



Performance Audit: Procuring the State Schools' Transport Service

June 2017



Performance Audit

Procuring the State Schools'
Transport Service

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Executive Summary

Suppliers' generally overbearing conduct and the Ministry's overall weak approach to this procurement process led to the significant forfeiture of value for money in the acquisition of State School Transportation Services.

Why This Study?

The contracts governing the State school transportation services currently carry a price tag of approximately €6.1 million per year, therefore resulting in an aggregate of €42.7 million over their seven-year effective period. Given this substantial financial materiality, the social importance of this service and the fact that the agreements currently in effect expire collectively in June 2018, NAO sought to determine the challenges faced by Government at the time and recommend mitigating solutions. This audit therefore becomes especially relevant for Government to achieve the best possible value for money in re-securing this service in the upcoming 2018 procurement process

What NAO Recommends

While NAO positively notes that work on the upcoming 2018 procurement process was already initiated by the Ministry as at the time of writing of this report, it nonetheless urges the Ministry to keep in view the considerations highlighted in this report and consequently adopt a much stronger approach in the upcoming procurement process. NAO encourages MEDE to endeavour in securing agreements which are heavily oriented towards safeguarding students' interests, while also ensuring that the best possible value for money is attained.

NAO's Key Observations

The process through which the contracts currently in vigore were awarded, can be categorised in what this Office is referring to as three distinct phases, that is: Phase 1 being the negotiations leading to a one year extension of the previous contract through a direct order; Phase 2 revolving around a failed attempt at procuring this service through a competitive tendering process; and Phase 3 dealing with the negotiated procedure which ultimately led to the signing of the contracts currently in effect with the five involved service providers.

During its review, NAO noted a number of factors and occurrences which negatively impacted on the overall attainment of value throughout the three aforementioned phases. Of the more prominent of these, NAO noted that, since the Ministry's original intention was not to issue a competitive tender but rather to adopt a faster and more direct procurement approach, the process of re-securing school transportation services (after the expiration of the original agreement) was initiated only around one month before the commencement of a new scholastic year. This consideration put the Ministry in a disadvantageous position from the start, which situation was further compounded by the suppliers' generally adopted overbearing conduct and the Ministry's overall weak and accommodating approach. More specifically, NAO observed the suppliers' adopted hard line tactics, particularly through their threats of withdrawing from negotiations if their requests are not met (thereby leaving students with no means to commute to and from schools) and through what this Office considers as collusive behaviour. In addition, NAO also noted that this conduct was met by an underlying sense of resignation from the Ministry, which at the time thought it could do little to effectively stand up to this situation.

The effect of the above considerations culminated during the Phase 3 negotiated process (which ultimately led to the actual signed contracts) when the Ministry was forced to compromise on the conditions quoted in the failed Phase 2 tender document in an attempt to push down the suppliers' asking price. It is this Office's considered opinion that this process resulted in the disproportionate reduction in the quality of service when compared to the attained marginal four per cent decrease in price.

List of Abbreviations

COLA	Cost Of Living Adjustment
COOP	COOP Services Ltd
DG	Director General
DSR	Director School Resources
DoC	Department of Contracts
ELSU	Education Logistics and Support Unit
HoS	Head of Secretariat
MEDE	Ministry for Education and Employment
MEEF	Ministry for Education, Employment and the Family
NAO	National Audit Office
PTA	Public Transport Association
RPI	Retail Price Index
TDP	Transport for Disabled Persons Ltd
UBS	Unscheduled Bus Service Consortium
UTS	Unscheduled Transport Service Consortium
VAT	Value Added Tax

Chapter 1

Introduction

This introductory Chapter starts off with NAO’s reasoning for embarking on this audit and by presenting a contextual backdrop of the subject under review. The audit’s scope, objectives and methodology utilised to complete the required analysis are also laid out, together with a synopsis for each Chapter in this report.

1.1. Why This Study?

1.1.1. This audit exercise follows NAO’s publication entitled “*Performance Audit: Managing and Monitoring the State Schools’ Transport Service*” which was published in November 2016. In this 2016 report, NAO assessed whether the current provision of school transportation service is meeting end user expectations and if the Education Logistics and Support Unit (ELSU) within the Ministry for Education and Employment (MEDE) is fulfilling its mandate of monitoring and managing the service in question in an efficient, effective and economical manner. During the 2016 audit exercise however, it became apparent to NAO that the process through which the school transportation service was procured was a complex one and that this issue merited a fully fledged audit of its own so that it is comprehensively analysed by this Office. To this end, this procurement process was scoped out of the 2016 publication and was consequently addressed through this 2017 audit. This second audit exercise examines whether the procurement process adopted in the acquisition of the current school transportation service presented good value for money to Government and the taxpayer, while following the principles of good governance throughout.

1.2. Background Information

1.2.1. The provision of school transportation service currently runs at an average cost of approximately €6.1 million per annum which, through its seven years effective period, will result in an aggregate price tag of approximately €42.7 million. This service is supplied by five individual service providers, consisting of the Unscheduled Transport Service Consortium (UTS) and COOP Services Ltd (COOP) as the two main suppliers entrusted with 96 per cent¹ of the total routes, as well as Transport for Disabled Persons Ltd (TDP), Peppin Transport Ltd and Paramount Garage servicing the remaining routes. These agreements were signed on the 20th of December 2011 (with the effective contract date set as at the 26th September 2011) between the aforementioned suppliers and the then Ministry for

¹ This figure is based on the number of routes originally established in the contract in vigore at the time of writing of this report.

Education, Employment and the Family (MEEF). These agreements collectively expire at the end of the scholastic year 2017/2018 and cover the geographical island of Malta while excluding Gozo.

1.2.2. The process through which the contracts currently 'in vigore' were awarded, was spearheaded by an external negotiator engaged by the Ministry at the time, and can be categorised in what this Office is referring to as three distinct phases. While each of these is graphically explained in detail in Chapter 2, NAO here highlights that:

- Phase 1 revolves around the negotiations with already engaged suppliers at the time (that is UBS², COOP and PTA), leading to a direct order intended to extend the contract which was due to expire in June 2010 (hereinafter referred to as the original contract) by one year (referred to throughout this report as the Gap Year);
- Phase 2 consists of the Ministry's attempt to procure the school transportation service through a competitive tender for years subsequent to the expiration of the Gap Year extension, which tender was eventually cancelled as all suppliers (which are the same five as those listed in section 1.2.1 above) were disqualified;
- Phase 3 deals with the negotiated procedure adopted after the cancellation of the Phase 2 tender attempt. These negotiations included Government on one side and the Phase 2 tender's five unsuccessful bidders on the other, and ultimately led to the signing of the contracts currently 'in vigore'.

1.3. Scope and Objectives

1.3.1. This audit exercise was approached with two main objectives in mind. The first of these was for the audit team to determine whether the manner through which the school transportation service was procured, yielded all due value for the money invested by Government, and consequently, the taxpayer. Secondly, this audit assessed whether all the adopted processes throughout this procurement exercise were carried out in a manner which was conformant with the principles of transparency and good governance. These two objectives were also intended to provide a basis on which this Office could recommend mitigating solutions to any identified challenges especially in view of the upcoming procurement process to re-secure the service in question once the current contracts expire in 2018.

1.3.2. This report is primarily focused on the three phases mentioned in 1.2.2 which together led to the award of the contracts 'in vigore' at the time of writing of this publication. More specifically, this audit is scoped to cover the related events which unfolded between August

² It is here important to note that from meetings held with key stakeholders, NAO was informed that UBS (active only during Phase 1) eventually merged with other suppliers to form UTS (which was active during Phases 2 and 3). To this end, while a distinction between these two consortia is to be made, it should still be highlighted that UBS's gained knowledge and adopted approach in the Phase 1 process was, naturally transferred to UTS for the subsequent two phases.

2010 and December 2011. Notwithstanding this however, a brief overview is also presented on the progress made so far by MEDE in re-securing the school transportation services in view of the upcoming expiration of the current contracts.

- 1.3.3. NAO's presented analysis is based on information received from the designated auditees by the cut-off date of 9th June 2017.

1.4. Methodology

- 1.4.1 The information at NAO's disposal for the compilation of this audit exercise originated from two primary sources. The first of these was documented information which, among others, included voluminous printed correspondence emanating from the then Director General (DG) - Educational Services electronic mailbox, as well as official files from the Ministry and the Department of Contracts (DoC). NAO here notes, however, that these official files forwarded both by DoC and the Ministry, only related to the Phase 2 failed tendering process. On the other hand, the aforementioned forwarded printed correspondence (which was not officially recorded in the Ministry's registry) was the only documentation in NAO's possession which gave an overall view of all the three phases. These latter files were retained in the DG's office, even after her being deployed elsewhere.

- 1.4.2 The second main source of information for NAO to compile this exercise, came in the form of a series of semi-structured interviews carried out with key stakeholders from the then Government's side, who were directly involved in the procurement process in question. More specifically, meetings were held with the then: Minister's Head of Secretariat (HoS); Minister's externally engaged negotiator; Permanent Secretary MEEF; DG Educational Services MEEF; and Director School Resources (DSR) MEEF. In addition, semi-structured meetings were also held with the Permanent Secretary MEDE, DG Educational Services MEDE, Head Education Logistics & Support MEDE, DG Operations MEDE and Director Finance and Administration MEDE who were incumbent as at the time of writing of this report. It is also important to note that all meetings held by NAO for this audit exercise were audio recorded for audit trail purposes.

1.5. Limitations of the Study

- 1.5.1 Throughout the progression of this study, the audit team encountered a number of challenges which somewhat hindered the smooth running of the audit process. Nonetheless, as far as possible, the team endeavoured to mitigate the effects of these complications on the final report.
- 1.5.2 As stated earlier, the events analysed in this Chapter occurred between June 2010 and December 2011. The considerable amount of time between this period and the time of writing of this report, presented a number of challenges for the audit team. Amongst these,

most individuals who are considered as key during the procurement process under review, have since moved to other places of employment, with some relocating abroad and others retiring altogether. This situation also presented challenges, particularly when it came to the audit team setting meetings with such individuals. Further compounding this challenge was the fact that most of the interviewed stakeholders repeatedly stated that the details on this procurement process were now not all too clear (as considerable time had passed) and that they no longer had relevant documented information in their possession.

1.5.3 Documented information provided to NAO spanning over the three phases of this procurement process, was practically limited to voluminous inter-Ministry correspondence, together with MEEF's and DoC's official files on the Phase 2 process. It is here important to note that, while voluminous, this Office cannot conclude that the above mentioned compilation of correspondence (which was received by this Office only in printed format) included all communication exchanged during this process. In addition, NAO here notes that any other supporting documentation, such as potential market studies, correspondence with service providers and minutes of meetings, were not made available to this Office by either the involved stakeholders (who may have not been occupying a public role at the time of writing) nor the current incumbent MEDE Officials. This situation meant that, at times, NAO was forced to base some of its observations, particularly those revolving around suppliers' conduct, on secondary (albeit reliable information gathered from the abovementioned inter-Ministry correspondence) rather than on primary information (that is, from communication involving service providers directly).

1.5.4 During meetings held with key stakeholders, NAO noticed numerous instances in which conflicting or unclear information was received. This meant that the audit had to invest time and effort to clarify such inconsistencies before progress on this audit could resume.

1.6. Report Structure

1.6.1 Chapter 1 - This introductory Chapter starts off with NAO's reasoning for embarking on this audit and by presenting a contextual backdrop of the subject under review. The audit's scope, objectives and methodology utilised to complete the required analysis are also laid out, together with a synopsis for each Chapter in this report.

1.6.2 Chapter 2 - This Chapter lays out a chronology of events which encompasses the main occurrences shaping the procurement process under review. While it must be noted that a much more detailed chronology is presented in Appendix A, this Chapter provides the reader with a summarised chronology through a brief textual version and then proceeds to present a more detailed timeline in graphical format. It must here be highlighted that this Chapter is purely intended to lay out the manner by which the events in question unfolded and not to present this Office's related observations.

1.6.3 **Chapter 3** - This Chapter presents NAO's main observations on the procurement process under review. Given the multifaceted nature of some of these observations, sub-sections were also used so that this Office's analysis on each facet is comprehensively presented. It is important to note that NAO's observations in this Chapter, are issue-based rather than documented on their position in the overall chronology of events. In view of this, it is hereby noted that certain incidents throughout the procurement process under review were referred to multiple times throughout this Chapter as they would have raised various concerns, thereby contributing to more than one of NAO's observations.

Chapter 2

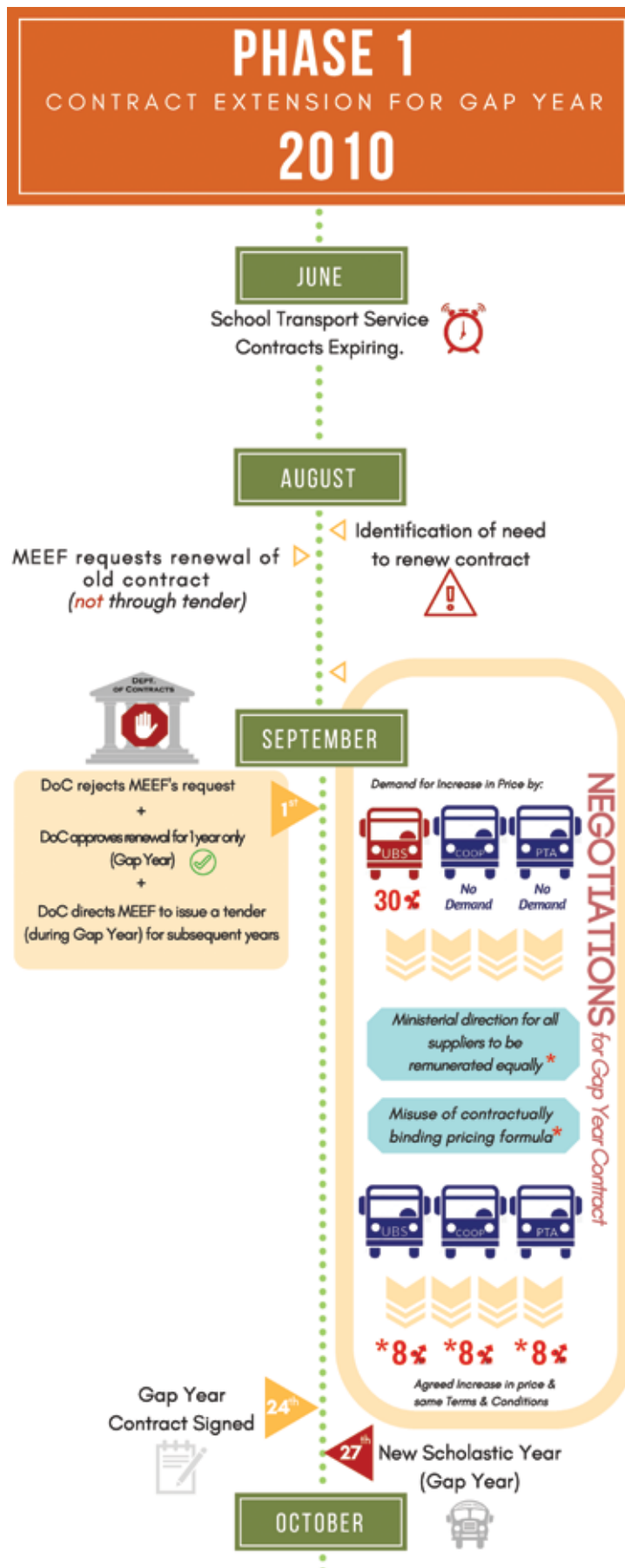
Chronology of Events

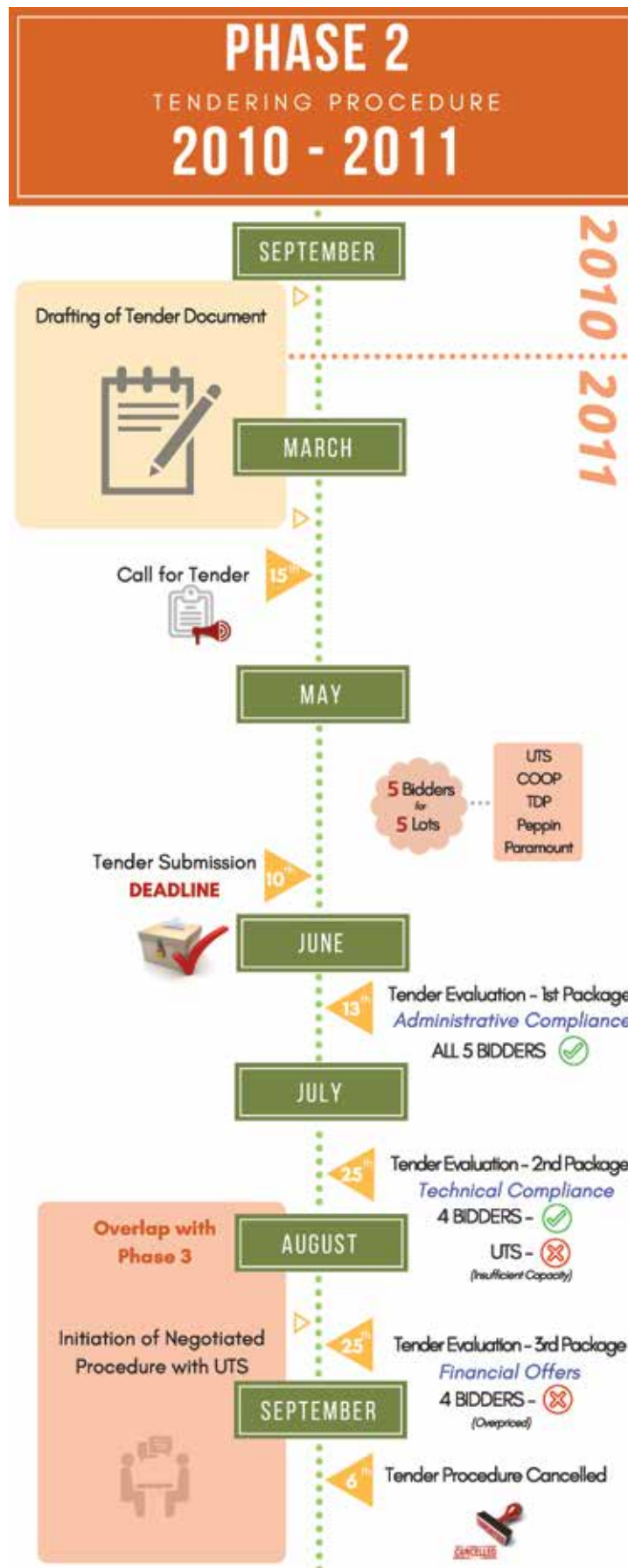
This Chapter lays out a chronology of events which encompasses the main occurrences shaping the procurement process under review. While it must be noted that a much more detailed chronology is presented in Appendix A, this Chapter provides the reader with a summarised chronology through a brief textual version and then proceeds to present a more detailed timeline in graphical format. It must here be highlighted that this Chapter is purely intended to lay out the manner by which the events in question unfolded and not to present this Office's related observations.

2.1. Chronology: A Brief Textual Version

- 2.1.1. The procurement process under review starts with the then MEEF's request in August 2010, to extend the original school transportation contract for subsequent scholastic years. This request was not accepted by the DoC, with the latter directing the Ministry to extend the contract by only one year (referred throughout this report as the Gap Year) during which MEEF was to enter into a competitive tendering process to re-secure this service for subsequent years. As directed by DoC, MEEF engaged in negotiations with the then three suppliers (that is UBS, COOP and the Public Transport Association (PTA)) to extend the original contract by a single year and, through these negotiations (Phase 1), the school transportation service was re-secured with the same conditions as that of the original agreement but at an overall eight per cent increase in price.
- 2.1.2. Following this, the Ministry proceeded to issue a call for tender (Phase 2) as also directed by DoC, which it categorised into five lots. This competitive procedure attracted five bidders (that is UTS, COOP, Peppin Transport, Paramount Garage and TDP) who however, were all disqualified during the tender's evaluation process. More specifically, UTS was disqualified through the second (technical) evaluation as it was found to have insufficient driver and vehicle capacity to service the category it had bid for, while COOP, Peppin, Paramount and TDP were all disqualified during the third (financial) evaluation as their bids all exceeded the allocated budget by a significant margin.
- 2.1.3. Following the disqualification of all bidders, and consequently the cancellation of the tendering procedure, the Ministry was only left with approximately one month to the start of the 2011/2012 scholastic year, which was, as yet, not covered with a State school transportation agreement. To this end, MEEF engaged in a negotiated procedure with the five bidders that were disqualified during the cancelled tender, with the aim of securing school transportation services for the upcoming scholastic years (Phase 3). Though the provision of the school transportation service was uninterrupted in the first part of the 2011/2012 scholastic year, these negotiations spilled over through this year's first semester, with the contracts (still 'in vigore' at the time of writing of this report) being signed retrospectively in December 2011.

2.2. Timeline: A Graphical Representation





PHASE 3

NEGOTIATED PROCEDURE

2011

SEPTEMBER

Initiation of Negotiations with COOP, TDP, Peppin and Paramount
Continuation of Negotiations with UBS



New Scholastic Year 26
Start of Service without a Contract

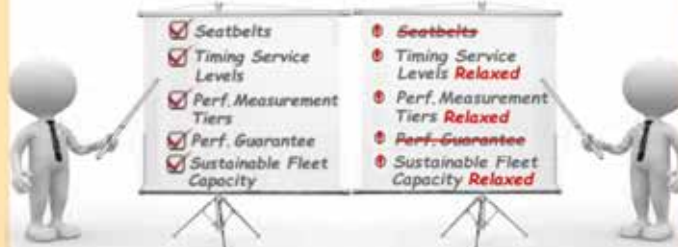
NEGOTIATIONS OUTCOME

from >>>>>>> to

CANCELLED TENDER BIDS & CONDITIONS **NEGOTIATED CONTRACT PRICE & CONDITIONS**



Tender Conditions >>>>>>> Negotiated Conditions



DECEMBER

20 Contract Signed Retrospectively

Chapter 3

Observations

This Chapter presents NAO's main observations on the procurement process under review. Given the multifaceted nature of some of these observations, sub-sections are also used so that this Office's analysis on each facet is comprehensively presented. It is important to note that NAO's observations in this Chapter, are issue-based rather than documented on their position in the overall chronology of events. In view of this, it is hereby noted that certain incidents throughout the procurement process under review are referred to multiple times throughout this Chapter as they raise various concerns, thereby contributing to more than one of NAO's observations.

3.1. Late Start to the Contract Renewal Process

- 3.1.1. During the progress of this audit exercise, and as can be seen in Chapter 2, NAO noted that the Ministry was late to act on the renewal of the school transportation service contract. The original five year contracts expired collectively at the end of the scholastic year 2009/2010, yet information made available to NAO indicates that the Ministry's first reaction to this situation only materialised in August 2010 (Appendix A1.1 refers), that is, approximately one month before the start of the subsequent scholastic year. This fact was also substantiated during meetings which NAO held with key players involved in this process. From the forwarded information, NAO additionally notes that this lateness in the Ministry's reaction can be partially attributed to the fact that MEEF's original intention was never to go for a tendering procedure, but rather to adopt a more direct procurement process which could have been concluded in a shorter timeframe (Appendix A1.8 and section 3.2 below refers).
- 3.1.2. This Office notes that the above mentioned considerations placed the Ministry in a weak negotiating position from the start. More specifically, NAO observed how the shortage of time at the Ministry's disposal had a significant negative effect on Government's negotiation leverage throughout this whole procurement process. In fact, it is NAO's considered opinion that this issue proved to be a critical disadvantage for the Ministry, particularly in instances in which it was pressured to accede to the service providers' requests for fear of the latter desisting from providing their services, leaving students with no means to commute to and from schools. Moreover, it is this Office's opinion that most of the concerns that will be discussed in the subsequent parts of this Chapter were further accentuated by this consideration.

3.2. MEEF's Original Intention was to Avoid a Tendering Procedure

- 3.2.1. From a detailed review of correspondence made available to NAO, this Office noted that the Ministry's originally planned course of action in procuring the school transportation service was to follow the same procedure as it has adopted in previous agreements, that is, by re-negotiating the terms of the preceding contract with the only three providers at the time, rather than engaging in a fully fledged competitive process (Appendix A1.8 refers). It is here important to note however that, for the procurement process under review, this direction was disapproved of by the DoC from the start. The DG DoC at the time, in fact directed the Ministry to extend the original contract by only one year (while retaining the same terms and conditions of the same agreement) so that MEEF could make up for the late initiation in the procurement process (section 3.1. refers) and be able to go through with a tendering procedure during this one year period.
- 3.2.2. NAO however further noted that, despite the above direction by DoC, MEEF still initially attempted to pursue its original intention. In fact, Minister MEEF directed an external negotiator (engaged by the former to assist her in extending the contract with the existing providers) to seek legal advice on what options remained open to the Ministry to extend the original contract for more than one year (Appendix A.1.1 refers). While NAO is not in possession of the reply given by the legal advisor on this matter, it is important to note that, despite this request for advice, MEEF eventually adopted DoC's direction in procuring the service (Phase 2).
- 3.2.3. MEEF's original intent of not securing this service through a competitive tender, raises significant concerns to NAO. Of specific note is the fact that, from the reviewed documentation and as mentioned earlier, it seems that this service had always been procured by methods other than through a competitive tendering procedure. NAO feels that this (together with the fact that there was no real competition in this market at the time and in view of the substantial financial materiality involved) has created a significant precedent, giving the suppliers a strong sense of entitlement and leaving Government with limited practical options on how the service could be procured. In fact, NAO feels that these considerations may have been instrumental in the eventual failure of the Ministry's attempt to procure this service through a tendering procedure (Phase 2).

3.3. Service Providers' Overbearing Conduct

Suppliers' Overall Behaviour

- 3.3.1. From meetings held with stakeholders from the then Government's side as well as from the reviewed communication at NAO's disposal, this Office observed that all three phases of the procurement process under review featured numerous episodes of undesirable behaviour by the suppliers. More specifically, during meetings with key stakeholders, NAO was repeatedly informed that it was not uncommon for suppliers to adopt a generally

overbearing conduct during the procurement process, which would include constant threats of them withdrawing from discussions, thereby leaving students without school transportation. NAO therefore feels it is important to state that all other concerns presented in this report, are to be contextualised within the prevailing environment portrayed in the foregoing.

- 3.3.2. One specific example of the above observation was the suppliers' reaction when faced with the prospect of a competitive tender. In fact, during meetings with key stakeholders, this Office observed how the *Unscheduled Bus Service (UBS)* threatened to adopt a "gloves off" attitude towards Government (thereby implying a more confrontational stance) should the Ministry pursue a tendering procedure instead of adopting the usual approach, that is (as explained in section 3.2 above), by directly re-negotiating the old contract. In fact, NAO noted that during the negotiations of the one year extension (that is, during Phase 1), two of the then three suppliers initially requested no increase in price, with the third (UBS) requesting a 30% increase (Appendix A.1.2 refers). As already presented in Chapter 2 and as discussed further in 3.4.6, following Phase 1 negotiations all three suppliers settled for an increase of approximately eight per cent over the original contract (which consideration is discussed in further detail in section 3.4.6). On the other hand however, when it came to the bids submitted for the tendering procedure, the submitted offers, in aggregate, amounted to a 57% increase on the original contract (resulting in a 21% increase on the tender estimate³ - Appendix A.2.11 refers). While NAO acknowledges that the tender sought to introduce a higher level of service when compared to the old contract, it is however of the opinion that the suppliers' reaction to the issue of the said tender was particularly peculiar. This is because NAO feels that the introduction of a competitive environment (through a tendering process) and the uncertainty of market dynamics due to the introduction of a new, potentially major competitor (Arriva through the 2011 transportation reform), would generally logically result in suppliers engaging in fiercer competition between them rather than threatening a "gloves-off" approach towards Government.
- 3.3.3. The suppliers' generally negative attitude can also be observed from unreasonable demands they made throughout the procurement process in question, the most prominent of which was a request put forward by UBS (and consequently also by UTS) to change school hours in order to carry out more trips with the same number of vehicles. During its review of forwarded correspondence, NAO noted that the reason given by the supplier for this proposal was to reduce traffic congestion by having less vehicles on the road at any one point in time and to reduce the cost of the service (Appendix A.1.6 refers). This Office however also notes that UTS was disqualified from the Phase 2 tendering procedure (Chapter 2 refers) due to insufficient vehicle and driver capacity to service the contract at the established service levels (Appendix A.2.9 refers). It is therefore inevitable that questions are here raised on the real reason behind the request to adjust school hours.

³ During meetings with the then MEEF externally engaged negotiator, NAO was informed that no particular market research was carried out in the calculations leading to the tender estimate figure, but rather these were solely based on the 30% price increase as requested by UBS during Phase 1.

This issue is of particular importance as, while the supplier's justifications for this proposal were seemingly not without their merits, NAO notes that such changes would impinge on students' daily routine, which consideration, this Office feels, should not be compromised. Although, from its review, this Office is not in a position to confirm whether school hours were actually changed to accommodate the above mentioned proposal or otherwise, NAO notes that the final contract's service levels governing pick-up and drop-off timeframes, were relaxed through Phase 3 negotiations (Chapter 2 and Appendix B refer). While this Office cannot conclusively state that this change in service levels (in the suppliers' favour) was intended to indirectly accommodate the suppliers' demand made above, this Office observes that these changes do in fact provide an opportunity for suppliers to perform more routes with reduced capacity requirements, with the consequence of increasing permissible student waiting time.

- 3.3.4. By means of a final example on the suppliers' general approach during the procurement process in question, NAO highlights an incident with TDP during Phase 3, in which the latter backtracked on an offer of a 14.9% negotiated reduction on the bid price it had submitted during Phase 2. This offer was made through TDP's externally engaged legal advisor during the initial stages of Phase 3 (September 2011), and was subject to MEEF agreeing to changes in the proposed contractual conditions. In October 2011 however (that is, while the first scholastic year intended to be covered by the final negotiated contract was already in progress) the external negotiator engaged by the Minister, reported to MEEF on TDP's assertion that the said offer did not stand, as the latter's legal advisor acted beyond the authority provided to him in offering the abovementioned 14.9% price reduction (Appendix A.3.5 refers). At this point, TDP further stated that it was only willing to concede a discount of 10% on the bid price for the first two years of the negotiated contract and, in fact, NAO notes that the final contract was eventually signed quoting a 10% discount for the first two years, tapering down to a six and three per cent for years three and four respectively, with no discount being allotted for the last three years of the contract. In NAO's opinion, this situation translated in MEEF having to carry the consequence of a potential miscommunication between TDP and its legal advisor, possibly by originally conceding to certain conditions in view of the originally proposed 14.9% discount, and having to eventually retain these concessions even at a lower discount rate.
- 3.3.5. These considerations, amongst others, show that the service providers adopted what can be considered as a hard line attitude throughout the procurement process under review. While this Office understands that, as businesses, it is obviously expected of the providers to negotiate in their favour, NAO however feels that the suppliers' behaviour was, in numerous instances, excessively domineering and that they exploited the Ministry's time shortage situation (as described previously in point 3.1) to the full in order to further their gains at every available opportunity. NAO opines that, this behaviour impinged heavily on the value for money of the contract in question, and that a fairer agreement could have been reached if the suppliers would have adopted a more balanced approach towards the negotiations.

Indications of Inter-Supplier Collusive Behaviour

- 3.3.6. Throughout the review of the forwarded correspondence and during meetings held with key stakeholders, it became apparent to NAO that the suppliers engaged in collusive behaviour with each other, thereby making it harder for the Ministry to obtain a good deal from the procurement process under review. The points presented in the subsequent paragraphs, amongst others, highlight the main occurrences which, in NAO's opinion, substantiate this concern.
- 3.3.7. One indication of this behaviour was observed during the stage in which a demand for an increase in price by UBS was being considered by MEEF during the Phase 1 negotiations. As can be seen in Chapter 2 and unlike UBS, the other two earmarked providers at the time (that is, COOP and PTA) had not initially demanded an increase in price to provide school transportation service for the 2010/2011 gap year. Reviewed correspondence however shows that, when an agreement was reached between UBS and MEEF over the former's demand for an increase in price, the external negotiator engaged by the Ministry felt that the other two earmarked providers were already knowledgeable of this fact (Appendix A.1.15 refers). While NAO is not in a position to certify whether the other providers were, in actual fact, informed or otherwise of this, it notes that, following Ministerial direction that all suppliers should be treated equally (Appendix A.1.10 and point 3.4.7 refer), all suppliers were eventually offered the price increase for the 2010/2011 gap year which UBS negotiated with MEEF during the Phase 1 negotiations.
- 3.3.8. Reference is again made to point 3.3.2, in which this Office observed that while it was only UBS who pressured MEEF with the prospect of a "gloves-off" approach in the event that the Ministry adopted a competitive tendering procedure, all bidders, in fact, ended up submitting bids in the Phase 2 procedure which were significantly higher than the tender estimates. Such behaviour leads NAO to question whether the suppliers were in communication with each other to present a united front during this incident.
- 3.3.9. During its review of forwarded correspondence, NAO also noted an instance (during Phase 3 negotiations) in which the Negotiator engaged by the Ministry specifically informed MEEF that a "confidential agreement was entered into between the COOP and UBS that UBS would not tender for mini bus routes" (Appendix A.3.10 refers). Although there is no specific mention in the correspondence made available to NAO whether this inter-supplier agreement was entered into for the purpose of Phase 3 negotiations or during the Phase 2 tendering process, NAO notes the use of the word "tender" in this correspondence (even if this correspondence was generated during Phase 3 negotiations), which hints that this agreement was, in fact, in place since the bidding stage of the failed tender process. NAO's premise on this is circumstantially substantiated by the fact that UTS did not submit any bids for mini bus routes during the tendering process. In addition, from the reviewed correspondence NAO also noted another instance in which the Ministry's engaged

negotiator informed MEEF that UTS and COOP were in discussions with one another during Phase 3 negotiations. More specifically, MEEF's negotiator noted that he was informed by UTS (in confidence) that they were sharing with COOP their calculations in arriving at their proposed discount in prices (Appendix A.3.9 refers).

3.3.10. Furthermore, during its review of forwarded correspondence, NAO noted that the same lawyer was assisting two suppliers (that is UBS and TDP) in their negotiations with MEEF. NAO here points out that one measure which would see Government incentivise a competitive element in a procurement process and subsequently secure the best value for money while reducing the possibility of inter-supplier collusive behaviour, would be to negotiate with each service provider individually, with no information on any one agreement being disclosed to other suppliers. In view of this, NAO feels that the situation of having the same person representing two distinct suppliers (albeit negotiating different parts of the service in question), creates obvious counter-competitive risks which could have impinged on Government's negotiating position.

3.3.11. As a final consideration on this matter, NAO also noted that the signatories for the contracts engaging Paramount Garage and Peppin Transport to provide school transportation services, are also the signatories of AIL Ltd and Peppin Garage Ltd respectively, which latter two companies form part of the UTS Consortium. This situation, NAO opines, created very obvious and probable risks of information being transmitted between supposedly competing providers, with obvious negative repercussions on the potential derivation of value from the negotiations under review.

3.3.12. With the above considerations in mind, reference is made to Article 5 of the Competition Act (Chapter 379 of the Laws of Malta) which, inter alia states:

“Subject to the provisions of this Act, the following is prohibited, that is to say any agreement between undertakings, any decision by an association of undertakings and any concerted practice between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta and in particular, but without prejudice to the generality of this subarticle, any agreement, decision or practice which:

(a) directly or indirectly fixes the purchase or selling price or other trading conditions; . . .”

3.3.13. Even though the incidents highlighted above can all be considered as circumstantial rather than conclusive evidence of suppliers collusive behaviour, NAO notes that, if proven, these would potentially constitute a breach of this Act. Furthermore, the issue of the UTS-COOP “confidential agreement” regarding mini-bus routes as discussed in point 3.3.9. above would, if proven, be in breach of part ‘c’ of the same Article which prohibits the intended portioning of the market.

3.3.14. This Office acknowledges that the correspondence made available to it on the above considerations is considered as secondary information, as it only includes inter-Ministry communication rather than primary exchanges between the suppliers themselves. Despite this however, NAO nonetheless opines that the amount and significance of identified incidents which hint at suppliers' collusive behaviour cannot be ignored. Furthermore, it is here imperative to highlight that NAO's observations on this matter were heavily substantiated during its meetings with the then key MEEF stakeholders (whose reaction to this behaviour is discussed in sections 3.4.10 and 3.4.11).

3.4. MEEF's Weak Negotiation Stance

MEEF's Overall Weak and Accommodating Approach

3.4.1. Through the analysis of this procurement process, it became apparent to NAO that MEEF adopted a negotiating approach, which this Office considers as weak, and at times, leaning excessively towards accommodating suppliers' demands. This approach can be observed in a number of instances, the first of which relates to the clause dictating the pricing mechanism in the original contract. In NAO's opinion, there was an incorrect interpretation of this clause by MEEF during Phase 1 negotiations in order to accommodate, in part, UBS's requested price increase. Specifically, the clause in question in the original contract apportioned the price of routes into three main components, that is, Retail Price index (RPI), Cost of Living Adjustment (COLA) and Diesel. The manner in which this clause was worded further indicated that any changes in the overall route price should be based solely on the official annual revisions of each component respectively. Reference is therefore here made to the fact that in Phase 1, DoC specifically informed MEEF that a one year extension of the original contract was only to be awarded if the same terms as those in the original agreement (Appendix A.1.7 refers) were retained. This being said however, reviewed correspondence shows how, in order to apply this pricing formula to the contract that was to cover the 2010/2011 gap year, MEEF's negotiator proposed to the Ministry a number of scenarios intended to partially address UBS's aforementioned request. In tackling this issue, these proposed scenarios featured a strong bias towards diesel, with the strongest quoting a 60% apportionment on this cost component⁴. It is here important to note however that the clause in the original contract quoted only a 17% diesel apportionment on the route price which, through DoC's instructions should have therefore remained unchanged for a one year extension to be awarded. This departure from the original formula was, in fact, flagged by DoC once the scenarios mentioned above were proposed. NAO however noted that at this point, MEEF's negotiator, with the backing of the then MEEF Minister, countered DoC's assertions and insisted that the proposed bias towards diesel is still within the parameters permissible in the original clause. This Office also observed that, following

⁴ Through meetings held with key stakeholders, particularly the then MEEF's external Negotiator, NAO was informed that these proposals featuring a bias towards diesel were not based on any specific market research exercise. When this Office queried further on how these figures were calculated, no conclusive answer was provided.

an email by the then MEEF Minister to DoC, strongly urging the latter for the matter not to be stalled, the one year contract was awarded through a direct order rather than an extension, quoting the maximum proposed bias (60%) towards diesel. As a result of this measure, this Office notes that the increase experienced in the overall route price (that is, an increase of 7.86%) was practically doubled when compared to the increase which would have been experienced if the original diesel allocation was retained (that is, an increase of 3.92%).

- 3.4.2. During this review, it also became apparent to NAO that UBS's fleet and driver capacity, was a constant underlying issue in these negotiations. As can be seen in Chapter 2, UTS was deemed to be technically non-compliant during the Phase 2 tender technical evaluation due to insufficient capacity, and therefore unable to fulfil the lots that it had tendered for within the service parameters set by the same tender document. Notwithstanding this situation however, NAO observed how MEEF still proceeded to engage in a negotiating procedure with UTS without, at any point, putting any real pressure on the latter to increase its fleet and driver capacity, which would have put this supplier in a better position to satisfy the school transportation service at the originally required level of service. As discussed previously in point 3.3.3 and further in point 3.4.7, NAO also observed that during Phase 3 negotiations, rather than pressuring UTS into seeing to its capacity issues, the Ministry actually conceded to broaden the contract's service levels. More specifically, NAO notes that this measure introduced the possibility of earlier permissible pick up times in the morning and longer waiting times for the students to be picked up in the afternoon (Appendix B refers). This, NAO further notes, enabled suppliers to perform more routes with a fleet which is smaller in size than that which was strictly required to honour the original tender specifications.
- 3.4.3. During meetings held by this Office with MEEF's then external negotiator and from reviewed correspondence (Appendix A.3.22 refers), the issue of proposing a student pass for free public transportation as a means to attain negotiation leverage came to the fore. MEEF's Negotiator informed NAO that, at one point, he advised the Ministry to consider exploring this possibility, which would have provided free public transport to students of a non-"vulnerable age" (Appendix A.3.22 refers). This stakeholder further informed NAO that this proposal was primarily intended to transmit a message to the providers that other arrangements could be made by the Ministry in the event that service providers persisted with their generally hard line approach towards these negotiations. Through the reviewed correspondence, NAO additionally observed that this proposal also had the backing of the DG DoC (Appendix A.3.21 refers). Although throughout the correspondence at NAO's disposal no mention is made on whether this proposal was accepted or otherwise, this Office was however informed by the then MEEF's external negotiator, that this idea was not accepted by the Ministry. He further informed this Office that the main reason given for this rejection was that this proposal was perceived as politically controversial.
- 3.4.4. As mentioned earlier in this Chapter (section 3.3.1 refers), it became apparent that the service providers' threats of pulling out of the service (thereby leaving students without a

means to commute to and from school) undoubtedly impacted on MEEF's negotiating stance throughout this procurement process. More specifically, both from meetings held with key stakeholders and from the reviewed correspondence, NAO noted how, on numerous occasions, MEEF felt it was being held at ransom and that its options were very limited in this regard. It became evident to this Office that MEEF deemed, at the time, the negotiating suppliers to be indispensable, while being somewhat convinced that the latter were in a position, if they so chose to, to actually simply withdraw from this agreement. This Office however disagrees with this sentiment as it feels that the contract being offered by MEEF at the time was too financially significant for the suppliers to forfeit easily. In fact, the contract value was so significant to the service providers that, a back-of-the-envelope calculation (offsetting UTS's and COOP's revenue⁵ against the prices tabled by these two suppliers during Phase 2), shows that the contract value would have amounted to around 67% and 95% respectively of all revenue generated by these two providers in the years preceding these negotiations⁶. This consideration leads NAO to conclude that the constant threats presented by the providers of withdrawing from this agreement featured a significant element of pretence, and that the Ministry had more leverage than it seemingly thought and exercised at the time. This, in NAO's opinion, in turn indicates that if a stronger position by MEEF was adopted at the time, better value could have been secured for Government through this deal.

- 3.4.5. While NAO acknowledges that, during the procurement process under review, the Ministry was faced with challenges which could not have been easily overcome, this Office opines that MEEF was still in a position to adopt a more determined approach to these negotiations, thereby securing additional value to the contracts in question. The Ministry's generally weak and accommodating approach to these negotiations has, in NAO's opinion, undoubtedly served to further strengthen an already existing precedent, possibly incentivising the generally domineering attitude adopted by the service providers. NAO also further notes that, if retained by the Ministry, this weak approach could, once again, negatively influence similar future dealings. This consideration is especially relevant in view of the upcoming expiration of the contract currently 'in vigore' and therefore, the subsequent required procurement process to re-secure the provision of school transportation services to State schools.

Conditions Negotiated with Individual Suppliers Applied to all Providers

- 3.4.6. During its review of this procurement process, this Office noted the Ministry's adopted position of presenting all suppliers with the same contractual terms, even if certain conditions were individually negotiated with only one provider. Of the more prominent instances, reference is once again made to the Phase 1 incident already discussed in points

⁵ The revenue figures used by NAO for this exercise were the ones submitted by the suppliers themselves during the Phase 2 tendering procedure.

⁶ The revenue figures used by NAO for this exercise also included the value of the previous school transportation contracts.

3.3.2 and 3.3.7, specifically the Ministry's direction of awarding the eight per cent price increase, negotiated only with UBS, to the other two service providers at the time (that is, COOP and PTA). From the reviewed correspondence, NAO noted that it was MEEF's then HoS on behalf of the then Minister, who clearly stated the Ministry's intention of applying any potential price increase to all service providers and not just to the one making the request (Appendix A.1.10 refers). From its review, NAO noted that this direction was immediately opposed by DoC, who specifically directed MEEF to formalise the one year extension (Phase 1) with COOP and PTA given that they were ready to accept this extension with the existing terms and pricing (Appendix A.1.7 refers). In reviewed correspondence, NAO noted how DoC further urged the Ministry to proceed with negotiations with UBS only after the extensions with the other two providers were secured. Despite being presented with a clear opportunity to maximise on the value derivation of this extension through a better price, the Ministry still persisted with its original intentions to negotiate terms with UBS, and offering the resulting price increase to the other two suppliers, which ultimately led to securing a less favourable overall pricing agreement.

3.4.7. Reference is made to the issue already discussed in sections 3.3.3 and 3.4.2 above, specifically the matter of changes in the time related service levels which broadened the timeframes in which students can be picked up and dropped off during their daily commute to and from school. While as already explained in section 3.3.3, it is this Office's opinion that these changes may have been introduced following a request by both UBS and UTS (in different stages of the process under review) to shift school hours, NAO here notes that these revised service levels were not only applied to the requesting supplier, but to all providers in negotiations with Government at the time.

3.4.8. This Office also observed that, throughout this procurement process, the Ministry had adopted what it referred to as an "open approach", and on one occasion was even considering presenting the negotiated prices for all school transport categories to all the involved suppliers in the draft contract document. This meant that every supplier would have been made formally aware of what the other providers were being offered (in financial terms) for their respective parts of the contract. This approach was however eventually reversed following a statement issued by the then Shadow Minister, which among other issues, criticised the procurement process under review for limiting competition. In this regard, NAO noted an email sent by MEEF's external Negotiator (Appendix A.3.19 refers), in which reference was made to the above mentioned statement, and which, in NAO's opinion, indirectly alleged that this statement was founded on leaked information. The Ministry's Negotiator further asserted that, had the Ministry persisted in the adoption of the "open" approach, further information could have been leaked and created additional problems. The above mentioned criticism and the threat of further information leaks, led the Ministry to opt for individual contracts (one for every provider) that would each only contain the prices relating to the category/ies serviced by that particular supplier. Through this incident, NAO once again observed the Ministry's original intention of not dealing with

suppliers individually which, in this instance, was only reversed not on the issue's own merits, but presumably to merely avoid being publicly criticised.

- 3.4.9. From the conducted fieldwork and analysis, NAO could not conclusively determine an adequate reason behind the Ministry's adaptation of this overall direction. These considerations, NAO opines, served to dilute the competitive element of the procurement process under review, possibly leading to a less favourable agreement to Government. This Office also notes that the Ministry's adopted "open" approach, as mentioned above, ensured that all suppliers benefitted from all the favourable conditions they each individually had negotiated with Government, making the situation conducive to an environment in which supplier collusive behaviour could further thrive.

Inaction on Suppliers' Collusive Behaviour

- 3.4.10. With reference to section 3.3 above, specifically NAO's observations on the apparent suppliers' collusive behaviour during this procurement process, this Office further highlights its concern that, while claims of suppliers' collusive behaviour were intermittently made internally within the Ministry (Appendix A.1.15, A.3.8, A.3.9, A.3.10, A.3.11 and A.3.12 among others refer), no instances could be identified from the documented correspondence made available to NAO, in which MEEF took a decisive and effective stand against this situation. NAO's assertion of the Ministry's inaction in this regard, can also be corroborated by the replies this Office received from key MEEF stakeholders when queried on this issue during set meetings, citing that they were faced with a collusive oligopoly which was next to impossible to stand up to.

- 3.4.11. While NAO keeps in mind the fact that MEEF had limited time in which to react to this behaviour due to considerations outlined in section 3.1 above, it however feels that complete inaction to at least attempt to formally challenge the service providers' behaviour in this regard, is unacceptable. Apart from the obvious repercussions such a situation has on the value derived from the negotiation process, NAO once again points out that, should these assertions be conclusively proven, there would be a clear breach in law (specifically Article 5 of Chapter 379 of the Laws of Malta). MEEF's seemingly total inaction on this issue, projects an excessive sense of indifference or, at the very least, of total resignation to the occurrence of a potentially illegal act which any Ministry, as an integral part of Government, is duty bound to detect and deter. In NAO's opinion, this situation could also have served to reinforce the suppliers' already domineering conduct while creating a somewhat dangerous precedent on future dealings.

Inaction over Confirmation of Suppliers' Incorrect Application of VAT Regulations

- 3.4.12. During its review of the tendering procedure (Phase 2), NAO noted a claim made by the prospective suppliers to MEEF's externally engaged negotiator that they do not pay Value

Added Tax (VAT) for the services they procure from sub-contractors (Appendix A.2.6 refers). This issue was, in fact, brought to the attention of the VAT Department by the same negotiator, who also requested direction on the matter (Appendix A.2.6 refers). While the VAT Department confirmed that this practice is not in accordance with VAT legislation and that it was never approved nor recommended by the Department itself (Appendix A.2.7 refers), NAO noted that further action on this issue was seemingly never taken. It must here also be pointed out that when NAO enquired on this issue during meetings with key stakeholders, this Office was provided with the same reply throughout, that is, that none of the stakeholders could recall this issue ever being brought up, let alone that any action was ever taken in this regard.

3.4.13. The apparent inaction on such a situation raises cause for concern to the NAO. More specifically, in view of clear misinterpretation of VAT legislation by suppliers on services procured from subcontractors, this Office is not comfortable with the fact that the Ministry did not endeavour to ensure that this situation is rectified, for both past and future transactions. In addition, this issue further reinforces NAO's opinion on the suppliers' overbearing conduct and, more pressingly, on MEEF's generally weak approach during the procurement process under review.

3.5. Conceded Reduction in Contractual Conditions Disproportionate to Marginal Decrease in Price.

3.5.1. Phase 3 negotiations, which ultimately led to the award of the contracts currently 'in vigore', saw the Ministry negotiate on the terms proposed in the Phase 2 tender document in an attempt to push downwards the suppliers' asking price for the provision of school transportation services. While not without their shortcomings, the conditions provided for in the unsuccessful tender document, would have, in NAO's opinion, provided Government with good quality of service and adequate monitoring mechanisms. Through Phase 3 negotiations however, the Ministry conceded to what this Office considers as a substantial reduction in the tender's cited quality of service requirements. While a detailed list of all downward revisions in this regard can be seen in Appendix B, NAO here points out the most prominent of these concessions which, among others include: the removal of the requirement for seatbelts in all transport vehicles servicing this contract; the broadening of acceptable time related service levels; the relaxation of performance measurement tiers; the removal of the requirement for a performance guarantee and; the easing on the requirement for the suppliers to have sustainable fleet capacity. While NAO acknowledges that it is difficult to accurately financially quantify all the concessions listed in Appendix B, it notes that they impinge on factors which this Office considers of utmost importance, such as the students' safety and their daily routine, as well as the control mechanisms at Government's disposal to adequately manage the contracts in question. On the other hand however, NAO notes that, when compared to the offers submitted by the suppliers during

Phase 2, the final negotiated price experienced a decrease of only four per cent⁷. To this end, this Office is of the opinion that the extent of Government's concessions in terms of contract conditions during the Phase 3 negotiations, is disproportionate (in the suppliers' favour) to the marginal four per cent negotiated decrease in price.

3.6. Upcoming Procurement Process in its initial stages

3.6.1. During a meeting with the Head ELSU incumbent at the time of writing of this report, NAO enquired on whether any progress was registered so far in the process which would ultimately re-secure school transportation services once the contracts currently 'in vigore' expire in June 2018. In reply, Head ELSU informed this Office that the Ministry's intention is to re-secure this service through a competitive tendering procedure and, in fact, this Unit is currently in the process of drafting the tender document. NAO was additionally informed that discussions between the Ministry and DG DoC are also currently underway to discuss the way forward. ELSU additionally informed this Office that it is its intention to publish this tender later on this year.

⁷ That is, from the total Phase 2 submitted offers of €6,459,339 per year, to the yearly average figure of €6,173,111 as agreed in the signed contracts.

Concluding Remark

This review has primarily shown that significant value was forfeited during the procurement process in question, namely due to suppliers' generally overbearing conduct and the Ministry's overall weak approach at the time. While the resulting contract agreements (which are still 'in vigore' at the time of writing of this report) are not without their merits, NAO strongly feels that these considerations heavily impeded on the acquisition of a fairer deal, to the obvious detriment to Government and consequently, the taxpayer.

This Office however positively notes that MEDE has (as at time of writing of this report) already started work to re-secure the school transportation service once the contracts currently 'in vigore' expire. NAO also commends MEDE's adopted direction to opt for a competitive process from the start, rather than a more direct procurement approach as was adopted during the process under review. At the time of writing of this report however, this Office obviously cannot, in any way, comprehensively comment on how the upcoming procurement process will develop as it is still in its initial stages.

Notwithstanding the above, this Office urges the Ministry to keep in view the considerations highlighted in this report and consequently adopt a much stronger approach in the upcoming procurement process. This recommendation becomes especially significant given the financial materiality and the social importance of this service, which factors render it critical for MEDE to endeavour in securing agreements which are heavily oriented towards safeguarding students' interests, while also ensuring that the best possible value for money is attained.

Appendix A

Detailed Chronology of Events

A.1. Phase 1: 2010/2011 Gap Year

A.1.1. *Date:* 24/08/10 *Sender:* MEEF Negotiator *Recipient/s:* MEEF Legal Advisor,
Minister MEEF, DG MEEF,
HoS MEEF, DCS MEEF

Negotiator MEEF informs MEEF legal advisor that he is “*assisting the Minister of Education and the Director General of the Education Division on extending a contract with the Unscheduled Bus Service, the Coop Services (Minibus) Ltd and the Public Transport Association for the provision of school transport for children attending state schools*”. He further states that Minister MEEF “has requested me to approach you on advise with regards to this extension”. In seeking such legal advice on the extension of the ongoing contract, Negotiator MEEF informs MEEF Legal Advisor that, following a request submitted by the Ministry, DOC did not approve an extension of the contract then ‘in vigore’, but guided MEEF to initiate a tendering procedure for the competitive acquisition of this service. Given that MEEF’s request was submitted close to the start of the 2010/2011 scholastic year, DOC conceded that negotiations with the then current service providers could be undertaken for an extension of only one year, during which the said tender preparations were to be undertaken. This been said however, Negotiator MEEF still asked legal adviser MEEF on “*possible options in law to move with a negotiation or an extension for more than 12 months*”.

A.1.2. *Date:* 25/08/10 *Sender:* MEEF Negotiator *Recipient/s:* HoS MITC,
DG MEEF, HoS MEEF

While agreement was reached with PTA and COOP to extend the original contract by a further year with the same terms (including price), UBS demanded a 30% increase in price, which request was deemed as excessively high by MEEF. Moreover, the Ministry, at the time, was of the opinion that any increase in price conceded to one supplier would have to be equally applied to the other service providers.

It is here noted that PTA were only licensed to operate till end of February 2011. To this end, MEEF (through its Negotiator) asked MITC if they are ready to consider extending PTA’s license to cover the scholastic year 2010/2011 in full.

Moreover, through this correspondence, NAO noted that, at this time, MEEF believed that, should UBS still persist in their request for a 30% increase in price, PTA and COOP were capable of servicing all routes (including those originally serviced by UBS). In view of this consideration, the approval of PTA's license extension, became of paramount importance to provide Government with much needed leverage in negotiating with UBS.

A.1.3. Date: 30/08/10 **Sender: Minister MEEF** **Recipient/s: Minister MFEI, MEEF Negotiator, DG MEEF, HoS MEEF, DCS MEEF, DSR MEEF**

Minister MEEF informs Minister MFEI on the state of play of discussions and of the fact that the former initiated discussions with MITC for a special dispensation through which PTA's license would be extended to cover the whole 2010/2011 scholastic year, which would put MEEF in a stronger negotiating position with UBS.

Despite the above, Minister MEEF felt that she "*must, however, assume the worst case scenario*" (that is, school starting without these negotiations being concluded and a workable agreement reached) which would have led to "*a major national and political issue*". She therefore solicited parameters from Minister MFEI on permissible price increases *vis-a-vis* negotiation with contractors.

A.1.4. Date: 30/08/10 **Sender: Negotiator MEEF** **Recipient/s: Minister MEEF, DG MEEF, HoS MEEF, DCS MEEF, DSR MEEF**

Negotiator MEEF informs Ministry that approval for the extension of PTA's license (to cover scholastic year 2010/2011 in full) has been granted by MITC. In view of this, he calls for a meeting with recipients of this e-mail to decide "*whether to reject 30% price increase by UBS*" and to "*initiate discussions with PTA and Minibus Coop to apportion UBS routes*"

A.1.5. Date: 31/08/10 **Sender: Minister MFEI** **Recipient/s: Minister MEEF, DG Contracts, Perm. Sec. MFIN, HoS MEEF, DG MEEF, DCS MEEF, Negotiator MEEF**

Minister MFEI replies to Minister MEEF's correspondence on permissible parameters *vis-a-vis* increase in prices, and directs her to refer the issue with DG Contracts.

A.1.6. *Date:* 31/08/10 *Sender:* Legal Advisor UBS *Recipient/s:* Minister MEEF,
Negotiator MEEF, DG MEEF

Legal Advisor UBS forwards a letter detailing a number of issues raised by his clients during a meeting between UBS and MEEF. Among these, UBS:

- suggested that while it was ready to accept a contract extension period of 2 years as a compromise on the 5 year proposal originally submitted by itself, it contended a 1 year extension period as proposed by Government.;
- showed its reluctance to co-operate in a process which would lead to a tendering procedure, and could potentially erode part of its business vis-a-vis the school transportation service. To this end, UBS felt that MEEF should "*not expect us now to act as if it is a straightforward extension*". It further referred to an unnamed audit firm's report which claims that the service provided by UBS is underpaid. UBS further stated that, should their request for a 2 year extension be met by Government, they would consider a downward revision in the requested 30% increase in price. Despite this projected intention to negotiate on their original pricing request should their extension duration terms be met, UBS however further requested that cancelled trips should be paid at the rate of 75% of the price of the trip and that changes in trips should be paid at the rate of 175%, based on the principle that a change involves a cancellation as well as a new trip.;
- felt that "*there is agreement in principle*" that bus routes serviced by PTA should be assigned to UBS once the former's license expires. Moreover, UBS here requests that, what it refers to as the "*gradual erosion of the number of routes*" assigned to them over the duration of the original contract (which factor, UBS once again asserted, impinges on the demanded overall percentage price increase), is reversed.;
- stated that it "*has campaigned for a number of years in favour of changes in school hours*" and felt that MEEF should alter the school start/end times in a manner that they do not all coincide together. This, UBS asserted, would contribute to a reduction in traffic congestion across the island and bring about a reduction in the cost of the trips since more trips could be carried out by the same number of vehicles.

A.1.7. *Date:* 01/09/10 *Sender:* DG Contracts *Recipient/s:* Minister MEEF,
HoS MEEF, Negotiator MEEF,
DG MEEF, DCS MEEF,
DSR MEEF, Minister MFEI,
Perm. Sec. MFEI

DoC informs MEEF of its approval for a one year extension of the contract under the same terms and conditions as the original agreement. It therefore suggested that if PTA and COOP were prepared to meet these conditions, then "*the Ministry for Education should immediately make an official request to the Department of Contracts to formalise the extension of the respective contracts*".

DoC further asserted that "It is only after agreement with these two operators is reached that negotiations with UBS should continue".

DoC further proposed that MEEF brings UBS in line with the other providers and extend the original contract with the same terms and conditions. In the eventuality that this course of action failed, DoC suggested that MEEF should either evaluate whether PTA and Minibus COOP are capable of providing transport services for the whole of Malta, or opt to apportion the UBS's routes through an award of tender following a public call.

As a final note, DoC draws MEEF's attention that the latter should have anticipated these scenarios well in advance and should have consequently been better prepared.

A.1.8. Date: 01/09/10 Sender: DG MEEF Recipient/s: Minister MEEF

DG MEEF explains to Minister MEEF that "during the years of transport service, Government has never issued a tender but entered into an agreement with all the providers. Since there are only three providers (so far), Government always negotiated terms with them". DG MEEF further stated that, notwithstanding communication sent by DoC (point A.1.7. refers), the Ministry "started to discuss issues with the three providers more than a year ago, but the understanding was always to come up with a new Agreement and not a tender".

A.1.9. Date: 16/09/10 Sender: Negotiator MEEF Recipient/s: DG MEEF, DSR MEEF, HoS MEEF

Negotiator MEEF proposed a revision in the pricing formula (which entails the apportionment of route prices between COLA, Diesel and RPI) through which the price per route is updated for the one year extension. More specifically, Negotiator MEEF asks that three scenarios were to be explored, in which the apportionment of diesel is set at 40%, 50% and 60% of the total price per route. These scenarios were based on his assumption that "UBS wanted a bias towards diesel", which request, in his opinion, "makes sense given the volatility experienced in this sector" while considering that COLA and RPI are expected to remain relatively stable.

A.1.10. Date: 16/09/10 Sender: HoS MEEF o.b.o Recipient/s: Minister MITC, Minister MFEI, Minister MEEF, Perm. Sec. MFEI, HoS OPM, HoS MITC, DG MEEF, DG DoC

HoS MEEF, on behalf of Minister MEEF, points out that, despite MEEF's rejection of UBS's request for an increase in price by 30%, it was "the Ministry's intention if at all possible to have the UBS as a service provider for the scholastic year 2010/2011". To this end, MEEF forwarded a final proposal to UBS, which would see an upward adjustment in the diesel component of the pricing formula (point

A.1.9. refers), essentially translating in an increase in the overall price, even though not by the requested 30% margin. HoS MEEF explains that "*a bias in this regard is legitimate*" since, during the years of the original contract, there were increases in fuel price and subsidies on the same resource were removed. He further noted that, any consequent increase in route price afforded to UBS (in the eventuality that this provider accepted the Ministry's final proposal), would "*have to be applied universally across the three service providers*". This increase in cost, HoS MEEF also pointed out, would however be offset with a reduction in the number of routes procured annually when compared to the scholastic year 2009/2010.

This correspondence further indicates that, should negotiations with UBS fail (which would see this provider being consequently excluded from the 2010/2011 extension), COOP and PTA (if the latter's operating license is extended), were ready to step in to perform the routes which were assigned to the UBS in the original contract. It however also highlights that, should COOP and PTA be approached to service all routes (thereby excluding UBS from the agreement), MEEF would have "*crossed the rubicon*" and reverting from this position would not have been possible. In such an eventuality, MEEF also projected that the issue would undoubtedly have taken "*a political dimension and that UBS will seek to exert pressure through the press as well as other measures to seek some form of compromise.*" To this end, MEEF felt that "*it is therefore of political importance*" for it to have the "*stated support*" of MFEI and MITC so that "*the school services will be provided uninterruptedly*" in the eventuality that UBS would have to be excluded from the 2010/2011 extension.

A.1.11. *Date: 16/09/10* *Sender: Minister MITC* *Recipient/s: HoS MEEF,
Minister MFEI, Perm. Sec. MFEI,
DG DoC, HoS OPM, HoS MITC
and Others*

Minister MITC informs MEEF that MITC was prepared to meet MEEF's requirements insofar as PTA's license extension is concerned. He also urges MEEF to initiate a tendering procedure to secure the school transport service for the years following the 2010/2011 extension.

A.1.12. *Date: 16/09/10* *Sender: Negotiator MEEF* *Recipient/s: DG MEEF,
HoS MEEF, DSR MEEF,
DCS MEEF*

Negotiator MEEF forwards four scenarios showing the difference in route prices when different apportionments for diesel are applied in the pricing formula. These four scenarios were based on the three aforementioned proposed revisions, with the remaining scenario using results emanating from a study carried out by the DCS MEEF, which was based on annualised increases in the three different cost components (that is, RPI, COLA and Diesel). The resulting calculations for each of the scenarios indicated the following price increases when compared to the rates established in 2005/2006:

Scenario	Diesel Allocation	Total Price Increase
Scenario 1 (DCS MEEF Study)	17%	3.92%
Scenario 2	40%	6.02%
Scenario 3	50%	6.94%
Scenario 4	60%	7.86%

A.1.13. *Date:* 18/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DG MEEF, HoS MEEF, DSR MEEF

Negotiator MEEF informs MEEF that COOP is requesting written commitment that new routes will be provided to them and that lost routes are replaced within a month, *“to keep peace with the other transport providers”*. He further acknowledges that UBS have accepted Government’s final proposal.

A.1.14. *Date:* 18/09/10 *Sender:* HoS MEEF *Recipient/s:* Negotiator MEEF, DG MEEF, DSR MEEF

HoS MEEF notes that he is confident that an agreement with COOP can be reached. He further notes that both COOP and PTA should be informed of the increase in rates agreed with UBS.

A.1.15. *Date:* 18/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DG MEEF, HoS MEEF, DSR MEEF

Negotiator MEEF asserts that, insofar as COOP and PTA being aware of the increase in prices is concerned, *“they already know”* as *“once information became privy thr (sic.) UBS meeting it would have spread”*. He nonetheless agrees that the other service providers should be informed of the agreed increase in rates. He also reminds the recipients that they need to speak to DoC to draw up the extension document.

A.1.16. *Date:* 20/09/10 *Sender:* DG MEEF *Recipient/s:* Negotiator MEEF, HoS MEEF, DSR MEEF

DG MEEF opines that COOP should be informed that the *“percentage increase”* is *“in return for decrease in routes”*. DG MEEF goes on to suggest that, with regard to COOP, the Ministry could consider *“assigning a route to them once it opens up”*. On the other hand, DG MEEF states that no resistance is expected from PTA as *“they have gained percentage increase”*.

A.1.17. *Date:* 20/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DG MEEF, HoS MEEF, DSR MEEF

Negotiator MEEF asserts that he does not think that COOP will rescind its request for an increased number of routes once presented with the increase in price. He further stated that COOP *“always maintained that if government concedes anything to UBS then such concession would have to be given to all providers as a matter of course”*. Moreover, Negotiator MEEF stated that the Ministry needs *“to find some routes over a period of a month”* to assign to COOP, as they have *“cooperated throughout and their cooperation strengthened our hand vis-a-vis UBS”*.

A.1.18. *Date:* 20/09/10 *Sender:* DSR MEEF *Recipient/s:* DG MEEF, HoS MEEF, Negotiator MEEF,

DSR MEEF opines that the Ministry should not commit itself to *“give all new minibus routes to minibus COOP”*.

A.1.19. *Date:* 20/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DG DoC, DSR MEEF, DG MEEF, HoS MEEF,

Negotiator MEEF forwards a draft of the 2010/2011 extension agreement to DoC, which draft includes a revision of the original pricing formula, setting the allocation for diesel at 60%.

A.1.20. *Date:* 20/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DSR MEEF, DG MEEF, HoS MEEF,

Negotiator MEEF states that, after discussions with Legal Advisor COOP, it was agreed that, amongst others, *“a new route - defined to mean the creation of the route where none existed (not the replacement of a bus of UBS by a minibus where-in this case the minibus will continue to be supplier (sic.) by UBS) will be presented to them should they occur”*.

A.1.21. *Date:* 21-22/09/10 *Sender:* DG DOC, *Recipient/s:* Negotiator MEEF, DSR MEEF, DG MEEF, HoS MEEF

In a number of emails spanning over the 21 and 22 September 2010, DG DoC asserts that the draft agreement forwarded by Negotiator MEEF, constitutes a *“departure from the signed contract rates. If this is so then the agreement cannot be considered as an extension but a direct order”*. He further asks whether the original contract was awarded through a tendering procedure or through a direct order. DG DoC asserts that, if it was through the latter, *“an extension to this contract would have to be covered through another direct order approval”*.

A.1.22. *Date:* 22/09/10 *Sender:* Negotiator MEEF *Recipient/s:* DG DoC, DSR MEEF, DG MEEF, HoS MEEF, Minister MEEF

Negotiator MEEF, with the written support of Minister MEEF, counters DG DoC's assertions by stating that Article 18.3 of the original contract *"is directed to mitigate changes that occur over a period of time when certain basic operational parameters are difficult to anticipate"*. To this end, he further asserts that *"the Directorate is only amending the formula to give more bias to the weighting within the said formula to reflect reality of changes in the price of diesel as a result of the removal of local subsidies and high unanticipated international price dynamics to account for operational costs increases which the agreement recognises that should take place following a review on an annual basis"*. Negotiator MEEF reminded DG DoC that *"authority was provided by the Minister of Finance to the Ministry for Education to discuss a change in the way the variables are apportioned within the formula to a maximum reconfiguration that places a 60% weighting towards diesel"*.

A.1.23. *Date:* 22/09/10 *Sender:* Minister MEEF *Recipient/s:* DG DoC, Negotiator MEEF, DSR MEEF, HoS MEEF, DG MEEF

Minister MEEF corresponds with DG Contracts stating that *"it is imperative that we do not get bogged down on this Agreement"*. Minister MEEF further iterates that the proposed extension is in line with the direction which DG DoC himself had given before, that is, that it maintains the same terms and conditions of the original contract.

A.1.24. *Date:* 23/09/10 *Sender:* DG DoC *Recipient/s:* DCS MEEF, Minister MEEF, Negotiator MEEF, Minister MFEI, DSR MEEF, Hos MEEF, DG MEEF, OPM Official

Following the formal request for a direct order by DCS MEEF dated 23/09/10, DG Contracts stated that GCC had discussed this request and consequently approved the extension of the agreement for the scholastic year 2010/2011 with the three service providers in which a 60% allocation to the Diesel factor was secured within the pricing formula. He further emphasised the need for a tendering procedure to ensure that *"the new tender for school transport services is published, adjudicated and awarded well before the beginning of scholastic year 2011/2012 so that the new economic operators will be prepared to provide these essential services in a timely manner"*.

A.1.25. Date: 24/09/10 **Sender:** DG MEEF **Recipient/s:** Minister MEEF

DG MEEF informs Minister that agreements were being signed by providers, with COOP signing under protest as they were still requesting that any new routes should be assigned to them. Michelin however further states that COOP were assigned with the same number of routes as the preceding year at the expense of the other two service providers, as they had been “*extremely cooperative*” throughout the process.

A.2. Phase 2: The Tendering Procedure

A.2.1. Date: 03/09/10 **Sender:** Negotiator MEEF **Recipient/s:** DSR MEEF, DG MEEF, HoS MEEF, Minister MEEF and others

Negotiator MEEF presents the first draft of the tender document to the Ministry.

A.2.2. Date: 20/01/11 **Sender:** Negotiator MEEF **Recipient/s:** DSR MEEF, DG MEEF, HoS MEEF, DCS MEEF

Negotiator MEEF informs the Ministry that the public transport reform called for the decommissioning of vehicles which had an age profile of more than 28 years. This, Negotiator MEEF explained, meant that, of all the vehicles which were in operation at the time, only 57 coaches fit this profile. He however further states that, “*in order to allow current transport operators to ease financing for re-investment the reform allows vehicles that are older than 28 years to operate until 31st December 2014*”. To this end, Negotiator MEEF (after consulting DSR MEEF) proposed that operators who had vehicles that were “*over 28 years can participate in the tender on the condition that they must substitute a similar vehicle after 31st December 2014 for the remaining period of the tender*”.

A.2.3. Date: 24/01/11 **Sender:** DSR MEEF **Recipient/s:** Negotiator MEEF, DG MEEF, DCS MEEF, Asst. Director Procurement & Administration MEEF

DSR MEEF presents workings showing the budget estimate for the five years the tender was projected to cover. These calculations were based on the budget estimate for the year 2010, which stood at €3.9million. DSR MEEF then applied the 30% price increase as requested by the providers during the negotiations for the 2010/2011 gap year (Phase 1), and multiplied the resultant figure by the number of years being covered by the tender. MEEF’s budgeted estimate was therefore set at €26.4million (exclusive of VAT).

A.2.4. *Date: 11/03/11*

Tender Notice on EU Journal

Tender notice is issued on the EU Journal dated 11/03/2011. NAO notes that certain conditions set in this version of the document differ from those set in the one issue locally.

A.2.5. *Date: 15/03/11*

Tender Notice on Government

Gazette

Tender issued on the 15/03/2011 with a closing date of 10/05/2011.

A.2.6. *Date: 12/04/11*

*Sender: Negotiator MEEF Recipient/s: VAT Department,
MEEF DSR, MEEF DCS,
MFEI Official*

Negotiator MEEF informs VAT Department of the suppliers' claim, which state that since *"they do not charge the Education Directorate Services VAT – they do not pay VAT for services they buy from sub-contractors"*. He further states that the suppliers are therefore requesting *"that the current state of play should remain given that if this is not so then they will have an 18% impact on cash-flow until they obtain refunds from the VAT department and interest accrued will be passed on to the Education Services Directorate"*.

A.2.7. *Date: 12/04/11*

*Sender: VAT Department Recipient/s: Negotiator MEEF,
MEEF DSR, MEEF DCS,
MFEI Official*

In reply to the correspondence presented in point 2.2.6. above, the VAT Department informed Negotiator MEEF that the state of play explained by the operators at the time (with specific reference being made to UBS), was not in accordance with VAT legislation and was never approved or recommended by the VAT Departments. In this correspondence, the Department further stated that the *"operators should realise that exemptions in VAT are not granted on the basis of cash-flow problems as they seem to imply"*.

A.2.8. *Date: 10/05/11*

Tender Submission Deadline Expires

Tender submission deadline expires. Five bids received on time, namely from: AIL Ltd./Paramount Garages; Peppin Garage Ltd.; UTS Consortium; TDP Consortium and; Co-op Services Ltd.

A.2.9. *Date: 25/07/11*

Technical Evaluation

Technical Report disqualifies the UTS Consortium on the basis of insufficient capacity both in terms of vehicles and drivers. It also states that the technical bids submitted by AIL Ltd./Paramount Garages, Peppin Garage Ltd., TDP Consortium and Co-op Services Ltd were accepted and consequently concluded that the financial offers of these bidders were to be opened.

A.3. Phase 3: The Negotiated Procedure

A.3.1. This third phase of the procurement process saw the eventual signing of the contract which was 'in vigore' at the time of writing of this report. Documentation forwarded to NAO on this negotiated procedure constituted, amongst other, of approximately two thousand pages of correspondence. Although this documentation has been thoroughly reviewed by the audit team, it was deemed to be too voluminous for a detailed but still readable account of its contents to be presented in this report. To this end, following pertinent analysis, NAO saw fit to identify the major milestones of this process and to present the difference in the contractual conditions between those proposed in the failed tendering process and those found in the final negotiated contract. In view of the above, and in contrast to Phase 1 and Phase 2 as documented above, the events of this third phase could not be reported in a chronological manner but was rather, categorised into separate salient issues, with a synopsis of pertinent documentary evidence of each being hereunder presented in chronological order (where applicable). These issues can be mainly classified in five categories, that is:

- (a) **UBS's Capacity** – This issue was carried forward from Phase 2 of this study, more specifically during the presentation of the tendering procedure. Mention is here once again made to the fact that UBS was disqualified from the tendering process as it was deemed technically incompliant due to a lack of capacity. This consideration implied that UBS was unable to provide the service (at the stipulated service levels) it had tendered for.
- (b) **Service Providers' Negotiations Stance** – The audit team notes and highlights a series of occurrences that reflect the service providers' generally officious attitude during the negotiations of the clauses in this contract, .
- (c) **Indications of Collusion between Service Providers** – This issue was identified by the audit team through a number of emails that indicate that service providers were in discussion with each other during the negotiation procedure rather than engaging in healthy competition.
- (d) **Route Pricing** – The calculations leading to individual route pricing.
- (e) **Other Salient Issues.**

UBS's Capacity

A.3.2. *Date:* 05/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF,
Perm. Sec. MEEF, HoS MEEF,
DG MEEF, DSR MEEF, DCS MEEF

Following a meeting with the UTS Consortium, Negotiator MEEF briefs MEEF on the topics discussed. Mainly, Negotiator MEEF notes that, the service providers are not in a position to provide the service within the stipulated parameters of standards and cost. He also remarks that

“we now suspect that the Consortium may not have the necessary capacity to deliver an improved transport service within these SLAs” and that “it also seems to us that the Consortium is not ready to invest further to boost its vehicle capacity.”

Negotiator MEEF also presents a number of requests, forwarded by the Consortium, which detail what the Ministry should take up in order for the former to reduce the cost of the service. Negotiator MEEF further informed MEEF on the Consortium's insistence that it can provide the service up to the standards requested by the Ministry, albeit at a higher cost. Negotiator MEEF however also expresses doubt on whether UBS can indeed fulfil this commitment, specifically stating that he suspects *“a degree of bluster in this”*. Despite his position, Negotiator MEEF however proceeds to state that *“they (service providers) are in a position to leverage the price of the service as we (Ministry) have no alternative.”*

Service Providers' Negotiations Stance

A.3.3. *Date: 05/09/11* *Sender: Negotiator MEEF* *Recipient/s: Minister MEEF, Perm. Sec. MEEF, HoS MEEF, MEEF DSR, MEEF DCS*

Reference is once again made to this correspondence in which Negotiator MEEF notes how, during a meeting with UTS, the latter presented a number of requests which, if accepted by the Ministry, would reduce the cost of the service. Among others, the service providers suggested that service levels are revised downwards, routes are amalgamated, the performance framework is replaced with the one adopted in the old contract and that the Ministry is *“flexible with regards to what is an exception”*.

A.3.4. *Date: 12/09/11* *Sender: Negotiator MEEF* *Recipient/s: Minister MEEF, HoS MEEF, DG MEEF, DSR MEEF, DCS MEEF.*

Negotiator MEEF briefs the Ministry on a number of meetings with the different providers. He notes that, in a meeting with UTS, the Ministry's costings and calculations were discussed and the service providers were asked to explain how they had arrived to an estimated quotation of €4 million. To this, *“UTS stated that it is not obliged to explain itself given that government had decided to establish market rules by issuing a tender”*. Despite this comment, UTS still went on and explained the dynamics of the quotation.

A.3.5. *Date:* 04/10/11 *Sender:* Negotiator MEEF *Recipient/s:* Perm. Sec. MEEF,
HoS MEEF, DSR MEEF,
DCS MEEF, DG MEEF

This email explained the scenario whereby TDP had originally agreed, through their representative via email, that they were willing to provide a discount of 14.19% on the bid they had submitted for the failed tender. Negotiator MEEF states that *“This compromise position was accepted by us (the Ministry) subject to all of the fine details and issues that were yet outstanding at the time”*. Despite this, Negotiator MEEF notes that, TDP had now informed the negotiation team that their representative had *“acted beyond the authority provided to him as they had not authorised a discount”*. In view of this, the service provider declared that it is not in a position to provide the 14.19% discount originally agreed between its own representative and the negotiation team, but is now offering a 10% discount for the first year of the contract term, with this percentage tapering down during the following years.

A.3.6. *Date:* 25/10/11 *Sender:* COOP *Recipient/s:* Negotiator MEEF

Following the circulation of a draft version of the final contract, COOP forwarded a number of proposed amendments to the terms and conditions of the mentioned agreement. Among others and similar to UBS, the service providers proposed a downward revision of the service levels due to the then *“disastrous”* traffic situation. Moreover, COOP requested that in the case that the service levels are not met, the Ministry should not impose the applicable penalties immediately but rather forward and discuss each case with the Agreement Management Committee (AMC) before any action is undertaken. The service provider also noted that it is not in agreement with the clause that stipulates that any route can be terminated, following prior notice, by the Ministry, as this would translate in previously engaged operators ending up without work. In addition to the above, COOP also stated that, it only accepts clause 1.17 (stating that the Directorate is not liable for any cancellation of school trips due to force majeure) on the condition that the guaranteed payment for 165 working days (Clause 1.8) is not effected in any way.

A.3.7. *Date:* 02/11/11 *Sender:* Negotiator MEEF *Recipient/s:* Perm. Sec. MEEF,
HoS MEEF, DSR MEEF, DG MEEF,
DCS MEEF

Negotiator MEEF sends a proposed correspondence for MEEF’s consideration prior to onward transmission to DoC. In this he highlights that, despite the advanced stage of the negotiations, COOP are *“still disputing what was previously agreed and coming with new demands”*. Among these demands, Negotiator MEEF notes that the service provider requested: a change in the service levels; that the Ministry does not have the right to terminate a route during the effective period of a scholastic year and; that the Ministry still pays for routes which would not have been performed due to strikes and *force majeure*. (N.B., these requests were not accepted by the Ministry.)

Indications of Collusion between Service Providers

A.3.8. *Date:* 13/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, HoS MEEF, DSR MEEF, DG MEEF

Negotiator MEEF informs the recipients of this mail that, following a meeting held between COOP and the negotiation team, it was clear that *"UTS and Minibus COOP are indeed speaking with one another"*.

A.3.9. *Date:* 20/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

Negotiator MEEF informs MEEF that he was approached by the legal representative of UTS who, in *"confidence"*, forwarded him *"the data UTS submitted to Coop yesterday explaining how they reached the discount figures and the reasons why"*.

A.3.10. *Date:* 22/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, Perm. Sec. MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

Recounting a meeting with the legal representative of UTS, Negotiator MEEF states that both representatives of UTS and UBS had *"portrayed that they were in agreement with all the other transport providers"*. During this meeting, Negotiator MEEF also added, UTS complained about their relationship with COOP. This was mainly because COOP had asked that the reduction in price sought by the Ministry with regard to mini-buses is also extended to coach routes serviced by UTS. Negotiator MEEF further points out that the UTS's legal representative remarked that this was not acceptable as, *"A confidential agreement was entered into between the Coop and UBS that UBS would not tender for mini bus routes – in 2010/11 UBS had 101 routes out of a total of 256 on the condition that Coop would allocate 50 of these routes to UTS"*. In reaction to this statement, Negotiator MEEF noted that he insisted with the legal representative of UTS that the latter was expected to reach an agreement with COOP.

A.3.11. *Date:* 23/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, Perm. Sec. MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

Negotiator MEEF highlights a phone call he had received by the legal representative of UTS, in which he was informed that *"discussions with Coop have broken down irretrievably"*. Moreover,

Negotiator MEEF added, the legal representative of the UTS also *“accused Coop of bad faith and that UTS have no intention to seek and agreed position with them”*.

A.3.12. *Date: 05/10/11* *Sender: Negotiator MEEF* *Recipient/s: Minister MEEF, Perm. Sec. MEEF, HoS MEEF, DCS MEEF, DSR MEEF, DG MEEF*

In a document detailing the negotiations’ progress at the time, Negotiator MEEF asserted that *“If there previously was doubt on the possibility of new entrants onto the market that would in turn result in competitive environment the tender demonstrated that not only this is not possible but rather allowed the transport providers to establish an oligarchical market environment which permitted them to dictate prices”*.

Route Pricing

A.3.13. *Date: 23/09/11* *Sender: Negotiator MEEF* *Recipient/s: Minister MEEF, Perm. Sec. MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF*

Negotiator MEEF briefs the recipients on the fact that, the list of routes to be performed during the then upcoming scholastic year differed from the number of routes quoted in the tender document. Negotiator MEEF notes that UTS would have six routes removed from what was originally quoted in the tender and that *“This will prove to be another showstopper unless we (the Ministry) resolve this”*. He consequently proceeded to propose that this issue is resolved by MEEF paying *“for 290 routes and not 284 routes; but any increases from 284 to 290 would be incorporated within the established base line. Any increased beyond the 290 would be on the basis of the short and long route”*.

A.3.14. *Date: 30/09/11* *Sender: DSR MEEF* *Recipient/s: Negotiator MEEF, HoS MEEF, DG MEEF*

DSR MEEF asks for direction on how the individual route price was to be calculated. The two options, he notes, were either to apportion the contract value among the number of routes as listed in the tender document, or among the number of routes as at the day of the signing of the agreement (with the latter option naturally resulting in a lower price per route as the number of routes was larger).

A.3.15. *Date:* 30/09/11 *Sender:* Negotiator MEEF *Recipient/s:* DSR MEEF, HoS MEEF, DG MEEF

Negotiator MEEF opines that the number of routes stipulated in the tender (rather than the number of routes set as at the day of the signing of the agreement), should be used to determine the baseline price for bus routes. He asserts that this is the most transparent option.

A.3.16. *Date:* 30/09/11 *Sender:* DSR MEEF *Recipient/s:* Negotiator MEEF, HoS MEEF, DG MEEF

While informing Negotiator MEEF that he was in agreement with the proposed baseline price calculations, DSR MEEF however also states this option would increase the Ministry's cost by €10,000, but it *"would avoid further issues with COOP"*.

A.3.17. *Date:* 04/10/11 *Sender:* Negotiator MEEF *Recipient/s:* Perm. Sec. MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

Negotiator MEEF once again states that in his opinion, the base line for route price should be calculated using the number of routes quoted in the tender (which would result in a higher price per route) rather than those *"as amended prior to the start and current adjustments underway"*. While acknowledging that there could be instances in which this option could result in an increase cost, Negotiator MEEF notes that he based his reasoning on *"the understanding that over the next six years we (the Ministry) expect significant reductions in bus routes"* which will result in a *"reduction of the cost of transportation"*.

A.3.18. *Date:* 04/10/11 *Sender:* HoS MEEF *Recipient/s:* Negotiator MEEF, Perm. Sec. MEEF, DSR MEEF, DCS MEEF, DG MEEF

With regard to the baseline route prices, HoS MEEF suggests that the number of routes stipulated in the tender is adopted (the option with the higher price per route). This, he asserted, is because *"the general direction of the agreement is being based on the submitted tenders and we should steer in the same direction"*. He however states that feedback is still being requested from the remaining members of the negotiation team.

Other Pertinent Issues

A.3.19. *Date:* 10/10/11 *Sender:* Negotiator MEEF *Recipient/s:* Perm. Sec. MEEF, HoS MEEF, DCS MEEF, DG MEEF, DSR MEEF

Negotiator MEEF makes reference to a press release issued by the then Shadow Minister for Education which, in previous correspondence (dated 07/10/11) sent by himself to MEEF Officials, he described it as alleging *“that the parameters presented in the tender with regards to service management, customer care, and contractual terms was not realistic”*. In reaction to this contention, Negotiator MEEF felt *“that if we (the Ministry) apply the ‘open’ approach as presented in the current draft the information would be leaked to create mischief”*. To this end, he proposed *“a re-drafting that whilst all clauses and articles in the agreement are consistent, specific terms of agreement reached with each service provider would not be shared with the other providers”*. For example, in the attached document proposing changes in the original draft agreement (which Negotiator MEEF sent with this correspondence), a specific clause which, in the original draft, detailed the price of all the service categories (even those not serviced by the individual provider – hence the ‘open’ approach mentioned earlier), is now changed to only outline the price of the categories awarded to the respective provider.

A.3.20. *Date:* 20/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

Negotiator MEEF recounts a telephone conversation with the DG Contracts. He notes that the DoC was proposing that the Ministry reconsiders a student pass system. This system, Negotiator MEEF quotes DG Contracts as saying, would *“provide students – in non vulnerable ages – with passes as against the provision of contracted school transport particularly if there continues to be market failure”*.

A.3.21. *Date:* 23/09/11 *Sender:* Negotiator MEEF *Recipient/s:* Minister MEEF, Perm. Sec. MEEF, HoS MEEF, DSR MEEF, DCS MEEF, DG MEEF

In view of the communication breakdown between the two major suppliers (that is COOP and UTS) which was leading to an increase in pricing, Negotiator MEEF proposed, amongst others, that a new system for school transport services is explored. This system he notes, would distinguish between students of *“vulnerable age”* that would still require school transportation services, and those who, if issued a pass, were considered as capable to use public transport as a means to commute to school.

Appendix B

Conditions quoted in the Phase 2 tender document which were conceded by Government during Phase 3 negotiations

Clause No. in Failed Tender	Clause in Failed Tender	Clause in effective Negotiated Contract
<p>Volume 1, Section 1, Sustainable Capacity 6.1.2.4.</p>	<p>A tenderer must be able to ensure that as a minimum:</p> <ul style="list-style-type: none"> a) With regards to vehicles that are chauffer driven cabs, he must be in possession of seven (7) vehicles; or b) With regards to vehicles that are lifter vans he must be in possession of seven (7) vehicles; or c) With regards to vehicles that are classified as servicing up to 14 students (Category D); servicing between 15 and 18 students (Category E); servicing between 19 and 36 students (Category F); and servicing between 37 and 53 students (Category G) he must be in possession of ten (10) vehicles or; or d) Two of the above; or e) All of the above. 	<p>Waivered</p>
<p>Volume 1, Section 1, Service Continuity 6.1.2.5.</p>	<p>A tenderer must give proof that he will always be available to replace any one vehicle in the event of a scheduled maintenance or a breakdown of a vehicle. A tenderer therefore must give proof that:</p> <ul style="list-style-type: none"> a) With regards to vehicles that are chauffer driven cabs he is in possession of one (1) extra vehicle for every ten (10) vehicles presented or a fraction thereof; or b) With regards to vehicles that are lifter vans he is in possession of one (1) extra vehicle for te first seven (7) vehicles presented and there-after of one (1) extra vehicle for every ten (10) vehicles presented or a fraction thereof; or c) With regards to vehicles that are classified as servicing up to 14 students (Category D); servicing between 15 and 18 students (Category E); servicing between 19 and 36 students (Category F); and servicing between 37 and 53 students (Category G) he is in possession of one (1) extra vehicle for the first ten (10) vehicles presented and there-after of one (1) extra vehicle for every ten (10) vehicles presented or a fraction thereof; or d) Two of the above; or e) All of the above. 	<p>Waivered</p>

Clause No. in Failed Tender	Clause in Failed Tender	Clause in effective Negotiated Contract
Volume 1 Section 1, Tender Preparation 17.3	Should the fuel prices in force, as at the closing date for the submission of Tender offers, fluctuate by more than a buffer limit of ±€0.0467 per litre, then an upward or downward rate adjustment equivalent to ±€0.8% of the accepted rate shall be applicable for any amount per litre increase or decrease in excess of €0.467 per litre buffer limit.	Clause 05.4.1 states that the rate is directly linked to the monthly diesel pump price issued by Enemalta Corporation, with any fluctuations in the said pump price, being reflected in the rate.
Volume 1 Section 1, Tender Form C4	If our tender is accepted, we (<i>the bidder</i>) undertake a performance guarantee of ten percent (10%) of the contract value as required by the General Conditions	Waivered
Volume 3, Section 1, Safety Equipment and Rating 3.2(a)(b)	A vehicle will have a seat belt for each passenger With regards to lifter vans the safety equipment of wheelchairs and buggies is strap not clamp based.	Waivered
Volume 3, Section 1, Safety Equipment and Rating 3.6	The Contract Manager and a designate appointed by the Authority are to meet at least once (1) a month to review matters appropriate to the good governance and regulation of this Tender.	Waivered
Volume 3, Section 1, Customer Service Relationship Management 5.6	A service provider is to present at the end of each month to the Contract Manager a report setting out the number of contraventions, by type and including the driver who committed such contraventions.	Changed to: "09.4 <u>Where it is so possible</u> the service provider is to present . . . "
Volume 3, Section 1, Driver Competencies 6.3	A vehicle driver should preferably have a minimum of six (6) months experience as a school transport driver. In the event that a driver nominated by the tenderer had no experience with regards to the provision of school transport services, the tenderer may nominate such a driver subject to the condition that the said driver will only be engaged to provide services under this contract if the said driver attends a training programme specifically related to transport services in the education sector of the choice of the Directorate. The training programme would be at a cost to the tenderer.	Waivered

Clause No. in Failed Tender	Clause in Failed Tender	Clause in effective Negotiated Contract
<p>Volume 3, Section 1, Driver Competencies 6.9</p>	<p>Directorate will, at its cost, together with the successful service providers hold two (2) four (4) hour seminars annually on training on specific issues relating to school transportation in the education sector. Such training will be held during hours that are mutually convenient to both parties.</p>	<p>Waivered</p>
<p>Volume 3, Section 1, Service Parameters 7.1</p>	<p>Students residing within a distance of four (4) km from school shall not be picked up earlier than thirty (30) minutes before school starts. Students residing outside the four (4) km distance shall not be picked up earlier than one (1) hour before school starts.</p>	<p>Parameters regulating morning service for primary students residing outside the four (4) km distance from school were waivered.</p> <p>Distinction in service levels between primary and secondary students introduced. Clause consequently changed to: <i>"01.3.1(a)(i) Primary school students residing within a distance of four (4) km from their respective school shall not be picked up earlier than thirty (30) minutes before school starts."</i></p> <p>Distinction between secondary school students residing within and beyond a four (4) km radius from school was waivered. Parameters in this regard were consequently widened through an additional sub-clause, which states: <i>"01.3.1(b) Secondary school students shall not be picked up earlier than one (1) hour before school starts."</i></p> <p>Parameters widened for secondary school students through the introduction of an additional sub-clause, which states: <i>"01.3.1(d) Secondary students are to find their transport waiting for them no later than thirty (30) minutes of when school finishes."</i></p>

Clause No. in Failed Tender	Clause in Failed Tender	Clause in effective Negotiated Contract
<p>Volume 3, Section 1, Service Parameters 7.3</p>	<p>Students are to find their transport waiting for them no later than fifteen (15) minutes of when the school finishes.</p>	<p>Changed to: <i>“01.3.1(c) Primary students are to find their transport waiting for them no later than fifteen (15) minutes of when the school finishes.”</i> Parameters widened for secondary school students through the introduction of an additional sub-clause, which states: <i>“01.3.1(d) Secondary students are to find their transport waiting for them no later than thirty (30) minutes of when school finishes.”</i></p>
<p>Volume 3, Section 1, Service Parameters 7.4</p>	<p>Clauses 7.1 to 7.3 above do not apply for: a) Student transport services that provide an interchange service. b) Student transport services where-in the distance from the first pick-up point to the destination is equal to or greater than ten (10) km.</p>	<p>An additional exemption was introduced through a supplementary sub-clause, which exempts providers from the service levels in question when the service is: <i>“01.3.2(c) Provided during officially designated half school days.”</i></p>
<p>Volume 3, Section 1, Service Parameters, 7.7</p>	<p>...Force Majeure – which in the context of this Tender is defined to mean exceptionally bad weather, major traffic accidents, and other natural and weather conditions that render it impossible to deliver a normal transport service – will not be governed by this clause.</p>	<p>Clause 1.3.3 defines Force Majeure as exceptionally bad weather, major traffic accidents, road works and closure, abnormal congestion and other natural and weather conditions that render it impossible to deliver a normal transport services.</p>

Volume 3,
Section 1,
Service Level
Targets,
8.2

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	<table border="1"> <thead> <tr> <th>Service Level</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> </tr> </thead> <tbody> <tr> <td>Timeliness of First Pick Up Point</td> <td>=>90%</td> <td>0</td> <td>>=85% & <=89%</td> <td>5% of route value</td> <td>>=80% & <=84%</td> <td>7.5% of route value</td> <td>=<79%</td> <td>10% of route value</td> </tr> <tr> <td>Speed Within Safety Threshold</td> <td>=>90%</td> <td>0</td> <td>>=85% & <=89%</td> <td>5% of route value</td> <td>>=80% & <=84%</td> <td>7.5% of route value</td> <td>=<79%</td> <td>10% of route value</td> </tr> <tr> <td>Unexplained Major Deviations of School Route</td> <td>=>90%</td> <td>0</td> <td>>=85% & <=89%</td> <td>5% of route value</td> <td>>=80% & <=84%</td> <td>7.5% of route value</td> <td>=<79%</td> <td>10% of route value</td> </tr> </tbody> </table>	Service Level	Performance	Penalty	Performance	Penalty	Performance	Penalty	Performance	Penalty	Timeliness of First Pick Up Point	=>90%	0	>=85% & <=89%	5% of route value	>=80% & <=84%	7.5% of route value	=<79%	10% of route value	Speed Within Safety Threshold	=>90%	0	>=85% & <=89%	5% of route value	>=80% & <=84%	7.5% of route value	=<79%	10% of route value	Unexplained Major Deviations of School Route	=>90%	0	>=85% & <=89%	5% of route value	>=80% & <=84%	7.5% of route value	=<79%	10% of route value	<p>Service Level Targets revised downwards as follows:</p> <table border="1"> <thead> <tr> <th>Service Level</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> <th>Performance</th> <th>Penalty</th> </tr> </thead> <tbody> <tr> <td>Timeliness of First Pick Up Point</td> <td>=>85%</td> <td>0</td> <td>>=80% & <=84%</td> <td>5% of route value</td> <td>>=75% & <=79%</td> <td>7.5% of route value</td> <td>=<74%</td> <td>10% of route value</td> </tr> <tr> <td>Speed Within Safety Threshold</td> <td>=>85%</td> <td>0</td> <td>>=80% & <=84%</td> <td>5% of route value</td> <td>>=75% & <=79%</td> <td>7.5% of route value</td> <td>=<74%</td> <td>10% of route value</td> </tr> <tr> <td>Unexplained Major Deviations of School Route</td> <td>=>85%</td> <td>0</td> <td>>=80% & <=84%</td> <td>5% of route value</td> <td>>=75% & <=79%</td> <td>7.5% of route value</td> <td>=<74%</td> <td>10% of route value</td> </tr> </tbody> </table> <p>This downward revision is accompanied with the introduction of a new sub-clause, which states: <i>“09.1 In the event that the service provider manages to obtain a performance level of 90% and over in one or any of the above performance management criteria during a particular month, then the 5% difference between the 85% and 89% performance threshold will be considered as a bonus that can be offset during the course of a scholastic year against penalty points accrued with the said performance criteria.”</i></p>	Service Level	Performance	Penalty	Performance	Penalty	Performance	Penalty	Performance	Penalty	Timeliness of First Pick Up Point	=>85%	0	>=80% & <=84%	5% of route value	>=75% & <=79%	7.5% of route value	=<74%	10% of route value	Speed Within Safety Threshold	=>85%	0	>=80% & <=84%	5% of route value	>=75% & <=79%	7.5% of route value	=<74%	10% of route value	Unexplained Major Deviations of School Route	=>85%	0	>=80% & <=84%	5% of route value	>=75% & <=79%	7.5% of route value	=<74%	10% of route value
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Volume 3, Section 1, Service Level Targets, 8.4	The Service Level Targets Review will be carried out not later than three (3) weeks following the end of each scholastic term.	Clause 10.5 of the contract stipulates that the same Review meeting is carried out within one (1) month from the end of a scholastic term.
Volume 3, Section 1, Cancellations and Suspension of Service, 9.3	A service provider will be compensated in the case of a cancellation and/or suspension as stated in Clause 9.2 above at ten percent (10%) of the route price excluding the cost of fuel	<p>Unlike the tender document (which makes no such guarantees), the contract currently 'in vigore' guarantees payment for: “</p> <p>1.8</p> <p>a) Transport services to and from mainstream schools for a minimum of one hundred and sixty five (165) school days.</p> <p>b) Transport services to and from special needs schools for a minimum of one hundred and seventy five (175) school days.”</p> <p>This added guarantee is accompanied by an upward revision in the cancellation compensation clause, specifically: “01.11 In the event that the Directorate cancels a trip over and above the guaranteed minimum established in Paragraph 1.8 above, the service provider will be compensated at forty percent (40%) of the route price excluding the cost of diesel.”</p>
Volume 3, Section 1, Cancellations and Suspension of Service, 9.4	In the event of a cancellation and / or suspension of service by a service provider for whatever reason and / or dispute, the Directorate reserves the right to temporarily assign the affected service provision to another service provider as the Directorate may at its discretion choose.	Clause 12.3.1 of the contract stipulates that in such an occurrence, the Directorate can only re-assign the services provided by the defaulting member of the Co-operative. Moreover, the Directorate is to strive to source an alternative arrangement from within the other, non-defaulting members.

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N/A	Moratorium period not mentioned.	<p>The contract introduces a clause (08.2.4) detailing a moratorium period (vis-a-vis financial penalties) of 4 weeks to provide the service provider with enough time to fine-tune its operations in order to conform with the service levels. This clause was later revised in an Amendment Agreement dated 18th January 2012, so that no particular timeframe is assigned to such a period.</p>
N/A	Contribution towards the maintenance of a tracking system not mentioned.	<p>Clause 09.4.1 stipulates that the Directorate will contribute a part sum of the cost that the service provider will bear to introduce a GIS vehicle tracking information system subject to the following conditions;</p> <ul style="list-style-type: none"> a. The maximum amount to be contributed by the Directorate towards this cost is €100,000 annually over the term of the agreement;... b. This is a neutral cost and the service provider is not to load any form of margin and is expected to select the most economic solution that meets the requirements...

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