP Agreement. However, this audit found no evidence that, as at the time of drafting this Report, ELC had honoured this contractual obligation.
- 4.4.7. On the other hand, Government's failure to request compliance by the Contractor, coupled with the signing of two Addenda in the following years, clearly constitute a severe shortcoming. In the circumstances, MELP's and MTIP's lack of effective action in this regard may be considered as a consequent waiver on the part of the Government.
- 4.4.8. Clause 28.2 of the 2002 Agreement states inter alia that, "*The Performance Bond shall remain valid until two months from the date of termination at any time and for whatever reason of this Agreement or until the 31st December 2007, whichever is the earlier*". The 2002 Contract as amended is still valid and at this stage Government may not be in a position to insist on receiving this performance bond, given that any such bond could only have been made valid by the end of December 2007.

The Contractor has not always sought the necessary approvals from MELP prior effecting any changes in the expected deliverables

- 4.4.9. Documentation available at MELP did not substantiate the approvals to be sought by the Contractor from the Monitoring Unit before carrying out any changes in the contracted deliverables. To this end, Clause 8 of the 2007 First Addendum to the 2002 Contract states that:-

"The Contractor acknowledges that Government has set up the MELP to ensure that the terms of the Agreement are being fully complied with ... the Contractor agrees to consult with MELP on all landscaping design issues prior to any commitment whatsoever being entered into and/or prior to the execution of any works on site. The final decision on any points of disagreement as may arise in this regard shall rest with MELP".

- 4.4.10. Hence, changes in maintenance levels, which constitute amendments to the landscape design, are covered by this contractual clause and thus, prior formal approval is to be sought and attained from MELP. To this end, no documentation was made available to the NAO to substantiate decisions by the Contractor to provide higher as well as, in fewer instances, a lower level of maintenance, as indicated in Chapter 2 of this Report.

- 4.4.11. Clause 8 of the 2012 Second Addendum makes it clear that the addendum “*shall be read and construed in conjunction with*” the 2002 Contract and the 2007 First Addendum “*except insofar as relates to the provisions and terms of contract contained in*” the 2012 Addendum “*which shall supersede the provisions laid down in*” the 2002 Contract and the 2007 Addendum.
- 4.4.12. Conversely, Clause 1.3.1 of the 2007 and 2012 Addenda only deal with increases in the footprint of the landscaping area to be maintained, that is, a variation of up to a maximum of 15 per cent that is to be absorbed in the established consideration. Any changes in the distribution of maintenance levels are only mentioned in the First Addenda, which however only refers to those changes arising out of new projects. Hence, ELC may argue that any changes in the distribution of such maintenance levels do not form part of the established consideration and should be charged separately.
- 4.4.13. Nevertheless, it is to be noted that Clause 1.3.2 of the 2012 Second Addendum stipulates inter alia that, “*the annual consideration indicated in section 1.3.1 above shall be all inclusive in relation to maintenance works and the Contractor shall refrain from making additional claims regarding maintenance works*”. In addition, where the Parties intended to depart from this principle, they were obliged to do so in an express manner, as noted in the second part of Clause 1.3.1 of the Second Addendum, which provides for the exceptional possibility of an increase in the consideration and corresponding budgetary allocation.
- 4.4.14. Moreover, Clause 1.3.3 of the 2012 Addendum stipulates inter alia that, “*the annual consideration is all inclusive and there shall be no revision in rates relative to the maintenance levels required in the areas listed in Annex ‘A’ herewith attached*”. This clause deals with ‘revision in rates’ rather than ‘changes in the distribution of maintenance levels’ but it is still proof that the Contractor may only claim an increase in the agreed consideration in exceptional circumstances.
- 4.4.15. Furthermore, Article 1008 and Article 1009 of Chapter 16 of the Laws of Malta provide as follows:
- Article 1008 - “*All the clauses of a contract shall be interpreted with reference to one another, giving to each clause the meaning resulting from the whole instrument*”.
 - Article 1009 - “*In case of doubt, the agreement shall be interpreted against the obligee and in favour of the obligor*”.
- 4.4.16. Consequently, in case of doubt relating to payments, this PPP Agreement is to be interpreted against the obligee, in this case ELC, and in favour of Government as the obligor. On the basis of the aforementioned considerations, the Contractor’s claims for additional payments due to changes in maintenance levels are debatable.

The Contractor's non-compliance with financially-related reporting obligations constitutes a contractual breach and is conducive to a lack of transparency

- 4.4.17. As noted in previous Chapter, and as shall be further discussed in Chapter 5 of this Report, the Contractor has not submitted critical documentation to MELP in relation to its operations. Such vital information, required to enable MELP to carry out its monitoring function more effectively, includes the reporting requirement established in Clause 6.1(k) of the First Addendum. This obligation relates to the submission of quarterly reports showing extract from the Contractor's Management Accounts that provide detailed information relative to operating and administrative costs. This contractual breach is considered to negatively impinge on the level of transparency and accountability expected from such a PPP Agreement.
- 4.4.18. Another reporting obligation arising through this PPP Agreement relates to the capital investment undertaken by the Contractor in relation to landscaping maintenance operations. To this end, Clause 6.1(g) of the First Addendum states that ELC is to submit a report listing the capital investment undertaken by the Contractor in relation to maintenance, including investment in the nurseries, equipment, heavy plant and machinery. However, this Office was not in possession of any documentation in this regard, particularly during the period November 2007 to April 2015, the period during which substantial investment may have taken place at the Wied Inċita Nursery, as contended by the Contractor. It was only in May 2015 that monthly reports by ELC sought to provide information on the Contractor's level of investment. However, as evidenced through a review of MELP's records and subsequent interviews, no capital investment was declared since.
- 4.4.19. Any breach of the reporting requirements established in the PPP Agreement is capable of rectification and as such should be acted upon by the Government in accordance with Clause 29.1 of the 2002 Contract. Repeated failures to adhere to such requests would be tantamount to a material breach and could constitute sufficient grounds for the termination of this PPP Agreement.
- 4.4.20. Additionally, it is to be noted that the Government is also entitled to act, through MELP, in accordance with Clause 6.2 of the 2007 First Addendum, by withholding monthly payments due to the Contractor until the latter remedies the breach/s in case.

4.5. Conclusion

- 4.5.1. The focus of this Chapter related to contractual deficiencies within the PPP Agreement that incorporated two subsequent Addenda, as well as a number of elements of contractual non-compliance. Both of these factors influenced service delivery and the business relationship between the Parties.
- 4.5.2. The contractual deficiencies reported upon, generally, have their roots within the 2002 Contract. This audit acknowledges the limited experience concerning PPPs at the time of drafting the original Agreement. Nonetheless, the contractual lacunae and generic definitions did not provide an appropriately robust legal framework to establish clear operating parameters for both Parties.
- 4.5.3. Amendments to the two subsequent Addenda imply that the Parties sought to iron out contentious clauses in the original 2002 Contract, and included some provisions to cater for changing circumstances. With the benefit of hindsight, the numerous changes within the Addenda raise the question as to why a new contract was not drafted. In such circumstances, the PPP Agreement became more complex and cumbersome to implement and enforce.
- 4.5.4. The Contractor's non-compliance remains evident on a number of issues. In some cases, deviations from contractual clauses that date back to 2002 impact negatively on Government's direct and broader interests. Contractual non-compliance prevailed in the face of Government's limited enforcement action. In such circumstances, Government's position shifted from one where action could be initiated to dissolve this PPP Agreement, to one where prolonged weak enforcement implied tacit consent.
- 4.5.5. The last Chapter of this Report discusses in detail Government's monitoring function that was entrusted to MELP. To this end, the following Chapter presents an assessment of MELP's duties in relation to this PPP Agreement, namely authorizing, monitoring, measuring and verifying the maintenance and landscaping works undertaken as well as certifying payments to the Contractor.

Chapter 5

MELP's monitoring function

5.1. Introduction

5.1.1. Sound contract management is crucial to ensure that contract deliverables are carried out in a timely, efficient and effective manner as stipulated in the contract conditions agreed in the Public-Private Partnership (PPP) Agreement between Government and Environmental Landscapes Consortium Limited (ELC). In the course of its examinations, the National Audit Office (NAO) identified various shortcomings in the management of this PPP. Primarily, these resulted from the lack of an adequate organizational and administrative structure within the Malta Embellishment and Landscaping Project (MELP) Monitoring Unit, lack of clarity in responsibilities and reporting lines as well as robust mechanisms in place to ascertain effective financial control.

5.1.2. Against this background, this Chapter discusses that:

- a. MELP's administrative capacity is not adequate to ensure a broader and more effective contract monitoring function; and
- b. On-site inspection and subsequent reporting is hampered due to MELP's severe staffing and procedural limitations.

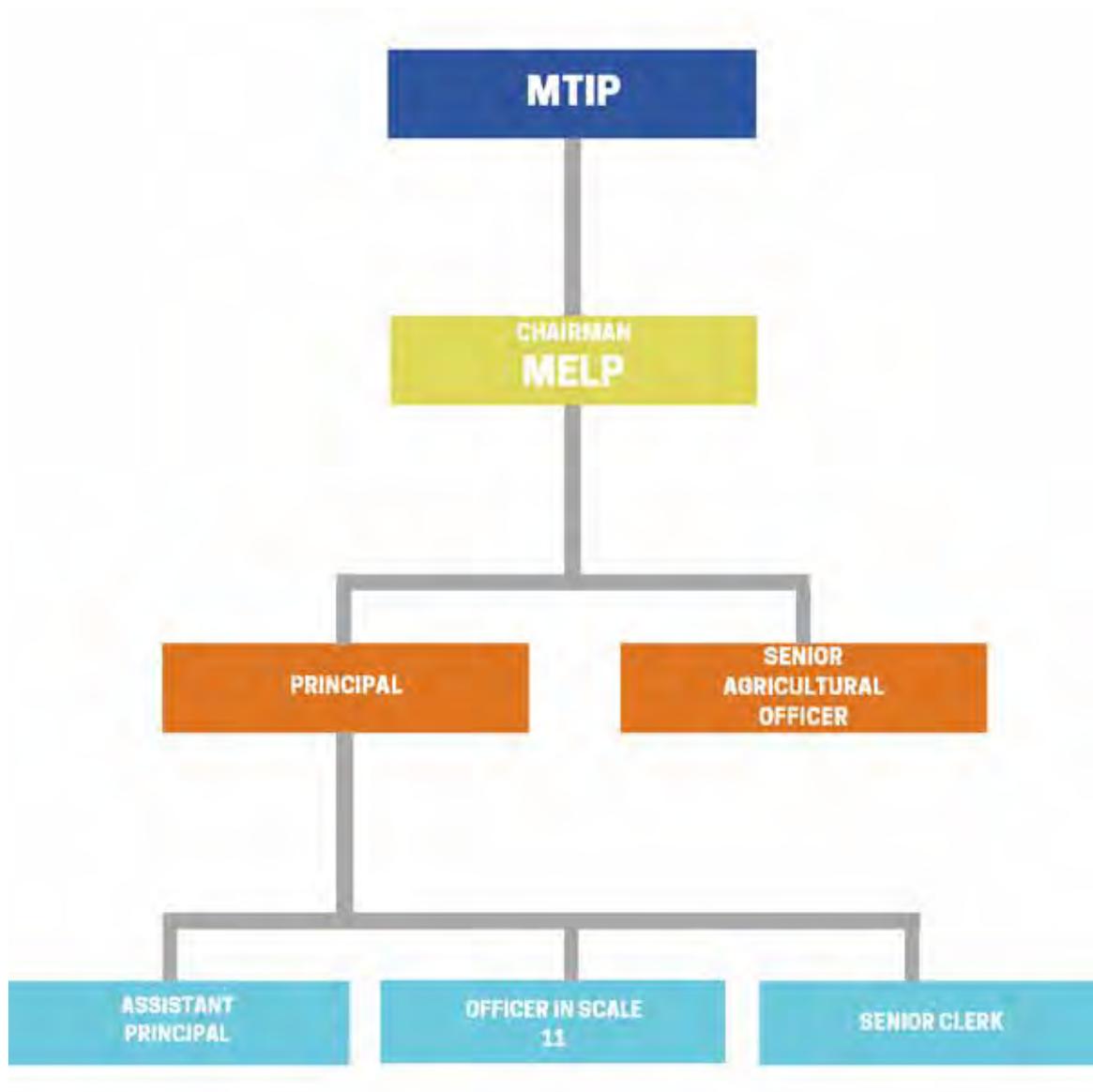
5.2. MELP's administrative capacity is not adequate to ensure a broader and more effective contract monitoring function

5.2.1. Government set up the MELP Monitoring Unit to ensure that the terms of the PPP Agreement are complied with. The Unit, which has been set up since the commencement of the PPP Agreement, is obliged to monitor the works being carried out by ELC and to report thereon to Government. To this effect the Contractor is to consult with MELP on all landscaping design issues prior to any commitment whatsoever being entered into and/or prior to the execution of any works on site. The final decision on any points of disagreement as may arise in this regard, shall rest with MELP. To enable MELP to perform the monitoring function meaningfully, the Contractor is obliged to submit, on a regular basis, updated information in the form and according to the deadlines stipulated in the Agreement.

MELP's role is severely affected by administrative capacity weaknesses

5.2.2. A Chairman, who is engaged on a part-time basis, leads the MELP Monitoring Unit. A Principal and a Senior Agricultural Officer are responsible for most of the monitoring works. Three other employees, namely an Assistant Principal, an Officer in Scale 11 and a Senior Clerk provide administrative support to the Unit. Figure 4 provides a graphical illustration of MELP's organizational structure as at December 2016.

Figure 4: MELP's organizational structure (December 2016)



- 5.2.3. MELP acknowledges that the current human resources level within the Unit, to a large extent, dictate its current set-up and work practices. Through this structure it is unlikely that the Unit would be able to extend further its monitoring activities. MELP recognizes that the human resource input has to be substantially augmented to enable its coverage to result in effective monitoring of the provision of landscaping services by the Contractor.
- 5.2.4. MELP's terms of reference obliges the Unit to perform the relative contract management functions and in particular to:
- a. liaise closely with the private contractor on planning and operational matters;
 - b. oversee works-in-progress and order the private contractor to carry out any corrective measures as may be necessary;
 - c. quantify works performed, certify same and refers bills for payment accordingly;
 - d. prepare period reports to the Project Management Committee;
 - e. collaborate closely with the MTIP on issues related to human resources, including disciplinary procedures;¹⁸ and
 - f. take such decisions as may be necessary to ensure the proper exercise of its functions.
- 5.2.5. The above terms of reference, however, are not supported by Standard Operating Procedures (SOPs). The absence of such documentation renders MELP's contract management and monitoring role more complex. Moreover, the absence of SOPs impinges on business continuity aspects, as newly appointed staff would need to solely rely on just a physical hand-over of duties.
- 5.2.6. MELP's terms of reference also imply that Government's input into the Partnership brought about by the PPP Agreement is dependent on the consorted effort of a number of Government entities, including the Ministry for Finance, Ministry for Transport, Infrastructure and Capital Projects (MTIP), the Department of Agriculture and particularly MELP. However, their respective modus operandi with respect to the PPP Agreement is not clearly defined. For instance, these entities have not signed any Memoranda of Understanding, which defines meeting and reporting obligations. Admittedly, there are broad references in the Agreement itself, such as those obliging MELP to report to Government. Nevertheless, such clauses do not specifically define the Governmental Entities to whom reporting is to be made. Moreover, these provisions do not outline the frequency of reporting or refer to the details to be included therein. In the circumstances, meetings and reporting between stakeholders tend to be on an ad hoc or exception basis. These arrangements are not conducive to more effective and structured contract implementation and monitoring.
- 5.2.7. While the Contract obliges the Contractor to routinely submit a range of financial and operational reports, it remains unclear, which Government Entity is delegated the task of ensuring compliance and enforcement. Further uncertainties arise with respect to who is

¹⁸ Formerly such duties fell under the responsibility of the Ministry for Agriculture and Fisheries.

delegated the responsibility for the scrutiny of these reports. While in the first instance such responsibilities appear to be within MELP's remit, it is unlikely that this Unit is adequately resourced to undertake such tasks.

The non-functioning of the Project Management Committee influences contract management and monitoring

5.2.8. The non-functioning of the Project Management Committee, which was set up in the commencement of this PPP Agreement, also influences MELP's management and monitoring roles. The primary objectives of this Committee were to manage the Contract and more specifically to perform the supervisory and management functions by operating concurrently with MELP. The Committee brought together Governmental stakeholders and comprised technical experts from various sectors, including the then Ministry for Agriculture and Fisheries, the Ministry of Finance, the Management Efficiency Unit and the Malta Investment Management Company Limited (MIMCOL). Records maintained by MELP relating to the last Committee meeting date back to June 2008. This performance audit was not presented with any documentation justifying the non-convening of the Committee.

MELP does not monitor regular reports submitted by the Contractor

5.2.9. In accordance with the provisions of the PPP Agreement, ELC is obliged to refer various operational and financial reports pertaining to works undertaken to MELP. These reports are intended to enable MELP to better monitor all works being carried out and to ascertain that Government's interests within this Partnership are adequately safeguarded.

5.2.10. At the outset, this performance audit revealed that MELP does not receive a number of these reports, particularly the quarterly management accounts. On the other hand, MELP regularly receives reports pertaining to the allocation of ELC employees within the various sites, stock utilization as well as the monthly programme of works undertaken.

5.2.11. Despite this valuable information, MELP contends that due to staffing limitations, the Monitoring Unit generally only registers receipt and files such documents. As MELP's review of these documents is very limited, the Unit's monitoring is not fully ascertaining that Government's interests as a partner in this PPP Agreement are being appropriately safeguarded. The following refers:

- a. By not reviewing daily staff complement and man-hours records, MELP is forfeiting the opportunity to monitor the level to which ELC is fulfilling its contractual obligation of declaring all works undertaken by the Contractor. Apart from the compliance aspect, Government would be in a stronger position to monitor and safeguard partnership related interests.

- b. Similarly, MELP is not fully safeguarding Government's interest with respect to ELC's use of Wied Inċita Nursery. Stock records submitted by the Contractor can provide insights on whether the nursery's commercial utilization of this Government property lies within the parameters of the PPP Agreement. Furthermore, MELP does not routinely perform site inspections at Wied Inċita Nursery or record the ensuing outcomes.

5.2.12. MELP's contention of staffing constraints is leading to a situation where this Unit is unable to regularly review documentation submitted by the Contractor relating to works carried out. Consequently, a situation developed where significant variances materialized between both Parties' works records. As noted earlier in this Report, the seriousness of this situation has in part led to two cases of litigation, which the Contractor referred to arbitration.

5.3. MELP's on-site inspection and subsequent reporting is hampered due to severe staffing and procedural limitations

5.3.1. A primary monitoring role undertaken by MELP relates to the verification of landscaping maintenance and capital projects undertaken by ELC. In broad terms, this is a two-pronged function, which the monitoring Unit performs in parallel. The first task relates to ascertaining that works undertaken complies with the agreed documentation. Secondly, MELP physically verifies that the works adheres to the standards required by the PPP Agreement. These two tasks form the basis for MELP's certification of completed works for payment purposes.

MELP's and ELC's maintenance records of completed works do not reconcile

5.3.2. On a monthly basis, MELP laboriously updates its records concerning landscaping maintenance works that have been undertaken by ELC. This compilation is mainly based on agreed deviations from the list of sites outlined in the Second Addendum of the PPP Agreement. These variances mainly relate to the changes in maintenance levels as well as the addition and deletion of sites. This task is to varying degrees influenced by MELP's resource shortage and the contractually stipulated limited periods within which the Contractor is to be notified of any disagreement pertaining to works undertaken. Similarly, contractually stipulated monthly payment periods also influence this aspect of MELP's monitoring function.

5.3.3. Upon review, the following issues materialized:

- a. On a monthly basis, MELP is updating its records pertaining to works undertaken by ELC. However, the Monitoring Unit is not reconciling its records with those submitted by ELC. MELP contends that staffing constraints prohibit a detailed exercise to be undertaken. As discussed in Chapter 2, there are significant variances between the two data sets.

- b. MELP contends that it is fulfilling its contractual obligations relating to informing the Contractor with variances discussed in the preceding paragraph. The Monitoring Unit maintains that it honours this contractual obligation since MELP forwards two sources of data. Firstly, a complete list of all sites, citing the respective maintenance level and footprints, is sent to ELC on a monthly basis. Secondly, MELP forwards a list of specific changes in maintenance levels and footprints from the previous month on a compact disc. However, on enquiry, this review noted that the Unit does not maintain the relative dispatch records.
- c. Despite the obvious variances between MELP and ELC records, there has not been a comprehensive exercise to reconcile the two data sets. Eventually, in part, the issues leading to variances between the Parties' records became the subject of the two arbitration cases referred to earlier.

In cases, on-site inspections are not supported by robust audit trails

5.3.4. As the monitoring unit, MELP is responsible to ascertain that the Contractor executes landscaping works in accordance with the specifications outlined in the PPP Agreement. In accordance with its terms of reference, MELP is responsible to oversee works in progress and instruct the Contractor to carry out corrective measures and to certify such works.

5.3.5. Section 2.5 refers to a representative sample showing that the vast majority of sites were well maintained. Nonetheless, MELP's monitoring of these sites is severely restricted through the following:

- a. There is only one Officer at MELP who is qualified to perform site inspections and to certify the quality of works. Despite this official's best efforts, it is not physically possible for one person to inspect around 1,700 sites on a monthly basis. Over and above this monthly certification, this Officer is also responsible to certify capital projects undertaken as part of this PPP Agreement as well as other maintenance works performed through the other third party contracts signed with MTIP.
- b. In the circumstances, MELP does not perform site inspections in accordance to any systematic plan. Generally, the Monitoring Unit targets its inspections on the basis of its accrued experience.
- c. Inspection documentation is limited to exceptional reporting. This scenario severs audit trails, as MELP does not maintain comprehensive records pertaining to all inspections undertaken. This situation namely materializes due to time limitations associated with one official being burdened with voluminous and a range of tasks. Time limitations tend to become more emphasized due to the contractual clauses which place tight duration restriction on MELP to inform the contractor of any corrections which the latter needs to undertake to ensure service delivery compliance. During

2015 and 2016, MELP issued 187 and 108 Notice of Improvements (Nols) instructing the Contractor to remedy landscaping works. Further time limitations materialize, as the Nols have to be followed-up by subsequent site inspections to ascertain contractor compliance.

5.4. Conclusion

5.4.1. This Chapter has illustrated that, despite MELP's best efforts, a number of contract management and monitoring shortcomings prevail at both the technical and administrative levels. Consequently, Government's position as a partner within this PPP Agreement is not appropriately safeguarded.

5.4.2. The major contributory factor relates to a weak correlation between administrative capacity and the value of the PPP Agreement in monetary, environmental and social terms. Since its inception, the Monitoring Unit has been hampered with staffing constraints. On the operational and technical level, one person cannot cope with the scope of works involved within this PPP Agreement. Similarly, administrative capacity related issues hinder better control and enforcement of contractual provisions, including those relating to financial matters.

5.4.3. MELP is the fulcrum within the PPP Agreement. It is unlikely that, unless appropriately resourced, this Unit will be in a position to act fully in accordance with its terms of reference. The Monitoring Unit also lacks the administrative support of other Governmental Entities. Communication between these entities is more reactive rather than dynamic. While acknowledging that contractual clauses and division of duties places MELP at the front-line of contract implementation, this should not be taken to imply that other Governmental Entities do not have their share of responsibilities.

2016-2017 (to date) Reports issued by NAO

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March 2017 Work and Activities of the National Audit Office 2016

NAO Audit Reports

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July 2016 An Investigation of Local Councils Funding Schemes launched between 2008 and 2013

September 2016 Performance Audit: Service Agreements between Government and Richmond Foundation Malta

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December 2016 Annual Audit Report of the Auditor General - Local Government 2015

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