

# An Investigation of the Mater Dei Hospital Project

Report by the  
Auditor General  
May 2018



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Mater Dei Hospital Project

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## List of Abbreviations

AG	Auditor General
BBF	Base Budget Figures
CBM	Central Bank of Malta
CEDB	Council of Europe Development Bank
CEO	Chief Executive Officer
DAS	Departmental Accounting System
DG	Director General
DoC	Department of Contracts
FMS	Foundation for Medical Services
FMSS	Foundation for Medical Sciences and Services
FSWS	Foundation for Social Welfare Services
GCC	General Contracts Committee
ICP	Interim Certificate of Payment
IHIS	Integrated Health Information System
Lm	Maltese Lira
MDH	Mater Dei Hospital
MFIN	Ministry for Finance
MHECC	Ministry for Health, the Elderly and Community Care
MTF	Monte Tabor Foundation
MTFM	Monte Tabor Foundation – Malta
NAO	National Audit Office
OTV	Original Target Value
PFC	Projected Final Cost
PMO	Project Management Office
PS	Parliamentary Secretary
RFP	Room Functional Planning
SMJV	Skanska (Malta) Joint Venture
VAT	Value Added Tax

## Disclaimer

All observations mentioned in this Report are based solely on documentation made available at the National Audit Office up to 8 January 2018 and feedback obtained from meetings held up to this date. Therefore, any conclusions reached and remarks made in this Report are to be read in light of the fact that the National Audit Office did not have a complete picture of events relating to the investigation at hand, due to the incomplete documentation made available.

Given the nature of this investigation, the complexity of the Mater Dei Hospital Project, the extensive time period in question, and particularly the limitations on scope encountered during the conduct of this investigation, reference to other reports had to be resorted to, in order to provide as much detail as possible on the investigation assigned.

# Executive Summary

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1. On 12 June 2015, the Minister for Finance requested the Auditor General to investigate the process leading to the design, building, execution, certification, payment, completion and eventual closure of the Mater Dei Hospital (MDH) project. Concerns relating to the governance, transparency and financial management of the project were cited. Attention was also drawn to whether applicable national and European procurement regulations were adhered to and whether value for money was ascertained. It was with a view towards ensuring clarity, transparency, as well as fiscal and regulatory accountability that Government, through the Minister for Finance, called on the National Audit Office (NAO) to undertake this investigation.
2. Responsibility for the overall management of the MDH project rested with the Foundation for Medical Services (FMS). However, the NAO identified other stakeholders that had diverse roles in the various phases of the project, namely, the Ministry for Finance (MFIN), the Ministry for Health, the Elderly and Community Care (MHECC), the Treasury Department, the Department of Contracts, the Department of Health and the Central Bank of Malta (CBM).
3. Despite all efforts by the NAO, a comprehensive investigation of the MDH project was not possible, primarily due to the significant lack of documentation with respect to all stages of the project. This deficiency prohibited the Office from establishing a comprehensive understanding of the project, an essential requirement in formulating an audit opinion for the project as a whole. Notwithstanding the FMS's long-term responsibility for the management of this project, dating back to 1998, it was unable to provide the documentation requested by this Office, including the project's accounting records. The NAO is of the opinion that the Foundation's inability to provide basic information relating to a project of this magnitude represents an institutional failure and gross negligence in the administration of public funds. Moreover, an inadequate and unreliable audit trail detracts from the expected level of accountability, transparency, fairness and governance warranted in this project of national importance.
4. Given the circumstances, the NAO sought to collate information from the other stakeholders identified, whose collaboration is duly acknowledged. Despite this and the Office's efforts, the information obtained in this manner was not complete and fragmented. This further limited the Office from establishing a comprehensive understanding of facts, figures and events, prohibiting due analysis. The Office deemed this as a matter of grave concern, undoubtedly compounded when one considers the magnitude of public funds involved and the critical nature of the project.
5. Notwithstanding this, the limited documentation made available to the NAO, together with information obtained from various meetings held with stakeholders, was duly scrutinised and analysed in respect of the terms of reference set. Hereunder are the salient conclusions arrived at.

6. The NAO is not in a position to provide assurance with respect to the comprehensiveness of the contractual framework regulating all aspects of the project. This resulted in various concerns emerging with respect to the completeness, validity and accuracy of the Interim Certificates of Payment (ICPs), and the subsequent regularity of payments. Furthermore, the Office is not in a position to provide assurance as to whether applicable public procurement regulations were adhered to and the required approvals sought for all contracts/agreements entered into with respect to the MDH project. The NAO noted one instance where award was conditioned by the source of the funding.
7. The NAO was not provided with the documentation necessary in determining whether the formulation of contractual relationships and the subsequent amendments thereto were justified and appropriately authorised. The Office is of the opinion that the choice to adopt the San Raffaele Hospital of Milan as a model remained unclear. The October 1996 change in Government resulted in a radical change in policy and vision for the project, from a specialised to a general acute hospital. This Office is unable to comment on whether the necessary justifications were made. Furthermore, information regarding possible referral to Cabinet for authorisation, or decisions thereof, with respect to such a drastic change in project scope, was not made available to the NAO.
8. The September 1998 change in administration perpetuated the haphazard management of the project. With the change in government came a re-evaluation of the scope of the project and again, the NAO was not provided with any documentation regarding justifications put forward and authorisation granted for the Skanska (Malta) Joint Venture (SMJV) to assume the design function in addition to its existent role in the construction of the hospital. It is with concern that the NAO notes that, within a span of less than two years, responsibility for the design of the hospital was entrusted to three different parties, with significant changes in scope following suit. In the NAO's understanding, the disorganised series of changes reflected poorly on the overall planning and management of the project and bore long-term negative effects.
9. Between 2000 and 2003, concern regarding major departure from the Original Target Value (OTV) for the completion of the hospital project emerged. The Gap Analysis Report, commissioned by the FMS to establish an understanding of the circumstances that led to the variance between the OTV and the Projected Final Cost, Lm82,625,346 (€192,465,283), and Lm120,738,000 (€281,243,885), respectively, strongly recommended agreement with the SMJV on a lump sum cost and timeframe. The matter was discussed during an ad hoc FMS Board meeting, attended by the Minister MHECC and the Parliamentary Secretary (PS) MFIN, among others. The FMS Board resolved to confirm and adopt the recommendations made in the Gap Analysis Report, particularly, the option to resort to a lump sum agreement.
10. Although documentation supporting the consideration of resort to a lump sum arrangement was deemed adequate by the NAO, authorisation in this respect by the Minister MHECC, the PS MFIN, or any other competent authority was not provided to this Office. This failure detracts from the required level of accountability, transparency and governance expected in the case of this project, particularly in view of its high materiality.



11. While documentation reviewed by the NAO leading to the decision to enter into a Lump Sum Contract imparted the understanding that this contractual arrangement was to cap costs, limiting Government's exposure and therefore finalise matters, this was not the case. In fact, a Settlement Agreement was entered into by the FMS with the SMJV on 21 January 2009, which comprised an additional disbursement by Government of €5,125,000 (excluding VAT), over and above the lump sum, and more importantly, an absolute waiver of rights. The change, effected by the President FMS Board, comprised the payment of €5,125,000 by way of a variation order and not as a settlement of claims. The Inquiry Board, established by the Ministry for Energy and Health to investigate matters relating to the construction of the MDH, noted that the FMS Board was not reconvened to sanction the new Terms of Settlement Agreement.
12. The NAO was unable to determine whether the Lump Sum Contract was permissible and compliant with public procurement regulations and whether this represented the most economically advantageous agreement for Government. Based on documentation reviewed, the NAO formed an understanding that rather than focusing on securing the most economically advantageous way forward, Government was driven by its desire to complete the project within the stipulated timeframe of June 2005.
13. On 19 February 2009, the FMS and the SMJV entered into the Project Closure Agreement. The absence of any documentation relating to the justification for entering into this Agreement and authorisation thereof precludes the Office from establishing a comprehensive understanding of whether this was permissible, warranted and safeguarded government's interests.
14. Reason would dictate that once a Lump Sum Contract was entered into, the only additional justified payments would be completely new works or services commissioned after the Lump Sum Contract and not included in any way therein. The Office is unable to provide assurance that payments made under the Project Closure Agreement fit this understanding. Aside from the settlement of €5,125,000 in variation orders, the implications of the Project Closure Agreement extended beyond this settlement, with the waiver of all concerns, claims or disputes by the parties. According to the President FMS Board, the waiver clause was inserted on the insistence of the SMJV. Aside from governance concerns relating to the manner by which the waiver clause was introduced, the NAO's attention focused on the resulting implications of this change, with Government exposed to significant risks arising from latent defects and left with severely limited means of recourse to rectify such defects.
15. Documentation provided by the FMS in respect of expenditure reported was severely limited. Information retained by the FMS was not indexed and not organised in any coherent manner. The NAO was informed that the FMS commenced referencing of the actual project-related documents in order to entertain the Office's multiple requests for information. Site visits by the NAO confirmed the haphazard mismanagement of the considerable volume of documentation. In certain cases, the FMS indicated that the files/documents sought by the Office were not found and that the said boxes, referenced as containing the documents requested, were in fact empty.

16. In addition, the NAO sought information relating to the financial management of the project, particularly, the project's transaction listing, that is, a complete record of disbursements and inflows of funds relating to the project. The FMS informed the NAO that the transaction listing was not found in their accounting system. Failure by the FMS in this respect reflects a gross shortcoming in terms of financial management, essential in providing a basic level of accountability in the disbursement of substantial public funds. Given the centrality of the transaction listing, the NAO sought to compile this information through data available in central government's accounting system, the Departmental Accounting System. The accounting information made available by the Treasury Department in this respect was limited in terms of detail.
17. Since the NAO was not provided with a list of bank/Special Accounts, the completeness of accounts reviewed could not be ascertained. The CBM provided bank statements corresponding to the Special Accounts identified by the NAO. The Office noted that the FMS held a bridge loan facility with a local commercial bank, through which payments to the SMJV were effected. However, the insufficient or lack of any details in terms of the transaction narrative in the CBM statements and the failure to source documentation relating to the loan facility further prohibited the Office from compiling the project's transaction listing.
18. Project accounts were not made available to the NAO, despite requests to this effect. In the NAO's opinion, even if the project accounts were prepared and made available, in view of the concerns regarding control over the booked costs by the SMJV, doubt persists as to whether such accounts would have reflected a true and fair view of the project's financial position. Additional concerns emerged in respect of the project's fixed assets, with the MDH having to compile a fixed asset register with incomplete and incorrect information submitted by the FMS, which shortcoming detracts from providing a real and properly evaluated register.
19. It was not possible for the NAO to ascertain whether payments made were in relation to eligible goods and services under the relevant contracts since these were not made available to this Office. Furthermore, this prohibited the NAO from establishing what controls had to be in place. In view of this significant limitation, the Office was unable to determine whether the specifications, bills of quantities, reporting requirements, certifications and payments fully adhered to the stipulated controls. Of additional concern was the conflicting evidence provided by the President FMS Board to the Inquiry Board regarding the adherence of accepted works to contract specifications.
20. The NAO specifically sought to establish the composition of the various groups, teams and committees engaged to act as the control mechanism in the MDH project. Given the lack of information, the Office was hindered in establishing a high-level understanding of the overall framework of project control, the mandate of each group, team and committee, the interrelation, if any, between members of each group, and the level of independence of members from the SMJV. Compounding matters was the extensive duration of the project, conceptualised in 1990 and concluded in 2011.

21. Compliance testing undertaken by the NAO confirmed that all invoices made available were supported with the relevant ICP; however, the NAO was unable to determine whether the signatures corresponded to an authorised FMS/Government official. In addition, given that site inspection reports were not provided, the Office could not verify whether there were instances when ICPs were signed despite identified shortcomings in terms of the quality of work.
22. Despite the numerous requests made, the NAO was not provided with information indicating whether appropriate mitigating measures were taken on board to address instances of poor workmanship. The information that emerged through the Inquiry Board remains cause for concern. Matters highlighted related to shortcomings in quality standards and controls at the initial construction phase. In this Office's opinion, failure to take timely corrective action when attention was drawn created the setting and context within which subsequent shortcomings and concerns were allowed to materialise.
23. The NAO is not in a position to comment as to whether the variation orders addressed shortcomings identified during implementation, or otherwise. Moreover, the Office was not provided with the contract agreements, which prohibited the establishment of an understanding of the instances of non-compliance and the corresponding penalties that were to be imposed on the SMJV.
24. A reconciliation between the amounts submitted as certified works/goods by the contractors and the Government/FMS accounting records and hospital inventory was not possible due to the insufficient, and at times complete lack of, information made available to the NAO. Notwithstanding this gross limitation, the NAO attempted to construct an understanding based on the partial information obtained from different sources. This allowed the Office to arrive at indications of costs at different phases of the project, as represented in Section 2.20 of this Report.
25. In the NAO's overall opinion, the FMS's failure to provide the required information and documentation, together with the various other shortcomings highlighted in this Report, represents a scenario characterised by the breakdown of any sense of accountability, transparency and good governance. Reconciliation would have allowed the NAO to provide assurance, or otherwise, to Parliament and the taxpayer of the regularity of public funds availed of to finance the MDH project.

# Chapter 1

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## 1.1 Request by the Minister for Finance

- 1.1.1 On 12 June 2015, the Minister for Finance requested the Auditor General to investigate the process leading to the design, building, execution, certification, payment, completion and eventual closure of the Mater Dei Hospital (MDH) project (Appendix A refers). In the correspondence submitted, the Minister for Finance made reference to the findings of the Mater Dei Inquiry Board, headed by Justice Emeritus Dr Philip Sciberras, which focused on the structural defects present at the MDH. The findings of the Inquiry Board raised significant doubts relating to the governance, transparency and financial management of the project. Attention was also drawn to whether applicable national and European procurement regulations were adhered to and whether value for money was ascertained.
- 1.1.2 It was with a view towards ensuring clarity, transparency, as well as fiscal and regulatory accountability that Government, through the Minister for Finance, called on the National Audit Office (NAO) to undertake this investigation. Appended to the correspondence submitted was a non-exhaustive list of areas of particular concern to Government, determined following the publication of the Mater Dei Inquiry Board report.
- 1.1.3 In this regard, the NAO was requested to establish whether:
- a. payments in relation to the design, execution and completion of the MDH have been made in accordance with the conditions of the relevant contracts and/or financing agreements, with due attention to economy and efficiency, and only for the purposes for which the financing was provided;
  - b. the goods and services procured, namely but not restricted to, those of:
    - Monte Tabor Foundation in 1993 for the designs of the new hospital, construction, supervision services and take over operations;
    - Skanska (Malta) Joint Venture (SMJV) in 1995, for the construction of the hospital;
    - Norman and Dawbarn in 1998, for the design of the expanded hospital;
    - SMJV in 1998 through the Memorandum of Understanding;
    - SMJV in 2000, for the design, execution and completion of the new hospital;

- SMJV in 2005 through the Lump Sum Amendment Agreement;
  - SMJV in 2009 through the Project Closure Agreement;  
have been awarded in accordance with the relevant national public procurement regulations and that all procedures related to public procurement and financial approvals for the relevant competitive procedures (as applicable) were fully followed;
- c. the necessary justifications and authorisations were obtained from the competent authorities in order to add, delete or convert the previous contracts and agreements in particular in 1998, 2005 and 2009;
  - d. the amendment in the contract with the SMJV, in 2005, into a lump-sum contract, was permissible and was not in breach of the original competitive process, in terms of level playing field with the other bidders;
  - e. the Lump Sum Contract and the Project Closure Agreement were the most economically advantageous agreements for the Government and verify whether and how, at the time, the negotiators achieved reasonable assurance of this; to establish also how the Lump Sum Contract and subsequently the Project Closure Agreement were determined;
  - f. the necessary supporting documents, records and accounts have been kept in respect of all expenditures reported;
  - g. where Special Accounts have been used, these were maintained in accordance with the provisions of the relevant financing agreements;
  - h. the project accounts have been prepared in accordance with consistently applied International Accounting Standards and give a true and fair view of the financial situation of the project at the time, and of resources and expenditures for the year ended on that date;
  - i. the project's fixed assets are real and properly evaluated and project property rights or related beneficiaries' rights are established in accordance with the conditions of the contracts and the project closure agreements;
  - j. payments made are in relation to eligible goods and services under the relevant contracts and against deliverables that can be quantified and accounted for;
  - k. there was full adherence to the level of controls established in the contract in terms of specifications, bills of quantities, reporting, certifications and payments;
  - l. site inspections were routinely carried out and that the outcome of these inspections was properly documented;

- m. the persons/teams engaged to act as the control mechanism were independent from the contractors during the whole process and the level of independence thereof;
- n. site inspections specifically outlined any shortcomings during the implementation phase, and in which sections of the hospital were these shortcomings identified;
- o. interim certificates duly signed by the Architect responsible were prepared for invoices issued by the contractor;
- p. there were instances, if any, where interim certificates were still signed by the Architect responsible for the project even in cases where site inspections outlining any shortcomings in the quality of work provided by the contractor had already been documented;
- q. in cases where poor workmanship was identified during the implementation, any mitigating measures had been taken on board in order to address the situation, and whether such mitigating measures were properly documented;
- r. in the case of variation orders these variation orders came about in order to address any shortcomings identified during implementation;
- s. in cases where the contractor was not found to be compliant with the Contractor's Obligations as stipulated in the Contract Agreement, any penalties were imposed during the implementation phase as per conditions specified in the contract; and
- t. there exists, or sufficient information is available, to enable a reconciliation between the amounts submitted as certified works/goods by the contractors and the Government/Foundation for Medical Services (FMS) accounting records, and the inventory of the hospital. If this exists, such a reconciliation is to be undertaken.

## 1.2 Limitations on Scope

- 1.2.1 The NAO acknowledged the request for investigation submitted by the Minister for Finance and in late June 2015 informed the Minister of the limitations on scope with respect to the terms of reference proposed. Indicated by the NAO was that the audit of all payment transactions was neither feasible nor practical and that the Office was to undertake verification based on samples, as is standard professional practice. The NAO noted that auditing by means of sampling would not necessarily result in a comprehensive review; however, the alternative, that is the audit of a population of data, was not viable, especially in view of the Office's limited resources and other regulatory obligations. Therefore, the Office intended to review the matters referred to in paragraphs 1.1.3 (a), (e) and (j) in this sense.

- 1.2.2 The agreements made reference to in paragraph 1.1.3 (b) were to be reviewed in their entirety; however, the level of detail that the NAO was to delve into was to be determined during the course of the review. Similar considerations applied to paragraphs 1.1.3 (c) and (d). With regard to the term of reference cited in paragraph 1.1.3 (b), specific attention was to be directed at establishing whether the goods and services awarded under the agreements were in line with applicable national public procurement regulations; however, as stated above, a sample of such goods and services was to be selected for further testing. In line with the above, the Office was to sample test particular payments made and therefore, was to review corresponding supporting documentation (paragraph 1.1.3 (f) refers).
- 1.2.3 The NAO anticipated that the availability of documentation, especially that in respect of key decisions and authorisations, was doubtful, more so in view of the considerable time lapse. Even if project record-keeping systems were in place and records did exist, this would undoubtedly be voluminous and there could be information gaps that would hinder the investigation. Nonetheless, in line with standard practice, the NAO intended to comprehensively review all documentation pertaining to payments sampled. If the sampled transactions were settled through Special Accounts, then the NAO would pay particular attention to whether these accounts were maintained in accordance with the relevant financing agreements (paragraph 1.1.3 (g) refers). The NAO was also to establish whether project accounts were prepared in accordance with International Accounting Standards and gave a fair view of the financial situation of the project at the time (paragraph 1.1.3 (h) refers).
- 1.2.4 If possible, the Office was to determine whether site inspections were carried out and if these inspections resulted in any shortcomings being identified during the implementation phase. Once again, the NAO was to limit its scope of review to a sample of project deliverables (paragraphs 1.1.3 (l) and (n) refer). In addition, for the same sample of project deliverables, the NAO was to ascertain whether interim certificates were prepared for each invoice issued by the contractor. Particular attention was to be directed towards instances where site inspections outlined shortcomings in the quality of work provided and possible mitigating measures implemented (paragraphs 1.1.3 (o), (p) and (q) refer). This review was to also establish whether variation orders were resorted to with respect to the sampled project deliverables, in order to address any shortcomings noted (paragraph 1.1.3 (r) refers).
- 1.2.5 Furthermore, the NAO was to review penalties imposed on contractors, if circumstances so warranted (paragraph 1.1.3 (s) refers). In a wider understanding of project management and control, the Office intended to establish, through sample testing, whether adherence to provisions relating to specifications, bills of quantities, reporting, certifications and payments was maintained (paragraph 1.1.3 (k) refers).
- 1.2.6 With regard to paragraphs 1.1.3 (i) and (t), which addressed matters relating to fixed assets and the reconciliation of certified works and goods, the NAO required more information before commenting further. Nonetheless, these were to be taken into account when undertaking the relevant investigation.

1.2.7 Other NAO concerns related to the anticipated difficulty in establishing value-for-money of a project of this complexity and nature. Moreover, issues relating to the fragmentation of data, the inaccessibility of key personnel and the considerable lapse in time since project commencement were but a few of the factors that could limit the NAO.

1.2.8 It was in this context that the NAO adopted the terms of reference proposed by the Minister for Finance. However, each of the terms was qualified on the basis of considerations outlined in the preceding paragraphs.

### 1.3 Methodology

1.3.1 The NAO undertook this investigation in accordance with Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Act XVI of 1997).

1.3.2 Responsibility for the overall management of the MDH project rested with the FMS. However, the NAO identified other stakeholders that had diverse roles in the various phases of the project, namely, the Ministry for Finance (MFIN), the Ministry for Health, the Elderly and Community Care (MHECC), the Treasury Department, the Department of Contracts (DoC), the Department of Health and the Central Bank of Malta (CBM).

1.3.3 The NAO submitted its initial request for documentation to the FMS on 2 May 2016 (Appendix B refers). The FMS, as the main stakeholder, was informed that requests for documentation were to be redirected to the pertinent ministry should any of the information sought not be available at their end. Hereunder is a summary of the key documentation requested by the NAO from the FMS:

- a. all issued tenders, complete documentation supporting the award of contracts and agreements, and the meeting minutes of various boards substantiating changes thereto;
- b. Cabinet decisions endorsing alterations to the project, including the decision to decline the offer made by the SMJV to take over the design phase under a Design & Build Cost Plus Agreement;
- c. detailed lists of payments, in relation to all phases of the project, as well as supporting certificates and approvals;
- d. details of bank/special accounts through which payments were effected;
- e. information relating to the establishment of the Project Management Office (PMO) and documentation substantiating its operations; and
- f. details as to the composition of various boards, committees, technical teams and groups involved in the project.



- 1.3.4 Aside from requests for documentation directed to the FMS, the NAO also sought information from the other stakeholders involved in the project. To this end, requests were submitted to MFIN, the MHECC, the Treasury Department, the DoC, the Department of Health and the CBM. Requests addressed matters relevant to the specific involvement of each stakeholder.
- 1.3.5 Given the centrality of the MDH Inquiry Board report to the subsequent request made by the Minister for Finance, the NAO made reference to this report in the conduct of its investigation. The MDH Inquiry Board was chaired by Justice Emeritus Philip Sciberras, a Partner Nexia BT and an Architect. The Inquiry Board report was dated 1 June 2015. Other reports were also referred to.
- 1.3.6 Various meetings were held by the NAO between April 2016 and May 2017. Multiple meetings were held with the President FMS Board, the CEOs FMS and other senior officials of the Foundation, as well as with the Permanent Secretary Ministry for Health and the Permanent Secretary MFIN, among others. Meetings held were intended to facilitate the sourcing of documentation, provide a means of obtaining clarification on matters identified, and to discuss difficulties encountered, primarily in relation to obtaining the required information from the diverse stakeholders. Issues discussed were duly documented and submitted as correspondence for purposes of validation and as a record of progress.
- 1.3.7 Information obtained by the NAO through meetings held and documentation submitted thereafter was duly scrutinised and analysed in respect of the terms of reference set by the Office. Observations reported in Chapter 2 must be considered in light of the following disclaimer:
- a. all observations are based on the limited documentation made available to the NAO and feedback obtained through meetings held up to 8 January 2018;
  - b. the extensive scope and audit period of this investigation, as well as the complexity of the MDH project compounded the process of sourcing relevant and complete information; and
  - c. the limitations on scope resulting from the gaps in documentation requested and obtained, constrained the NAO to refer to third party reports.
- 1.3.8 In line with its guiding principles of independence, fairness and objectivity, the NAO sought to ensure that the issues brought to its attention were duly scrutinised and the resultant findings objectively reported on. The NAO's findings and conclusions are based solely and exclusively on the evaluation of such documentation and information supplied, and the evidence at its disposal. In its scrutiny of the MDH project, the NAO reported on any identified shortcoming or irregularity in the use of public resources, even in instances when such shortcomings or irregularities extended beyond the terms of reference set.

# Chapter 2

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## Audit Observations

**2.0.1** Given the breadth and complexity of the MDH project, the considerable time period involved, ranging from 1989 to 2011, and the extensive scope of the terms of reference set, the NAO was of the understanding that its observations be structured according to the terms of reference. While this approach does not provide a chronological overview of the entire project, it provides insight into each of the specific terms, which correspond to particular aspects of the MDH project. For a chronological perspective of the key developments relating to the project, reference may be made to the timeline presented in Section 3.1 of this Report.

### **2.1 Payments: Regularity in terms of relevant Contracts/Financing Agreements**

**2.1.1** The NAO sought to determine whether payments in relation to the design, execution and completion of the MDH were made in accordance with the conditions of the relevant contracts and/or financing agreements. In addition, the Office sought to ascertain the economy and efficiency of such disbursements and whether regularity in terms of the purposes for which the financing was provided was assured.

**2.1.2** In this regard, the NAO was not provided with all relevant contracts and/or financing agreements despite numerous requests to this effect. The following agreements entered into by Government and the SMJV<sup>1</sup> were neither provided by the FMS nor traced in documentation made available to the Office by other stakeholders, namely, the:

- a. Construction, Finishing and Engineering Works (1995);
- b. Design, Execution and Completion (1998);
- c. Design & Build Cost Plus Contract (2000); and
- d. Lump Sum Contract (2005).

**2.1.3** Agreements entered into by Government/FMSS/FMS with other parties for various aspects of the MDH project, yet similarly not made available to the NAO, comprised the:

- a. Construction Agreement with the Italo-Maltese Foundation Monte Tabor (July 1993);

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<sup>1</sup> The SMJV comprised Skanska International Building Ltd, Blokrete Ltd, Devlands Ltd and Cassar, Grech, Ebejer & Partners.

- b. Supply Agreement with the Italo-Maltese Foundation Monte Tabor (July 1993);
- c. Financial audit undertaken by Bovis Europe (July 1996);
- d. Design Consultancy Contract with Norman & Dawbarn Ltd (July 1998);
- e. Fifth Italian Protocol Agreement (20 December 2002); and
- f. Supply, Installation and Commissioning of Medical Equipment and Medical Furniture and the Provision of related services for the New Hospital with Inso SpA (26 December 2003).

2.1.4 The only agreements made available to the NAO were the Frame Agreement entered into between the Foundation for Medical Sciences and Services (FMSS)<sup>2</sup> and the Italo-Maltese Foundation Monte Tabor in 1993, and the Project Closure Agreement entered into by the FMS and SMJV in 2009. Although letters of acceptance relating to the award of the tender for the Construction, Finishing and Engineering Services for San Raffaele Hospital (1995), Design Consultancy Services in Connection with the Tal-Qroqq Acute General Hospital (1998) and that relating to the Design & Build Contract for the New Hospital (2000) were traced, these were insufficient for the NAO to ascertain whether payments made were in accordance with contractual specifications. Moreover, the Office remained uncertain whether other contracts relating to the MDH project were entered into. In the case of the supply of an Integrated Health Information System, although the NAO noted direct reference thereto in documentation reviewed, the Office could not establish whether this was in fact entered into. Therefore, the NAO is not in a position to provide assurance that the above-cited agreements represent the complete contractual framework that was to regulate all aspects of the project.

2.1.5 Notwithstanding this, based on the limited information provided, the NAO undertook compliance testing and noted the following:

- a. various concerns emerged with respect to the completeness, validity and accuracy of Interim Certificates of Payment (ICP). Certain ICPs were not provided in original format while others did not bear a separate and distinct reference;
- b. different modes of payment hindered verification of the completeness of payments made. Funds were made available from the appropriation of central government budgets and through the topping up of advance payments into various CBM accounts. The NAO noted that payments were effected through the government accounting system preceding the Departmental Accounting System (DAS) and subsequently through DAS, by means of direct payments and foreign drafts from the CBM accounts, and settlement through a commercial bank loan;

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<sup>2</sup> The FMSS was established by Government in 1990 as an autonomous body of a non-commercial nature. It was to provide healthcare services, promote medical studies through teaching and collaborate with other similar bodies. In March 1998, the FMSS was restructured, resulting in the setup of the FMS and the FSWS. The FMS retained responsibility for health sector services, while the FSWS took over social welfare services.

- c. the contra-entry in a specified CBM account of a payment by draft transfer in excess of Lm4,000,000 (€9,300,000) was not traced;
- d. an overpayment of approximately €3,500,000 was noted in the review of an ICP relating to the contract with Inso SpA arising from the addition of a retention amount that was meant to be deducted;
- e. an overpayment of approximately €1,000,000 arising from the interpretation by the FMS that figures cited in the Project Closure Agreement excluded Value Added Tax (VAT), when this was not explicitly stated in the Agreement; and
- f. a payment of Lm2,000,000 (€4,659,000) in terms of the Memorandum of Agreement entered into on 4 December 1998 between the Chair FMS and SMJV representatives. The Inquiry Board noted that no explanation was given for the payment thereof, while minutes indicated that the sum constituted a 'gesture of goodwill'. The NAO cannot ascertain whether this disbursement constituted an additional payment or an on account payment, therefore the regularity of this payment remains a moot point.

2.1.6 Although the Office's findings remain anecdotal in nature, effectively constrained in terms of scope by the limited documentation made available, concerns relating to the regularity of payments, as well as the economic and efficient use of public funds persist. Moreover, these concerns are accentuated when one considers the shortcomings identified by the NAO, together with those identified by the Inquiry Board.

## 2.2 Regularity of the Goods/Services Procured with Public Procurement Regulations

2.2.1 The NAO requested documentation relating to the award of the contracts indicated in the request for investigation submitted by the Minister for Finance. This documentation was essential in order to ascertain compliance with applicable public procurement regulations and determine whether the necessary financial approvals were obtained. The stipulated contracts comprised that entered into by the Government/FMS with the:

- a. Monte Tabor Foundation in 1993 for the design of the new hospital, construction, supervision services and take over operations;
- b. SMJV in 1995, for the construction of the hospital;
- c. Norman and Dawbarn in 1998, for the design of the expanded hospital;
- d. SMJV in 1998 through the Memorandum of Understanding;
- e. SMJV in 2000, for the design, execution and completion of the new hospital;

- f. SMJV in 2005 through the Lump Sum Amendment Agreement; and
- g. SMJV in 2009 through the Project Closure Agreement.

2.2.2 Aside from the above-cited contracts, the NAO also sought information in relation to:

- a. the engagement of Ortesa SpA for the design of the hospital (1993);
- b. the financial audit that was to be undertaken by Bovis Europe (1996);
- c. the contract entered into with Inso SpA for the supply, installation and commissioning of medical equipment and medical furniture and provision of related services for the new hospital (2003);
- d. the contract entered into with Frezza SpA for the supply, installation and commissioning of medical services to implement a comprehensive furniture system for MDH (22 December 2004);
- e. the Integrated Health Information System (IHIS);<sup>3</sup> and
- f. any agreements paid out of the Non-Medical and Facilities Vote.

2.2.3 Specifically requested in this respect was all documentation relating to tender specifications, call for tenders, tender adjudication reports, appeals lodged and officials involved at all stages of the procurement process. In addition, the NAO requested Cabinet decisions in support of any alterations and/or approvals to the MDH project. Notwithstanding the numerous requests made by the NAO addressed to the FMS, none of the information requested was provided. Requests addressed to MFIN, the DoC and MHECC, albeit scoped according to their respective function in the procurement process, were also futile. In view of this significant absence of documentation, the NAO is not in a position to provide assurance as to whether applicable public procurement regulations were adhered to and the required approvals sought.

2.2.4 The only documentation provided by the DoC in relation to a selection procedure was in respect of the contract awarded to Inso SpA for the supply, installation and commissioning of medical equipment and medical furniture and the provision of related services for the new hospital. In its review, the NAO noted that on 30 April 2002, the Adjudication Board unanimously concluded that this tender should be awarded to Hospitalia International GmbH since their bid was deemed to be the most advantageous offer with regard to technical compliance, cost and overall quality. In its recommendations, the Adjudication Board also remarked that although the cheapest tender was submitted by Inso SpA, at €64,000,000, it represented the weakest of

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<sup>3</sup> Although it was unclear whether the IHIS contract was entered into, the NAO was provided with a support contract entered into by the Ministry for Investment, Industry and Information Technology with Malta Information Technology and Training Services Ltd for ICT consultancy services in relation to the IHIS.

offers as the evaluation revealed it to be technically inferior. The difference in value between the bid submitted by Inso SpA and that of Hospitalia International GmbH was of approximately €10,000,000. On 8 October 2002, the Chair General Contracts Committee (GCC) informed the members that Secta, the technical advisors to the Adjudication Board, were to re-evaluate the offer submitted by Inso SpA. In this context, Inso SpA were provided with the opportunity to submit additional information to their original bid, which resulted in a higher compliance level. On the basis of the report submitted by Secta, the GCC unanimously agreed that the contract should be awarded to Inso SpA.

2.2.5 Subsequently, Hospitalia International GmbH and Simed International BV, other tendering parties involved in the process, lodged appeals. In its report dated 28 October 2003, the Public Contracts Appeals Board decided to annul the decision in favour of Inso SpA and to disqualify the tender by Hospitalia International GmbH on the basis of the conditional nature of their offer. Furthermore, the Public Contracts Appeals Board recommended that clarifications be obtained from Simed International BV in relation to all the items and areas highlighted by the technical, financial and legal advisors commissioned by the Adjudication Board.

2.2.6 In correspondence dated 26 December 2003, FMS indicated that the response by Simed International BV was not satisfactory in this respect. Minutes of the GCC also held on 26 December 2003 reported that:

- a. it was not in the public interest to delay any further the award of the contract;
- b. the offer by Hospitalia International GmbH had been disqualified and that of Simed International BV was still less technically responsive than that submitted by Inso SpA;
- c. the Public Contracts Appeals Board cancelled the original decision of the GCC to award the tender to Inso SpA but in no way disqualified the offer;
- d. the offer by Inso SpA's offer was approximately €10,000,000 less than both other bids; and
- e. Secta described the offer by Inso SpA as of 'an acceptable calibre' in its re-evaluation report.

2.2.7 It was in this context that the GCC unanimously agreed and recommended that the Minister of Finance and Economic Affairs was to, "... exercise the authority vested in him by Clause 4(4) of the Public Service (Procurement) Regulations 1996<sup>4</sup> and approve the award of this contract to Inso SpA of Italy at a total cost of circa Euro 64 million ...". The NAO traced approval issued by Mr John Dalli, the then Minister of Finance and Economic Affairs, affirmed in a reply to a parliamentary question (PQ 1034); however, the Office noted that the approval was not signed and dated. The Office established that the final contract value was updated to €66,403,000.

<sup>4</sup> Clause 4(4) of the Public Service (Procurement) Regulations 1996 states that, "*The Minister may, in writing, dispense from any of the provisions of these regulations and may order that any procedure therein prescribed be not carried out, he may further in writing convalidate anything done not in accordance with these regulations or any procedure prescribed therein, or in writing direct that any procurement be carried out otherwise than in accordance with these regulations.*"

- 2.2.8 Concerns regarding the outcome of the adjudication process emerged when reviewing ancillary documentation. In correspondence submitted by the Head Foreign Financing Division to the Permanent Secretary Ministry of Health, Care of the Elderly and Family Affairs, dated 4 December 1996, it was stated that, “It is therefore vital for Malta to mop up the Lit 20 billion grants available as Commodity Aid for 1997 that one submits to the Farnesina a list of projects which will have a high content of Italian sourced equipment.” Reference was also made to the medicines and equipment likely to originate from Italy for the running and upgrading of the other hospitals, that is, St Luke’s Hospital, St Vincent de Paul and Boffa Hospital.
- 2.2.9 The NAO’s attention was subsequently drawn to documentation relating to funding obtained through the Fifth Italian Protocol intended to finance various aspects of the MDH project. These funds covered the provision and installation of soft, loose and fixed furniture as well as the design, provision and installation of a storage and logistics system for the MDH. In correspondence submitted by the DoC to the Permanent Secretary Ministry of Finance and Economic Affairs in May 2003, reference was made to the pre-qualification exercise for the procurement of furniture at the MDH. Cited in this regard was that, “... in the first instance an unpublished restricted call for Expression of Interest goes under way exclusively from selected Italian prospective bidders; subsequently, those short-listed bidders would be invited to submit a formal tender.” It was also recommended that any right of appeal be eliminated as, “the scope to exclude all forms of publicity would be defeated.”
- 2.2.10 Of particular interest was correspondence exchanged between a secretariat officer within the Office of the Prime Minister and the Permanent Secretary Ministry of Finance and Economic Affairs, dated 22 July 2004. Appended to this correspondence was a document which stated that, “About half of the construction costs of the Mater Dei hospital, including the medical equipment, are being financed by the Development Bank of the European Council. During the tendering process for this project the German company Hospitalia was disqualified in the last round. The decisive factor for this was ‘technical reasons’. The first award to Inso was appealed against by the other bidders, namely, the German company Hospitalia and the Dutch company Simed. The basis for this was also that Inso, with the weakest offer had been permitted to hold subsequent consultations, which went against the regulations of the tendering process. The complaint was upheld. However, in the end, the Government disregarded even the newly appointed Public Appeals Board and awarded the contract to Inso again in the second round.” Also noted was that, “Sources close to the Government explain the award of the contract to the Italian consortium by pointing to the fact that Italy came to the aid of the Maltese economy by means of the so-called Financial Protocol that was renewed at the end of 2003. The acceptance of the bid, it has been claimed, was a form of ‘compensation’ for the Financial Protocol.”
- 2.2.11 On the basis of documentation reviewed, the NAO is of the opinion that the adjudication process leading to the award to Inso SpA was unfair, intended to favour the bid submitted by Inso SpA not because it was the most advantageous offer but merely due to the fact that it was an Italian company. Despite the decision by the Adjudication Board not to award the tender to

Inso SpA, which decision was reaffirmed by the Public Contracts Appeals Board, Government proceeded in this respect regardless. While the authorisation issued by the Minister of Finance and Economic Affairs was permitted by law and based on the conclusion arrived at by the GCC, the NAO contends that the process was vitiated through the procedural anomalies introduced favouring Inso SpA at the expense of other competitors.

## 2.3 Justification/Authorisation for Contractual Amendments

- 2.3.1 The NAO was requested to verify whether the necessary justifications and authorisations were obtained from the competent authorities in order to add, delete or convert the previous contracts and agreements in particular in 1998, 2005 and 2009. Hereunder are the Office's salient observations in this respect.
- 2.3.2 On 15 July 1992, a Letter of Intent was signed between the FMSS and the Monte Tabor Foundation (MTF) Malta, set up in 1991, specifying the building of a 450-bed specialised hospital to complement the St Luke's Hospital. The FMSS were to make available land, construct the structure and provide all equipment including medical and sanitary. The MTF Malta were tasked with responsibility for the design and construction supervision, as well as the operation of the San Raffaele Hospital Malta. In 1993, these tasks were contracted to the MTF<sup>5</sup> by the FMSS. The MTF appointed Ortesa SpA as designers of the project. The NAO was not provided with any information substantiating the basis of Government's decision to adopt the San Raffaele Hospital of Milan as a model.
- 2.3.3 The SMJV was awarded the contract for the construction of the San Raffaele Hospital Malta on 12 September 1995. The October 1996 change in Government resulted in a radical change in policy and vision for the project. The designed capacity of the hospital was increased to 980 beds and was intended to serve as a general acute hospital replacing St Luke's Hospital. Although reference was made to a report commissioned by Government motivating this change, the NAO was not provided with primary documentation to this effect. This Office is unable to comment on whether the necessary justifications were made. Furthermore, information regarding possible referral to Cabinet for authorisation, or decisions thereof, with respect to such a drastic change in project scope, was not made available to the NAO.
- 2.3.4 In April 1997, the contracts with the MTF Malta and Ortesa SpA were terminated. Notwithstanding the termination of contracts with the construction supervisor and the project designer, in January 1998, full development permission was granted for the construction of an additional floor on the existing structure together with a new hospital wing. In July 1998, Norman & Dawbarn were chosen as the new designers for the hospital. No documentation regarding the manner with which these changes were carried out was provided to the NAO.

<sup>5</sup> The MTF comprised representatives from the Fondazione Centro San Romanello di Monte Tabor and representatives of the Maltese Government. Despite queries to this effect, the NAO was not provided with information regarding the representatives of the Maltese Government.



This Office was unable to establish the rationale behind these significant changes and whether the required approvals were obtained. In the NAO's understanding, the disorganised series of changes reflected poorly on the overall planning and management of the project and bore long-term negative effects.

- 2.3.5 The September 1998 change in administration perpetuated the haphazard management of the project. With the change in government came a re-evaluation of the scope of the project, amended from 980 beds to 650 beds, with a possible extension to 825 beds. The contract for the design of the hospital with Norman & Dawbarn was terminated. Instead, on 4 December 1998, a Memorandum of Understanding was signed with the SMJV for the design, execution and completion of the hospital. Subsequently, on 29 February 2000, the SMJV and the FMS entered into an agreement for the building, finishing and commissioning of the new hospital under a design and build contract.<sup>6</sup> Of interest was the fact that the SMJV had proposed taking over the design function from Ortesa SpA in July 1996; however, this proposal was declined by the FMSS. Again, the NAO was not provided with any documentation regarding justifications put forward and authorisation granted for SMJV to assume the design function in addition to its existent role in the construction of the hospital. It is with concern that the NAO notes that, within a span of less than two years, responsibility for the design of the hospital was entrusted to three different parties, with significant changes in scope following suit. Moreover, following the termination of the relationship with Ortesa SpA, no party was tasked with responsibility for design for a substantial part of this term. Notwithstanding this, the construction of an additional floor on the existing structure together with a new hospital wing were approved during this period when no party was tasked with responsibility for design.
- 2.3.6 Between 2000 and 2003, concern regarding major departure from the original target value (OTV) for the completion of the hospital project was captured in various FMS Board and Committee meetings. The NAO noted that correspondence regarding the escalation in project costs had been brought to the attention of MFIN as early as August 1997. In an effort to identify the variances and reasons thereto, on 24 September 2003, the FMS Board commissioned a detailed gap analysis between the OTV and the projected final cost (PFC). The gap analysis was undertaken by a Financial Consultant and presented to the FMS Board in April 2004. The analysis comprised a thorough study and breakdown of SMJV's base budget figures, followed by a detailed deconstruction of the project's PFC. Of interest to the NAO was correspondence rendering evident difficulties encountered by the Financial Consultant in obtaining vital information essential in terms of the gap analysis. Notwithstanding this, the NAO is of the opinion that the Gap Analysis Report provided insight into the circumstances that led to the escalation of project costs.
- 2.3.7 Noted in the Gap Analysis Report was that original base budget estimate by the SMJV was far from robust and practically bore no resemblance to the PFC estimates compiled by the SMJV. The absence of a complete project design also compelled the SMJV to make certain

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<sup>6</sup> According to the Inquiry Board Report, indicated in the minutes of the FMS Board meeting dated 30 March 1999 was reference to advice against the Cost Plus Agreement by the previous FMS Board members.

assumptions, adopt statistical budget methods or allow lump sums provisions in certain areas. A comprehensive analysis of SMJV's forecast computations revealed that the projections, initially presented to the client in June 2003 and updated on a monthly basis, were very conservative. According to the Gap Analysis Report, in view of the contract's 'cost plus %' nature, the SMJV appears to have focused on all sunk costs, that is, all costs incurred during the life of the project.

2.3.8 Cited in the Gap Analysis Report were the reasons giving rise to the increase from an OTV of Lm82,625,346 (€192,465,283), as referenced in the Design & Build Contract, and the PFC of Lm120,738,000 (€281,243,885), as per SMJV report dated 26 September 2003 (Figure 1 refers). Noted was that both sums excluded unallocated contingencies, management and design fees and further claims for time extension.

Figure 1: Gap Analysis Report - OTV and PFC variances

	Original budget	Re-allocations by SMJV	Revised budget	PFC	Variance
Preliminaries	Lm12,929,293 €30,117,151	Lm443,705 €1,033,555	Lm13,373,028 €31,150,776	Lm26,435,517 €61,578,190	(Lm13,506,224) (€31,461,039)
Floor and wall finishes	Lm4,225,815 €9,843,501	Lm619,798 €1,443,741	Lm4,845,613 €11,287,242	Lm4,897,695 €11,408,560	(Lm671,884) (€1,565,069)
Doors, partitions & joinery	Lm4,443,214 €10,349,904	Lm47,861 €111,486	Lm4,491,075 €10,461,391	Lm4,984,007 €11,609,613	(Lm540,793) (€1,259,709)
Screed, gypsum walls & plastering	Lm9,182,792 €21,390,151	(Lm3,362,719) (€7,833,028)	Lm5,820,073 €13,557,123	Lm8,893,413 €20,716,080	Lm289,379 €674,072
Structural works	Lm11,107,450 €25,873,399	Lm1,930,265 €4,496,308	Lm13,037,715 €30,369,706	Lm18,664,220 €43,475,938	(Lm7,556,770) (€17,602,539)
External works	Lm3,941,107 €9,180,310	(Lm268,465) (€625,355)	Lm3,672,642 €8,554,955	Lm7,556,755 €17,602,504	(Lm3,615,648) (€8,422,194)
Mechanical works	Lm18,423,109 €42,914,300	Lm8,872 €20,666	Lm18,431,981 €42,934,966	Lm23,685,833 €55,173,149	(Lm5,262,724) (€12,258,849)
Electrical works	Lm18,372,566 €42,796,567	Lm580,653 €1,352,558	Lm18,953,219 €44,149,124	Lm25,622,018 €59,683,247	(Lm7,249,452) (€16,886,681)
<b>Total package summary</b>	<b>Lm82,625,346</b> <b>€192,465,283</b>	<b>Lm0</b> <b>€0</b>	<b>Lm82,625,346</b> <b>€192,465,283</b>	<b>Lm120,739,462</b> <b>€281,247,291</b>	<b>(Lm38,114,116)</b> <b>(€88,782,008)</b>

Source: Gap Analysis Report (2004)

2.3.9 According to the Gap Analysis Report, the main factors contributing to the variance comprised:

- a. ongoing design changes and development;
- b. measurement growth or material discrepancies on re-measurement;
- c. increased scope of works;
- d. higher material costs including carriage, insurance and freight charges and currency risk;

- e. increase, as well as underestimation, of several item quantities that often resulted in complete revisions of original bills of quantities issued at tender stage;
- f. in-house operating expenses incurred by the SMJV, particularly material and labour costs;
- g. use of different sized items or different materials than originally envisaged;
- h. preliminary costs incurred due to change in sub-contractual agreements;
- i. inclusion of Block A1/A2 Level 11 and Block E Level 9 East in forecast estimates. These blocks were not included in SMJV's OTV since these did not form part of the original Design & Build Contract; and
- j. disputes with subcontractors as to re-measured work, rates and/or interpretation of contractual agreement originally entered into by the SMJV.

2.3.10 In light of the material adverse variances and the continuous escalation in costs, the Gap Analysis Report strongly recommended that:

- a. the contractual agreement entered into be revised and possibly renegotiated;
- b. attempts be made to reach an amicable agreement with the SMJV on a lump sum cost and timeframe; and
- c. more stringent control systems be introduced, particularly with respect to the receipt and issue of material to and from site, weighing thereof, re-measurement of works, audit of the SMJV's Nominal Leger and Fixed Asset Register updates.

2.3.11 The Gap Analysis Report was endorsed by the FMS Board and subsequently discussed during an ad hoc FMS Board meeting held on 3 May 2004, attended by Dr Louis Deguara, then Minister for Health, the Elderly and Community Care, Mr Tonio Fenech, then Parliamentary Secretary (PS) MFIN, their respective Heads of Secretariat, and the Permanent Secretary MHECC, among others. During discussions held, reference was made to instructions received by the FMS from 'higher authorities' regarding advice necessary with respect to the implication and/or meaning of the term target value within the Design & Build - Cost Plus Contract. The FMS Legal Adviser noted that different interpretations had been given to the importance and overall validity of the term 'Target Value' in the contract and unless a consensual definition was agreed on, different conclusions would be reached depending on the legal perspective on the matter, hence perpetuating the impasse with the SMJV.

2.3.12 During the FMS Board meeting of 3 May 2004, the FMS President proposed possible courses of action, namely to:

- a. continue the project in its present form, that is, Design & Build – Cost Plus; or

- b. change the modality of payment for the project, possibly through a fixed lump sum agreement with special conditions; or
- c. adopt a more radical approach by seeking other parties to complete the project and therefore terminate the contract with the SMJV.

Subsequently, on 12 May 2004, the FMS Board resolved to confirm and adopt the recommendations made in the Gap Analysis Report.

2.3.13 Following the ad hoc FMS Board meeting referred to in the preceding paragraphs, an FMS Project Manager was tasked with analysing the findings of the Gap Analysis Report and comment on the extent of variances attributable to the SMJV. The report, referred to as the 'Without Prejudice Report', was finalised on 17 May 2004. Hereunder are the major variances identified:

- a. the Design & Build Contract was signed with an overall completion date of June 2005. However, it was noted that in the then PFC forecast, the SMJV had made an allowance for the prolongation of the contract period beyond June 2005. This allowance amounted to approximately Lm7,000,000 (€16,306,000), much of which was tied up with the delay in the award of the Medical Equipment Contract;
- b. Lm2,000,000 (€4,659,000) for 'new positions' over and above the original staffing plan. Lm1,440,000 (€3,354,000) were confirmed by the SMJV as relating to costs up to the end of the original contract period, while the remainder related to prolongation costs beyond the overall completion date of the Design & Build Contract;
- c. the SMJV stated that final cleaning was the responsibility of the FMS and had therefore not factored this cost in the OTV;
- d. there had been no significant change to the overall site plan proposed by the SMJV at pre-construction stage, justifying the variance of Lm3,690,000 (€8,595,000) relating to external works. Due to the inadequacy of the SMJV allowance in the OTV for hard landscaping, the Government/FMS were compelled to authorise additional expenditure amounting to approximately Lm900,000 (€2,096,000);
- e. previous landscaping designs by SMJV indicated an even higher cost than was eventually achieved with the finally accepted design;
- f. the allowance in the OTV for roads was inadequate when considered in terms of the scale of the hospital development, leading to an overspend of approximately Lm1,500,000 (€3,494,000); and

- g. increases in mechanical works costs arose as a result of the need for additional chillers and disputes with a sub-contractor on measurement principles. Associated power package modifications resulted in an approximate increase of Lm480,000 (€1,118,000) in project costs.

2.3.14 In sum, urged in the Without Prejudice Report was the need for agreement to be reached with the SMJV on their forecast of the project's final cost. This would ensure that the SMJV would commit to a cost 'not to be exceeded' to complete the project and achieve the construction completion programme milestone by September 2006.

2.3.15 On 17 May 2004, the President FMS submitted correspondence to the Minister for Health, the Elderly and Community Care, copied to the PS MFIN and the Permanent Secretary MHECC, intended to assist Government in reaching an equitable decision as to the most appropriate way forward. Reference was made to the Gap Analysis Report, conflicting legal advice obtained regarding the interpretation of the term 'Target Value', the memorandum submitted by the Chief Executive Officer (CEO) FMS, and the Without Prejudice Report in an effort to take stock and provide context to Government's position regarding the project. Also outlined in the correspondence were the main contributors to cost escalation identified by an FMS Board member, namely:

- a. erroneous target value assessment;
- b. enhancement of specifications by commissioning teams;
- c. increase in the floor area of the hospital;
- d. increase in the scope of services in the hospital;
- e. introduction of new services;
- f. resorting to tender with incomplete contract documents;
- g. incomplete, or in cases inexistent, detailed drawings and bills of quantities; and
- h. late decisions by FMS, including the late award of the Medical Equipment Tender and the late appointment of Cost Controllers.

2.3.16 Although documentation supporting the consideration of resort to a lump sum arrangement was deemed adequate by the NAO, authorisation in this respect by the Minister for Health, the Elderly and Community Care, the PS MFIN, or any other competent authority was not provided to this Office. Compounding matters was the fact that the NAO was not provided with the Lump Sum Contract entered into in 2005, cited as Lm146,557,783 (€341,387,802)<sup>7</sup>. These gross

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<sup>7</sup> This figure is indirectly cited in clause 3.2 of the Project Closure Agreement.

shortcomings in terms of documentation prohibited the NAO from ascertaining whether the authorisation provided was appropriate, whether it reflected advice and recommendations made by the FMS and whether authorisation provided was faithfully reflected in the Lump Sum Contract. The NAO's concern is heightened in view of the major change in the nature of the contractual relationship between Government/FMS and the SMJV, from a cost plus modality to a fixed sum. Failure to provide the NAO with the relevant documentation detracts from the required level of accountability, transparency and governance expected in the case of this project, particularly in view of its high materiality.

- 2.3.17** While documentation reviewed by the NAO leading to the decision to enter into a Lump Sum Contract imparted the understanding that this contractual arrangement was to cap costs, limiting Government's exposure and therefore finalise matters, this was not the case. According to the Inquiry Board report, a Settlement Agreement was entered into by the FMS with the SMJV on 21 January 2009. From the information gathered in this respect, the NAO understood that the Settlement Agreement comprised an additional disbursement by Government of €5,125,000 (excluding VAT), over and above the lump sum, and more importantly, an absolute waiver of rights. In the NAO's opinion, this effectively compromised the finality of the Lump Sum Contract. An element of context was provided in the Inquiry Board report, wherein it was stated that in December 2008, various claims were raised by the parties against each other; however, negotiations in this respect failed. According to the Inquiry Board report, on 20 December 2008, the President FMS informed Mr John Dalli, Minister for Social Policy that arbitration was inevitable. Agreement was reached on 26 December 2008, formalised through the signature of a Terms of Settlement Agreement. This Agreement was brought to the attention of and approved by the FMS Board on 15 January 2009. A fundamental discrepancy was noted by the Inquiry Board when comparing the Terms of Settlement Agreement endorsed by the FMS Board with that entered into with the SMJV. The change, effected by the President FMS Board, comprised the payment of €5,125,000 by way of a variation order and not as a settlement of claims. The Inquiry Board noted that the FMS Board was not reconvened to sanction the new Terms of Settlement Agreement.
- 2.3.18** It must be noted that the NAO's reliance on third party information, in this case the Inquiry Board, was not in line with standard practice, but a constraint imposed on the Office as a result of the failure of the FMS to provide key documentation essential for due analysis. The NAO was unable to ascertain whether the Lump Sum Contract provided for amendments to be made to the contractual terms, as this key document was not made available. Neither was it possible for the NAO to determine the precise nature of the changes brought about by the Terms of Settlement Agreement, and whether such changes were conformant with that stipulated in the Lump Sum Contract, as the Settlement Agreement was also not made available.
- 2.3.19** Shortly thereafter, on 19 February 2009, the FMS and the SMJV entered into the Project Closure Agreement. The NAO reviewed the Project Closure Agreement, sourced in files retained by MFIN; however, the Office was unable to identify changes made through comparison with the Terms of Settlement Agreement for the latter document was not made available. The

Inquiry Board Report made reference to correspondence, dated 5 April 2009, submitted by the President FMS Board to the Minister for Social Policy. In this correspondence, the President FMS Board stated, “I realize that I have not communicated with you directly regarding the closure of negotiations with Skanska, despite the fact that [CEO FMS] advised me that he had briefly informed you about it. ... Your clear direction and backing were extremely important in our achieving this result. Just in case you had not been forwarded a copy of this ‘Project Closure’ agreement, I am attaching herewith a PDF copy thereof.” The President FMS Board proceeded to give a general overview of the terms agreed. Contradictory testimony was provided to the Inquiry Board by the Minister for Social Policy, whereby the Minister stated, “... u lanqas qaluli [referring to the President FMS Board and CEO FMS] li kienu qeghdin jiffirmawh u lanqas ma gejt infurmat li kkonkludew.” The NAO’s concern in this respect centres on whether the required ministerial authorisation was sought and obtained prior to the FMS entering into the Project Closure Agreement on 19 February 2009. The absence of any documentation relating to the justification for entering into the Project Closure Agreement following the Lump Sum Contract and authorisation thereof precludes the Office from establishing a comprehensive understanding of whether this was permissible, warranted and safeguarded government’s interests.

## **2.4 Regularity of the Lump Sum Contract**

**2.4.1** As part of its investigation, the NAO sought to determine whether the amendment in the contract with the SMJV, on 12 April 2005, into a Lump Sum Contract, was permissible. Furthermore, the Office sought to establish whether this change conformed with the original competitive process, specifically in terms of ensuring a level playing field with the other bidders. In order to determine whether the Lump Sum Contract entered into with the SMJV in 2005 was permissible and not in breach of the original competitive process, understood as leading to the award of the Design & Build Contract, the NAO required documentation relating to the tender for the design and build of the hospital, from conceptualisation to award, as well as the Design & Build Contract and Lump Sum Contract.

**2.4.2** Despite numerous requests to this effect, the NAO was not provided with any of the aforementioned documentation. This prohibited the Office from undertaking a review of the amendment to the contractual relationship between Government/FMS and the SMJV, and whether this was permissible in terms of the Design & Build Contract and compliant with public procurement regulations. Irrespective of whether the amendment was legally permissible, the NAO is of the opinion that, by their very nature, amendments pursuant to the award of any contract are contrary to the principle of ensuring a level playing field among bidders.

## **2.5 Economic Advantageousness of the Lump Sum Contract/Project Closure Agreement**

**2.5.1** In order to determine whether the Lump Sum Contract and the Project Closure Agreement were the most economically advantageous agreements for the Government, the NAO sought

to establish whether any related feasibility studies were undertaken to determine the impact of multiple scenarios under both Agreements. The limited information made available to this Office did not provide insight in this respect and no reference was made to studies undertaken in all documentation reviewed.

2.5.2 Notwithstanding, the FMS did undertake analysis indirectly related and leading to the decision to resort to a Lump Sum Agreement, namely, the Gap Analysis Report, the Without Prejudice Report and the FMS memorandum presented during the ad hoc FMS Board meeting referred to in paragraph 2.3.13. The analyses undertaken provided a context and rationale leading to the decision to resort to a lump sum agreement; however, whether this was the most economically advantageous agreement for Government remains a moot point. The implications, be they financial or otherwise, of adopting one course of action over another were not considered. The options discussed by Government entailed continuing the project in its Cost Plus Design and Build form, or continuing the project in another form, possibly lump sum, or termination of the contract with the SMJV. In the NAO's understanding, analysis undertaken was retrospective, highlighting variances and reasons thereof, whereas reasonable assurance may have more readily been obtained had feasibility studies been carried out. Rather than focusing on securing the most economically advantageous way forward, Government was driven by its desire to complete the project within the stipulated timeframe of June 2005.

2.5.3 With respect to the Project Closure Agreement, reason would dictate that once a Lump Sum Contract was entered into, the only additional payments that would be justified would be completely new works or services commissioned after the Lump Sum Contract and not included, in any way, therein. The NAO was not provided with adequate documentation essential in justifying that variation orders covered by the Project Closure Agreement in fact comprised new works or services commissioned after the Lump Sum Contract. An element of concern emerges with respect to that cited in correspondence exchanged between the former CEO FMS and the President FMS Board on 5 February 2009, reported in the Inquiry Board report. Stated in this correspondence was that, "[SMJV] has introduced the term 'Amended Main Agreement' which re-introduces the issue SMJV tried to force upon us [FMS] which is their assertion that there was a change of Scope to the Main Agreement as a result of the Amendment Agreement – this must not be accepted." This statement resonates and validates the NAO's concern in this respect. The Office is unable to provide assurance that payments made under the Project Closure Agreement corresponded to entirely new works or services commissioned after the Lump Sum Contract.

2.5.4 Aside from the settlement of €5,125,000 in variation orders, the implications of the Project Closure Agreement extended beyond this settlement. Specific reference is made to clause 9.1, reproduced hereunder:

'Except as explicitly stated in this Project Closure Agreement, the parties will not be liable whatsoever for all and any further, past, present or future concerns, claims or disputes that the parties have or may have in respect of the Amended Main Agreement and each Party waives



with binding effect all its rights in relation to the Amended Main Agreement except in relation to those rights explicitly stated in this Project Closure Agreement.’

- 2.5.5 In testimony provided to the Inquiry Board, the President FMS Board stated that the waiver clause was inserted on the insistence of the SMJV. Further drawing the NAO’s concern was that stated by the President FMS Board, who declared that, “... at no point was a waiver of the kind found in the Contract [Project Closure Agreement] discussed or agreed upon.” Aside from governance concerns relating to the manner by which the waiver clause was introduced, the NAO’s attention focused on the resulting implications of this change, with Government exposed to significant risks arising from latent defects and left with severely limited means of recourse to rectify such defects.
- 2.5.6 Notwithstanding the broad and all encompassing nature of the waiver clause, the Inquiry Board noted the release of a pending balance of €200,000 on 24 November 2011, which amount had been retained due to defective works undertaken in 1996. Correspondence submitted by the CEO FMS to the President FMS Board indicated that legal advice was sought and “... pursuing the line of attempting to get SMJV to resolve the problem was not a recommended way forward.” The NAO maintains reservations whether this release of funds was in line with the waiver cited in the Project Closure Agreement. More so, when one considers that the SMJV had invoked this waiver a few months earlier, on 26 July 2011, when contesting claims raised by the FMS regarding structural defects identified.

## 2.6 Retention of Expenditure-related Supporting Documentation

- 2.6.1 The NAO sought to determine whether the necessary supporting documents, records and accounts were kept in respect of all expenditures reported. Documentation provided by the FMS in this regard was severely limited, prohibiting the NAO from establishing a comprehensive understanding of facts. Information retained by the FMS was not indexed and not organised in any coherent manner. This concern assumes greater relevance when one considers the scale of the project, which undoubtedly generated voluminous documentation. The NAO was informed that the FMS commenced referencing of the actual project-related documents in order to entertain the Office’s multiple requests for information. In fact, the initial request for documentation made by the NAO in March 2016 could not be addressed prior to February 2017, that is, the point at which the FMS referenced documentation retained. Moreover, the Office established that documentation retained was not complete. Site visits by the NAO confirmed the haphazard mismanagement of the considerable volume of documentation for which the FMSS/FMS was responsible, with loose documents scattered about.
- 2.6.2 On occasion, the Office requested information registered as available by the FMS; however, the documents requested were not traced. In practical terms, the FMS references corresponded to particular boxes within which documents relating to the project were stored. When requests were raised by the NAO for certain boxes, the FMS indicated that the files/documents were not found and that the said boxes were in fact empty.

- 2.6.3 Although the NAO was provided with the possibility of vetting all documents at the FMS in order to find documents deemed relevant for the conduct of the investigation, the Office maintained that responsibility for the organisation and coherence of files/documents rested solely with the auditee, in this case, the FMS. Notwithstanding the access granted to the FMS premises, failure to adequately reference and manage documentation generated throughout the project's lifespan was deemed tantamount to failure to provide the Office with the required documentation.
- 2.6.4 In this context, the NAO sought documentation relating to the MDH project from MFIN. Efforts undertaken by MFIN proved useful, resulting in the submission of numerous files for the attention of the NAO. The Office noted the positive results yielded through an appropriately managed and referenced documentation and filing system. Nevertheless, two important files relating to the Fifth Italian Protocol, financing the design, supply and installation of equipment and the provision of services for MDH, and the procurement of an information technology system, were not traced. As part of the discussions held with MFIN regarding the sourcing of information, the NAO raised its significant concerns regarding the difficulties encountered in obtaining reliable and complete information, which was effectively limiting the proper conduct of the investigation.
- 2.6.5 Meetings were also held with the Ministry for Health, wherein the NAO requested details in respect of the Non-Medical and Facilities Vote (DAS Item 7234) and documentation relating to the Integrated Health Information System and IT Hardware. Present for these meetings was the CEO FMS, who was requested to submit a list of the payroll and office costs incurred by the FMS and subsequently reimbursed from MFIN. Although the Ministry for Health provided a number of ministerial files relating to the project, the specific information requested was not submitted.
- 2.6.6 Similarly, efforts were undertaken by the NAO to source information from the DoC, specifically requesting all documentation from the tender evaluation stage onwards for the design and build of MDH (including the SMJV, the MTF and Norman & Dawbarn), the procurement of furniture and non-medical facilities, as well as the commissioning of an Integrated Health Information System. Although the DoC sought to assist this Office, information was not made available, with the Department effectively limited by the generic search terms provided by the NAO (in turn conditioned by the lack of relevant specific file reference details) and the change in the DoC's file recording system, from a manual-based system to one that was electronic. Moreover, the DoC expressed concern regarding the completeness of traced records.
- 2.6.7 Aside from the project-related documentation, the NAO sought information relating to the financial management of the project. The Office requested the FMS to make available the project's transaction listing, following up the initial request with numerous reminders to this effect. The transaction listing was deemed essential in this investigation, as this would have provided a comprehensive account of payments issued, suppliers engaged and the timing of settlements, which would have indicated project progress, as well as possible inflows relating

to the project. The transaction listing was to serve as the basis for conducting the financial investigation of sampled transactions and/or sampled suppliers, apart from other analysis. Notwithstanding the essential nature of the financial data requested for investigation by the NAO, and the obvious requirement of the same information by the FMS for purposes of project management, the FMS informed the NAO that the transaction listing was not found in their accounting system.

- 2.6.8 Given the centrality of the transaction listing, the NAO sought to compile this information through data available in DAS, that is, the accounting system used by central government. For the period 1996 to 1999, the accounting records of the Ministry for Health were not registered on DAS but were maintained on the previous accounting system. It was not possible for the NAO to retrieve information from accounting records registered on this system. With respect to the period 2000 to 2011, information was at times very limited, in that it failed to identify key variables such as the supplier paid, invoice details and related amounts. On occasion, the financial data available on DAS solely comprised aggregate amounts, without the possibility of obtaining a breakdown of figures cited. Attempts were made by the Treasury Department, on request by the FMS, to forward to the NAO all accounting information available on DAS related to the project. The information made available in this respect was limited in terms of detail, provided aggregate data and only corresponded to the period 2006 to 2009.

## 2.7 Special Accounts in accordance with the Financing Agreements

- 2.7.1 The NAO was unable to determine whether Special Accounts used were maintained in accordance with the provisions of the relevant financing agreements, for such agreements were not made available. Furthermore, since the Office was not provided with a list of bank/Special Accounts, the completeness of accounts reviewed could not be ascertained.<sup>8</sup> In the review of documentation, the NAO noted that the FMS held a bridge loan facility with a local commercial bank, through which payments to the SMJV were effected. However, no documentation relating to the loan facility was traced.
- 2.7.2 Notwithstanding these limitations, the NAO identified Special Accounts held at the CBM. One Special Account identified corresponded to the period 2001 to 2004, which Account was held by the Ministry for Health. The CBM informed the NAO that it was only possible to provide details of transactions corresponding to this Special Account through back-end queries and not through statements of account. To this end, information required, reported as illustrating all transactions and running balances, was made available in excel format. Other Special Accounts identified related to the period 2005 to 2011, which Accounts were held by the Ministry for Finance. The CBM provided bank statements corresponding to these Special Accounts. Insufficient or the complete lack of any details in terms of the transaction narrative further prohibited the NAO from compiling the project's transaction listing.

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<sup>8</sup> In correspondence exchanged between the Ministry for Finance and the Ministry of Foreign Affairs in August 1997, reference was made to loan facilities up to Lm50 million available by the Council of Europe Social Development Fund. Due to the limited documentation, the NAO was unable to determine whether this facility, in full or in part, was availed of and whether a financing agreement was entered into.

## 2.8 Project Accounts

- 2.8.1 One aspect of the request for investigation made to the NAO comprised verification as to whether the project accounts were prepared in accordance with the applicable International Accounting Standards. Moreover, the Office was to indicate whether the project accounts provided a true and fair view of the financial situation of the project at the time, and of resources and expenditures for the year ended on that date.
- 2.8.2 Project accounts were not made available to the NAO, despite requests to this effect. Also requested were the interim and management accounts relating to the MDH project, as well as the financial audit report drawn up by Bovis Europe in 1996. None of the documentation requested was forthcoming. Although the FMS did provide financial statements of the Foundation, corresponding to various years when the project was underway, it was not possible for the NAO to identify which figures related to the project since the financial information provided corresponded to all functions and responsibilities of the FMS. Therefore, the NAO is unable to express an opinion as to whether the project accounts, if prepared, were in accordance with International Accounting Standards and provided a true and fair view of the financial situation of the project for the period of interest.
- 2.8.3 Notwithstanding this limitation, documentation reviewed provided evidence of an element of ex-post control over project expenditure. Specific reference is made to the Gap Analysis Report, which involved an internal audit of each sub-contractor's file, re-measurement of figures and scope of works, altogether intended to provide substantiating evidence and a comprehensive comparison to the base budget figures.<sup>9</sup> In addition to the insight obtained on the variances between the OTV and the PFC through the Gap Analysis Report, emphasis was placed on the vital need to carry out a comprehensive internal audit of the SMJV's booked costs. This concern was again brought forward by the CEO FMS in the memorandum dated April 2004. Of interest to the NAO was that, "In view of the remarks in this report [Gap Analysis Report] and if it is revealed that there is a possibility that all the Contractor's costs were not being challenged and audited, then the FMS must, in earnest, commission a thorough exercise to ensure value for money." This contrasted with a previous statement reported in the same memorandum, wherein it was stated that, "In various presentations made to the FMS Board the Cost Controllers confirmed that the total remeasuring of the works was being carried out."
- 2.8.4 In the NAO's opinion, even if the project accounts were prepared and made available to this Office, in view of the concerns regarding control over the booked costs, doubt persists as to whether such accounts would have reflected a true and fair view of the project's financial position.

<sup>9</sup> It is pertinent to note that the OTV was exclusive of costs relating to field surveying, testing, insurance (in terms of prolongation of the contract period), as well as audit, legal and consultancy fees.

## 2.9 Project Fixed Assets, Project Property Rights and related Beneficiary Rights

- 2.9.1 In determining whether the project's fixed assets were real and properly evaluated, the NAO sought to establish an understanding of the position at the time of migration to MDH, immediately thereafter and at present. Concerns and difficulties encountered regarding the compilation of a complete fixed asset register at the MDH were flagged in correspondence exchanged between the Financial Management Monitoring Unit, the MDH and the FMS in November 2007, which coincided with the migration process. Further concerns were raised during an Accrual Accounting Financial Management Meeting held on 30 June 2009, wherein the members of the working group enquired as to the reason why no movement in the MDH fixed assets were reported by the FMS between the years 2007 and 2008.<sup>10</sup> The NAO's attention was drawn to the fact that, during 2009, there was no Director Finance at the MDH, a fully-fledged financial management system was not in place and room loading lists, which had been provided by the FMS pre-migration, were not updated. In addition, the FMS was to provide the MDH with a plant register; however, this never materialised. The Office's concern in this respect centres on MDH having to compile a fixed asset register with incomplete and incorrect information, which shortcoming detracts from providing a real and properly evaluated register.
- 2.9.2 The NAO sought to determine whether the MDH resolved the issues that emerged in respect of the incompleteness of the pre-migration room loading lists forwarded by the FMS. In addition, the Office enquired whether the MDH have in place an asset and plant register, together with assertions as to the completeness and correctness thereof. This information was an essential component in determining the accuracy of assets as reported in the project accounts. Information required by the NAO in this regard was not forthcoming up to the date of writing of this report.
- 2.9.3 The NAO cannot ascertain whether project property rights or related beneficiaries' rights were established in accordance with the conditions of the contracts and agreements as these were not made available to the Office. Although the NAO reviewed the Project Closure Agreement, no reference to property rights or related beneficiaries' rights was made in this context.

## 2.10 Payments: In relation to Eligible Goods and Services

- 2.10.1 It was not possible for the NAO to ascertain whether payments made were in relation to eligible goods and services under the relevant contracts since the relevant contracts were not made available to this Office. Of concern to the NAO was the conflicting evidence provided by the President FMS Board to the Inquiry Board. In correspondence submitted by the President FMS Board to the Minister for Social Policy, as cited in the Inquiry Board Report, "In general, FMS accepted works which albeit not being in full accordance to contract specifications, still carried out their intended function – and, in any case, these had been supervised by FMS's staff for the

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<sup>10</sup> Also noted in the Accrual Accounting Financial Management Meeting was that purchases of fixed assets by the MDH were not being recorded as such in DAS and, at the time, the MDH was not in a position to check whether assets were properly flagged in DAS.

years it took to build the Hospital.” However, testimony provided by the President FMS Board to the Inquiry Board, subsequently presented to Parliament, stated that, “... he [President FMS Board] was constantly under advisement and also sought re-assurances that all the works were done in accordance with the standards and specifications established in the contract of works.”

## 2.11 Level of Controls

2.11.1 The NAO was requested to verify whether there was full adherence to the level of controls established in the contract in terms of specifications, bills of quantities, reporting, certifications and payments. However, the Office was not provided with the contracts and was thereby prohibited from establishing what controls had to be in place. Moreover, in view of this significant limitation, the Office was unable to determine whether the specifications, bills of quantities, reporting requirements, certifications and payments fully adhered to the stipulated controls.

## 2.12 Site Inspections

2.12.1 Although specific requests for documentation relating to site inspections were made to the FMS, no information was forthcoming, thereby prohibiting the NAO from undertaking the required verifications. However, in its review of the Inquiry Board report, the NAO noted testimony provided by a Senior Technical Officer, Works Division, who stated that although tests were carried out by the Works Division, samples were delivered directly to the laboratory by the SMJV. This procedure introduces an element of doubt in terms of the integrity of the testing process and confidence in results obtained therefrom.

## 2.13 Independence of Control Mechanisms

2.13.1 Another aspect of the NAO’s analysis centred on whether the persons/teams engaged to act as the control mechanism were independent from the contractors during the whole process and the level of independence thereof. To this end, details corresponding to the composition of the various groups, teams and committees tasked with management of the MDH project were requested from the FMS. The NAO specifically sought to establish the composition of the MTF, the MTF Malta, the Decision Group, the FMSS/FMS Board, the FMS Negotiating Team and the Steering Committee. In addition, the Office requested information relating to the setup of the PMO in 1993, specifically indicating interest in the joint venture agreement between the Works Division and the Malta University Services Ltd setting up the PMO, as well as any meeting minutes and advice provided with respect to the project. Despite numerous requests in this regard, the FMS did not provide any of the information requested by the NAO. This hindered the Office in establishing a high-level understanding of the overall framework of project control, the mandate of each group/team/committee, the interrelation, if any, between members of each group, and the level of independence of members from the SMJV. Notwithstanding this limitation in scope, the NAO reviewed the Inquiry Board report, which focused on the controls in place with respect to the construction of the Accident and Emergency Department

at the MDH. The main conclusions arrived at by the Inquiry Board are presented hereunder, structured according to stakeholder.

- 2.13.2 In terms of the Design & Build Contract, the SMJV was to ensure that the site as a whole, as delivered to Government, met the specifications set. The Inquiry Board maintained that it had “enough evidence to determine that the tests provided by the Contractor [SMJV] are fraudulent.” Concerns relating to the independence of quality testing emerged as early as 1996. Noted in the Final Structural Design Review commissioned by the FMSS at the time was that, “... SMJV had carried out its own quality checks.” Referring to the extent of the defective concrete found on site, the Inquiry Board further concluded that, “... such defect could not be a result of genuine mistake or failure of oversight, but must have been the result of a concerted effort from which the Contractor [SMJV], Suppliers, and possibly third parties benefitted.” However, the Inquiry Board reported that it had “no evidence identifying any particular individual or individuals.” Nevertheless, the Inquiry Board commented that “... it is shameful how a contractor of international renown, fame and stature such as Skanska International could default so comprehensively in its quality assurance and oversight, and possibly participated in fraudulent activity.”
- 2.13.3 The Inquiry Board concluded that, “... the PMO was found wanting, severely understaffed and unprepared for the crucial role it assumed for the success of a project of this magnitude. ... The constant and persistent failings of the PMO, and subsequently the Client’s Representative [FMSS/FMS], to carry out the expected oversight borders in the least on gross negligence.”
- 2.13.4 With respect to the involvement and role of Ortesa SpA, the Inquiry Board noted that it, “... was also tasked with overseeing construction and thus share in the failure of the PMO in protecting the interests of the client [FMSS].” Furthermore, the Inquiry Board expressed concern on the, “... pronounced let-down in providing the necessary expertise and level of diligence needed for the proper commissioning of such a project.” The NAO noted that the ARUP Report, dated May 2015, made reference to the relation between Ortesa SpA (appointed by the MTF as project designers) and the co-founders of the MTFM, who were responsible for the supervision of design and construction, as well as the operation of the hospital. The Inquiry Board made reference to correspondence received by the MTFM, dated 17 July 1996. Stated in this correspondence was that, “... all the shortcomings have been attributed to Ortesa ... for a situation that ... is much more complex and with different responsibilities.”<sup>11</sup>
- 2.13.5 A significant element of responsibility, in terms of the control mechanisms essential in securing project achievement, was attributed to the FMSS/FMS and Government by the Inquiry Board. Specifically stated in this regard was that the, “... FMSS and the Government remained passive, resolving only to hold further meetings rather than taking the necessary direct and drastic measures required.” Moreover, both failed “... to intervene when faced with the growing

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<sup>11</sup> Source is as follows, “Sono molto preoccupato in quanto ritengo che tutte le colpe siano state fatte ricadere su ORTESA quale capro espiatorio di una situazione che, come le ho spiegato nella mia nota, è molto più complessa e con responsabilità diverse.”

problems and concerns afflicting the project,” despite matters being brought to their attention. When one considers that at the time, three of the FMSS Board members were also Government Members of Parliament, “... it would be naive to consider that the Government did not know or could not have known of the dire state that the project was in.”

**2.13.6** Compounding matters was the extensive duration of the project, conceptualised in 1990 and concluded in 2011. The FMSS/FMS Board underwent numerous changes throughout this 21-year period, as detailed hereunder (Figures 2 and 3 refer).

**Figure 2: Presidents FMSS/FMS Board, 1990-2018**

Period	Name
8 December 1990 – October 1996	Hon Dr Louis Galea
6 December 1996 – 15 July 1997	Mr Mario Cacciottolo
21 July 1997 – 19 February 1999	Mr Alfred Sladden
19 February 1999 – 28 May 2003	Dr Joseph L Pace
28 May 2003 – 11 August 2004	Mr Rene Formosa
11 August 2004 – 31 March 2005 (Acting)	Arch Paul Camilleri
1 April 2005 – not available	Arch Paul Camilleri <sup>1</sup>
31 May 2013 – November 2013	Mr Mario Grech
November 2013 – June 2014	Mr Joe Cappello
June 2014 – July 2016	Mr Peter Cordina
14 January 2017 – to date	Ing. Joseph Sammut

Notes:

1. The NAO noted that Architect Paul Camilleri informed the Inquiry Board that he was appointed President FMS Board in 2007, when the FMS financial statements for year-end 2004 indicated that appointment to President FMS Board was effective in April 2005.

**Figure 3: Vice Presidents FMSS/FMS Board or CEOs FMSS/FMS, 1991-2018**

Period	Name
3 October 1991 – not available	Rev Fr Charles G Vella
3 October 1991 – 27 June 1992	Dr George Hyzler
27 June 1992 – not available	Hon Prof John Rizzo Naudi
February 1996 – 15 July 1997	Mr Emmanuel Attard
21 July 1997 – not available	Mr Joe Bugeja
19 February 1999 – 22 June 2000	Mr Rene Formosa
18 February 2001 – 11 April 2003	Mr Albert Attard
28 May 2003 – 10 August 2004	Arch Paul Camilleri
11 August 2004 – September 2008	Information not available <sup>1</sup>
September 2008 – May 2014	Mr Brian St John
June 2014 – June 2016	Mr James Camenzuli
July 2016 – to date	Ms Carmen Ciantar

Notes:

1. Documentation reviewed made reference to Dr Kenneth Grech and Architect Martin Attard Montaldo as CEO FMS during 2004 and 2007 respectively; however, the precise dates of tenure could not be ascertained.

**2.13.7** Prior to the FMS assuming responsibility for oversight of the project, a Steering Committee, comprised of Permanent Secretaries from various ministries, was set up in 1997. Initially, the Steering Committee was to take over the high-level management of the MDH project; however,



this function later widened to include complete responsibility for the project. The NAO was not provided with information indicating the members of the Steering Committee and was therefore unable to ascertain independence from the SMJV.

**2.13.8** Similar shortcomings in terms of documentation may be cited with respect to the Decision Group, which was set up in 2005 to oversee the finalisation of the project. The establishment of the Decision Group followed the replacement of the Design & Build Cost Plus Agreement to the Lump Sum Contract. The PS MFIN was appointed Chair with effect from 12 April 2005, and was substituted by the Minister for Social Policy on 28 May 2008.

**2.13.9** The NAO noted reference to the New Hospital Cabinet Committee in the Inquiry Board report. Although a request for information relating to Cabinet decisions in support of any changes made to the scope of the MDH project was made to the FMS, no documentation was provided. Ascertaining independence from the SMJV, or otherwise, and establishment of the mandate of this Committee, was precluded in this regard.

## **2.14 Site Inspections: Shortcomings Identified**

**2.14.1** The NAO sought to determine whether site inspections undertaken outlined any shortcomings during the implementation phase, and in which sections of the hospital these shortcomings were identified. No site inspection reports were made available to the NAO, despite numerous requests to this effect, and therefore, the Office is unable to comment in this regard.

## **2.15 Interim Certificates of Payment**

**2.15.1** Compliance testing undertaken by the Office confirmed that all invoices made available were supported with the relevant ICP. All ICPs tested were endorsed by at least one person; however, the NAO was unable to determine whether the signatures corresponded to an authorised FMS/ Government official, as details of the signatory were not specified. Furthermore, the NAO was not provided with a list and sample of authorised signatories and therefore comparison in this respect was not possible.

## **2.16 Interim Certificates of Payment: Shortcomings in the Quality of Work**

**2.16.1** Aside from concerns specified in paragraph 2.15.1, given that site inspection reports were not provided, the NAO could not verify whether there were instances when ICPs were signed despite identified shortcomings in terms of the quality of work.

## **2.17 Mitigation of Poor Workmanship**

**2.17.1** In seeking to determine whether the FMS undertook any mitigating measures in cases of poor workmanship identified during implementation and whether such mitigating measures were properly documented, the NAO made numerous requests for documentation relating to site

inspections undertaken during the project lifecycle and any follow-up action instigated thereby. Furthermore, the NAO specifically requested documented assurances that works were carried out according to standards, approved by the FMS Board and in terms of the direction provided by Government. Despite requests made, no information was made available to this Office, hence limiting the NAO from establishing whether appropriate mitigating measures were taken on board to address instances of poor workmanship.

- 2.17.2 Notwithstanding this, in the Office’s review of the Inquiry Board report, reference was made to project audit reports undertaken by Bovis Europe in 1996. Cited in these reports was that, “Quality standards and control do not appear to meet the requirements of such an important project,” with a subsequent report indicating no improvement in this respect.
- 2.17.3 This concern resurfaced in correspondence submitted by Ortesa SpA to the PMO, dated 11 July 1996, referred to in the Inquiry Board report. At the time, Ortesa SpA was tasked with the design of the project, while the PMO was entrusted with management of the project. Following a site inspection carried out by Ortesa SpA numerous concerns regarding the situation on site were raised. Principally, Ortesa SpA highlighted that the quality of works were totally insufficient and unacceptable in many areas, lack of site security was a concern, and indicated shortcomings in terms of proper site order and maintenance. Evidence illustrating the poor workmanship was appended to the correspondence. In a reply dated 2 August 1996, the PMO contested that stated by Ortesa SpA, maintaining that while there was room for improvement, in their opinion, quality was deemed generally good. Somewhat contradictory was the fact that the PMO indicated that action had been taken against the SMJV for the lack of progress and the poor quality of works. The PMO proceeded to comment on the poor quality of design submitted by Ortesa SpA. On 28 August 1996, Ortesa SpA informed the PMO that, in view of the disagreement regarding its evaluation and the latter’s satisfaction with the quality of all works undertaken, then this implied that the PMO would bear responsibility for decisions taken towards the FMSS. In testimony provided to the Inquiry Board, the then Minister for Health reinforced the understanding that the PMO’s role was to ensure that the highest standards and practices were being observed during project implementation.
- 2.17.4 The Inquiry Board also obtained the views of the architect engaged by the PMO for the supervision of works and by the FMSS as a structural reviewer. The architect indicated that, “... on certain occasions when he would indicate bad workmanship he would be overruled by those above him.”
- 2.17.5 Although the NAO was not provided with the documentation required to establish a comprehensive understanding of all facts relating to instances of poor workmanship and the mitigating measures taken thereto, the information that emerged through the Inquiry Board remains cause for concern. This issue assumes further significance when one considers that the project was at its initial construction phase. In this Office’s opinion, failure to take timely corrective action when attention was drawn created the setting and context within which subsequent shortcomings and concerns were allowed to materialise.

## 2.18 Variation Orders

2.18.1 Although requests for documentation relating to variation orders corresponding to the MDH project were submitted to the FMS, no information was forthcoming in this respect. Therefore, the NAO is not in a position to comment as to whether the variation orders addressed shortcomings identified during implementation, or otherwise. The only documentation sourced by the NAO related to the €5,125,000 variation order captured in the Project Closure Agreement, discussed in paragraph 2.3.19.

2.18.2 In the NAO's review of documentation made available by the Ministry for Finance, attention was drawn to a report drawn up by Symonds Group Ltd, dated 21 February 2002. Symonds Group Ltd were entrusted with the review of the change control procedures applicable to the MDH project and were to identify improvements in this regard. In this context, Symonds Group Ltd stated that the control of changes was one of, if not the most important procedure to reduce the final outturn cost of the MDH project, a view fully subscribed to by the NAO. Numerous concerns were highlighted by Symonds Group Ltd, namely:

- a. a lack of a coordinated method of monitoring the progress of change order assessments;
- b. no regimented system of reporting the effects of changes to enable the Government's/FMS's representatives to make timely decisions;
- c. the absence of a system of reporting to be able to clearly review decisions that have already been taken and related reasons;
- d. an independent review of the final cost effects of change orders was not occurring, resulting in the Government/FMS not being informed of the realistic predicted final outturn cost of the project; and
- e. the FMS was placing too much reliance on the SMJV providing information. While it was appreciated that a certain amount of reliance on the SMJV was necessary, the information being provided to the Government/FMS could not be compromised by any lack of performance on behalf of the SMJV.

2.18.3 In this context, the NAO was unable to establish whether variation orders were the result of shortcomings identified during implementation, or the effect of a poor change control mechanism. It was not possible for the Office to ascertain whether the recommendations by Symonds Group Ltd were adopted, in part or in full, by the FMS, for no documentation was made available in this respect.

## 2.19 Penalties Imposed on the Contractor

- 2.19.1 The NAO was not provided with the contract agreements, which prohibited the establishment of an understanding of the instances of non-compliance and the corresponding penalties that were to be imposed on the SMJV. Requests for information regarding penalties imposed were also raised with the FMS; however, such requests were to no avail as no documentation was forthcoming. The only agreement sourced by the NAO was the Project Closure Agreement, which contemplated the waiver of any concerns, claims or disputes.
- 2.19.2 Reference to the possible imposition of penalties during the implementation phase was made in the Inquiry Board report, wherein correspondence issued by the FMS to the SMJV on 3 March 2011 was cited. Outlined in this correspondence was that during a routine inspection, extensive structural problems were noted in the water reservoirs. Legal advice obtained on 1 April 2011 stated that the FMS had sufficient ground to argue that clause 9.1 of the Project Closure Agreement should not debar it from raising additional claims. The SMJV contended otherwise, maintaining that clause 9.1 effectively waived any obligations to rectify defects.
- 2.19.3 Furthermore, in the review of payments issued through DAS and transactions listed in the CBM statements, no direct reference was made to penalties imposed with respect to instances of non-compliance by the SMJV during the implementation phase.

## 2.20 Reconciliation: Certified Works/Goods and Government/FMS Accounting Records

- 2.20.1 A reconciliation between the amounts submitted as certified works/goods by the contractors and the Government/FMS accounting records and hospital inventory was not possible due to the insufficient, and at times complete lack of, information made available to the NAO. In the Office's opinion, this failure, together with the various other shortcomings highlighted in this report, represents a scenario characterised by the breakdown of any sense of accountability, transparency and good governance. Reconciliation would have allowed the NAO to provide assurance, or otherwise, to Parliament and the taxpayer of the regularity of public funds availed of to finance the MDH project, as should have been reported in the Government/FMS accounting records.
- 2.20.2 Notwithstanding this gross limitation, the NAO attempted to construct an understanding based on the partial information obtained from different sources. This allowed the Office to arrive at indications of costs at different phases of the project.

### Initial Estimated Cost of the San Raffaele Hospital, August 1995

- 2.20.3 The Letter of Acceptance corresponding to the tender for the Construction, Finishing and Engineering Services for the San Raffaele Hospital, dated 14 August 1995, cited Lm31,744,687 (€73,945,228) as the contract sum for all the works that were to be carried out by the SMJV.

## FMS Figures, May 2004

2.20.4 Unstructured documentation provided by the FMS indicated a total PFC of Lm161,300,000 (€375,727,929) (Figure 4 refers).

Figure 4: Project cost based on FMS figures, May 2004

	Lm	€
Production costs	121,700,000	283,484,743
General contingency	2,300,000	5,357,559
Sub-total 1	124,000,000	288,842,301
Management fee	7,300,000	17,004,426
Design fee	7,700,000	17,936,175
Sub-total 2	139,000,000	323,782,902
Sub-contractor claims	22,300,000	51,945,027
<b>Total</b>	<b>161,300,000</b>	<b>375,727,929</b>

2.20.5 According to FMS records, the Lm161,300,000 (€375,727,929) was factored down to Lm142,200,000 (€331,236,897) due to:

- i. the FMS not accepting the additional design fee of Lm3,000,000 (€6,988,120) claimed by the SMJV;
- ii. the SMJV had already factored a Lm2,300,000 (€5,357,559) contingency; and
- iii. from the total of Lm22,300,000 (€51,945,027) in sub-contractor claims, according to the SMJV only Lm8,500,000 (€19,799,674) were valid claims.

## Memorandum to Parliamentary Secretary MFIN, February 2005

2.20.6 In reporting on preparations undertaken in respect of loans to be availed of from the Council of Europe Development Bank (CEDB), a memorandum was submitted to the PS MFIN by the Director General (DG) (Financial Administration) MFIN on 21 February 2005. Cited in this memorandum was the project cost as approved by the CEDB and a revised estimate in respect of the Info Tech System (Figure 5 refers).

Figure 5: Memorandum regarding CEDB loans, February 2005

	Lm	€
Project Cost	177,700,000	413,929,653
Increase in Info Tech System	14,900,000	34,707,664
<b>Total (excluding VAT)</b>	<b>192,600,000</b>	<b>448,637,317</b>

## NAO Best Estimate of the MDH Project Cost

2.20.7 In view of the limitations outlined, in particular, the incomplete information made available and the poor quality of data, the NAO sought to compile a list of costs incurred in relation to the MDH project. Costs in respect of the MTE, if any, payroll costs reimbursed to the FMS and the actual Lump Sum amount do not feature in the NAO's estimated project cost as details were not available. Hence, the NAO refrains from providing assurance regarding the completeness of the amounts cited in Figure 6, which amounts were compiled solely from the limited documentation made available to this Office. Furthermore, it is not clear whether amounts cited are inclusive or exclusive of taxes.

Figure 6: NAO best estimate of total project cost

	Lm	€
Pre-design and pre-construction phase	1,649,121	3,841,419
Construction, finishing and engineering works	12,767,406	29,740,056
Payment as per MoU dated December 1996	2,000,000	4,658,747
Design & Build Contract	144,515,000	336,629,397
Prolongation costs of Design & Build Contract <sup>12</sup>	7,000,000	16,305,614
Environment landscaping of soft areas	14,000	32,611
Payment by draft in 2007	4,000,000	9,317,494
Other 2009 costs as per summary project cashflows end 2008	707,556	1,648,161
Project closure	2,200,163	5,125,000
VAT on project closure	396,029	922,500
Hospital information system	24,000,000	55,904,961
Supply, installation and comm. of medical equipment/furniture <sup>13</sup>	28,506,808	66,403,000
Supply, installation and commissioning of medical services	5,038,657	11,736,914
Payments to Norman & Dawbarn regarding design	1,312,452	3,057,191
ICT-related costs	243,302	566,741
<b>Best estimated total project cost<sup>14</sup></b>	<b>234,350,494</b>	<b>545,889,807</b>

2.20.8 During compliance testing of documentation sourced within the Department of Health files, the NAO noted a list of aggregate annualised payments made in respect of the MDH project for the period 1993 to 2004. Also indicated in this list were payments made to the SMJV (Figure 7 refers).

<sup>12</sup> The NAO noted reference to Lm3,500,000 (excl VAT) (€8,152,807) in relation to the variation of the Design & Build Contract. The Office was uncertain as to whether this amount forms part of the Lm7,000,000 (€16,305,614) prolongation costs, and in line with the principle of prudence, did not consider the Lm3,500,000 (€8,152,807) as an additional cost.

<sup>13</sup> This amount is inclusive of the Lm943,685 (€2,198,195) mobilisation fee.

<sup>14</sup> Figures may not add up due to rounding error.

**Figure 7: Payments effected in respect of MDH, 1993-2004**

Year	All payments effected in respect of MDH (Lm)	Paid to SMJV (Lm)
1993	856,117	-
1994	1,706,813	-
1995	979,870	142,699
1996	3,980,776	2,767,199
1997	3,930,142	3,533,498
1998	5,440,885	4,699,357
1999	5,374,427	3,046,888
2000	12,126,541	10,761,843
2001	19,899,972	19,140,610
2002	34,743,583	24,910,684
2003	27,752,996	26,181,179
2004	25,358,372	17,442,078
<b>Total<sup>15</sup></b>	<b>142,150,495</b>	<b>112,626,035</b>

Source: DH637/2000/II

**2.20.9** It must be noted that the amounts cited in Figure 5 could not be reconciled with workings undertaken by the NAO in the review of other documentation retained by the Department of Health, ICPs and payments featuring in the CBM statements. Therefore, the NAO is not in a position to provide assurance on the completeness of the amounts cited in Figure 5. In addition, the Office was uncertain whether amounts paid to the SMJV formed part of the payments effected in respect of the MDH project, or whether one was to compound Lm142,150,495 (€331,121,582) and Lm112,626,035 (€262,348,090). Furthermore, the NAO deemed it prudent to assume that the Lm142,150,495 (€331,121,582) is represented in and forms part of the best estimated total project cost of Lm234,350,498 (€545,889,816) cited in Figure 6.

**2.20.10** For information purposes, Figures 8 and 9 provide summaries of annual withdrawals as reported by the CBM and annual payments effected through DAS, respectively.

<sup>15</sup> Figures may not add up due to rounding error.

Figure 8: Annual withdrawals in respect of the MDH project from CBM, 2001-2012

Year	Lm	€
2001	7,040,587	16,400,156
2002	17,250,745	40,183,427
2003	11,215,865	26,125,937
2004	10,130,213	23,597,049
2005	35,120,412	81,808,553
2006	39,355,269	91,673,117
2007	25,929,862	60,400,331
2008	11,860,517	27,627,573
2009	302,517	704,676
2010	2,747,904	6,400,896
2011	79,814	185,917
2012	101,904	237,373
<b>Total<sup>16,17</sup></b>	<b>161,135,611</b>	<b>375,345,005</b>

Figure 9: Annual payments through DAS in respect of the MDH project, 2000-2011

Year	Lm	€
2000	17,434,576	40,611,639
2001	19,900,806	46,356,408
2002	27,457,022	63,957,656
2003	27,774,213	64,696,513
2004	25,361,091	59,075,452
2005	40,056,643	93,306,879
2006	38,056,000	88,646,634
2007	28,900,000	67,318,891
2008	5,838,480	13,600,000
2009	3,056,357	7,119,396
2010	2,747,520	6,400,000
2011	181,165	422,000
<b>Total<sup>18</sup></b>	<b>236,763,873</b>	<b>551,511,467</b>

<sup>16</sup> These amounts were derived from withdrawals shown on CBM bank statements, and include all withdrawals, including those described as 'outward payments', 'account transfers', 'foreign drafts issued' and 'cheques issued' on the respective CBM statements.

<sup>17</sup> Figures may not add up due to rounding error.

<sup>18</sup> Figures may not add up due to rounding error.



## 2.21 Other Concerns

- 2.21.1 During the course of the investigation, the NAO noted other issues of concern that did not correspond to any of the terms of reference proposed by the Minister for Finance and endorsed by the Office. Hereunder are the salient issues identified in this respect.
- 2.21.2 The NAO's attention was drawn to the release of the performance and retention guarantees by the FMS through correspondence dated 27 August 2009. The guarantees were collectively valued at €7,000,000 and were to expire on 31 August 2009. Article 6.1 of the Project Closure Agreement provided for the release of these guarantees, specifically stating that, "The Parties agree that the Retention Bond and the Performance Bond shall be released, provided SMJV has carried out its obligations in terms of this Project Closure Agreement, in accordance with the Amended Main Agreement." Notwithstanding this, acknowledged in the correspondence exchanged was that the parties were to expediently convene a meeting that was to be attended by the FMS and the SMJV, and their respective technical personnel, so as to consider and resolve pending differences of opinion.<sup>19</sup> Furthermore, stated in the correspondence was that this letter agreement constituted an amendment to the Project Closure Agreement entered into in February 2009. In the NAO's understanding, the contradiction in the acknowledgement of pending issues and the simultaneous release of the €7,000,000 guarantees is evident. While bearing in mind the implications of the waiver clause within the Project Closure Agreement, the Office is of the opinion that the FMS should have ascertained that pending matters were resolved prior to consenting to the release of the guarantees.
- 2.21.3 Other concerns rendered evident the poor planning practices applied by the FMS in its management of the MDH project. The NAO's concern was drawn to the apparent flaw in the design process identified by Symonds Group Ltd in its review of the procurement process, captured in a report dated January 2002. Cited in this report was that, "... it became apparent that the Institutional Operations staff had generally not been consulted in the procurement of work packages. In some cases, they felt that they were only consulted in the final phases when almost all decisions were already taken, and when it is very difficult and expensive to take corrective action. Furthermore, the FMS technical team had not been given the opportunity to review the technical package assessment reports being produced by SMJV." Although the report by Symonds Group Ltd acknowledged that action had been taken and the review of relevant specifications was undertaken to ensure proper fit with user requirements for packages that were still in progress. The NAO's concern in this respect centres on the gap in the design process, attributable to failures in the timely consultation with key stakeholders, whose input was essential at this phase of the project. Shortcomings of this nature inevitably lead to subsequent amendments intended to bridge the expectation gap, which amendments constitute variations and an escalation in project costs.

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<sup>19</sup> The NAO was unable to establish the signatories of the letter agreement dated 27 August 2009.

2.21.4 Additional flaws in the planning process were highlighted by the Head Institutional Operations FMS in a report dated May 2004. Of interest to the NAO were observations noted with respect to the hospital room functional planning (RFP) design process, which included the following:

- a. when the Design & Build Contract was signed in February 2000, the design of the hospital was still at a preliminary stage, with department designs only partially completed, and RFP layouts, room loading lists and detailed designs not yet started;
- b. there was a notable delay in the subcontracting of designs by the SMJV, with an architectural firm engaged in March 2000;
- c. meetings were held between the FMS and the SMJV on how to address variations; however, in the majority of cases, the FMS failed to provide a timely response to the SMJV, approving or refusing the variation and relative additional cost; and
- d. a significant lapse in time was registered from the Design & Build Contract award in February 2000 up to the finalisation of the RFP design process in November 2001.

2.21.5 As part of the review of documentation retained by the Ministry for Finance, the NAO noted correspondence submitted by the CEO FMS to the DG DoC, through the Permanent Secretary MFIN, dated 12 November 2007. The request was endorsed by the Permanent Secretary MFIN on 21 November 2007; however, no information relating to the authorisation by the DG DoC was forthcoming. In essence, approval was sought for a variation relating to the provision of facilities management by the SMJV at MDH up to end 2007. Specifically, the variation related to post-sectional completion maintenance of the completed buildings, which was reportedly excluded from the contract scope of works. The NAO was unable to verify this statement as the Design & Build Contract and the Lump Sum Agreement were not made available.

2.21.6 Cited in the correspondence was that the exact value of the variation could not be determined; however, works were estimated at Lm2,130,000 (€4,961,565) (excluding VAT). Moreover, the total value of all variations on the contract cited in this respect, including the Lm2,130,000 (€4,961,565) cost of facilities management, was approximately Lm3,500,000 (€8,152,807) (presumably exclusive of VAT). As indicated, the relevant Contract/Agreement were not made available to the NAO, which hindered the Office from establishing whether a provision for facilities management was catered in this regard. However, if this was in fact catered for, then the Office fails to understand the necessity of the request for variation raised. On the other hand, if this was not catered for, then this represents another instance of poor planning by the FMS, which failed to anticipate the need to manage the facilities when negotiating the Lump Sum Agreement.

- 2.21.7 Evident in the conduct of this investigation was the systematic failure of the FMS to provide the NAO with documentation required. The FMS was unable to source information/documentation relevant to the vast majority of requests raised by this Office (Appendix B refers). This was in contrast with the situation faced by the Inquiry Board, which was provided with key documentation such as technical reports, relevant contracts and agreements, monthly works progress reports, and correspondence exchanged. This failure by the FMS severely limited the NAO in its conduct of the investigation and in forming a comprehensive understanding of the terms of reference set.
- 2.21.8 In determining how best to proceed in the conduct of this investigation, the NAO sought to establish whether the Inquiry Board report was referred to the Attorney General and the Commissioner of Police, as in fact instigated in the report. This was of particular concern to the Office, for the report presented a strong case with regard to the civil, contractual and criminal responsibilities borne by the various parties involved in the MDH project (Appendix C refers). As a matter of procedure, the Office does not intentionally pursue the audit of issues under active police investigation as this may readily jeopardise evidence and subsequent legal remedies. The NAO sought to establish what action had been taken by the then Ministry for Energy and Health following the Inquiry Board report recommendations; however, despite numerous requests to this effect, this matter remained unclear to the Office.

# Chapter 3

## Conclusions

### 3.1 Timeline of Key Events

3.1.1 Hereunder are the key developments noted by the NAO with respect to the MDH project. Outlined are the main phases of the project, as represented by the contractual agreements entered into by the FMS/Government with the SMJV and other contractors. Third party reports deemed influential in terms of the project and critically important correspondence exchanged are also highlighted (Figure 10 refers).

Figure 10: Timeline of key events

Date	Details
9 July 1993	MTF Malta contracted to provide the FMSS with the design, construction supervision and operation of the hospital
1993	MTF Malta contract the design of the hospital to Ortesa SpA
12 September 1995	Contract entered into with the SMJV for the construction, finishing and engineering works
8 July 1996	Project audit report undertaken by Bovis Europe
July 1996	Offer by the SMJV to take over the design function, which offer was declined by the FMSS
April 1997	Termination of the contractual relationship with MTF Malta and Ortesa SpA
29 January 1998	Full development permission granted for the construction of an additional floor and a new hospital wing
July 1998	Norman & Dawbarn Ltd contracted for the design of the new hospital project
September 1998	Termination of the contract with Norman & Dawbarn Ltd
4 December 1998	Memorandum of Understanding signed with the SMJV for the design, execution and completion of the hospital
29 February 2000	Agreement entered into with the SMJV, referred to as the Design & Build Cost Plus
21 February 2002	Symonds Group Ltd submit a quarterly report highlighting weaknesses in the MDH project's change control procedure
20 December 2002	Fifth Italo-Maltese Financial Protocol, signed by the Italian and Maltese Governments, financing the provision and installation of furniture as well as the design, provision and installation of a storage and logistics system
24 September 2003	FMS Board commissioned the Gap Analysis Report, which sought to establish the reasons for variance between the OTV and the PFC
26 December 2003	Letter of acceptance issued to Inso SpA for the supply, installation and commissioning of medical equipment and medical furniture and the provision of related services for the new hospital
April 2004	Gap Analysis Report presented to the FMS Board, highlighting reasons for variances and recommending mitigating measures

3 May 2004	Ad hoc FMS Board meeting wherein the Gap Analysis Report was discussed
12 May 2004	FMS Board confirmed and adopted the recommendations made in the Gap Analysis Report
17 May 2004	'Without Prejudice Report' submitted by the FMS Project Manager, highlighting negotiating points in addressing major variances
17 May 2004	Gap Analysis Report and 'Without Prejudice Report' referred to the Minister MHECC, copied to the PS MFIN, by the President FMS Board to take stock and provide context to Government's position regarding the project
22 December 2004	Agreement entered into with Frezza SpA for the supply, installation and commissioning of medical services to implement a comprehensive furniture system for the MDH
12 April 2005	Replacement of the Design & Build Cost Plus Agreement with the Lump Sum Contract
12 April 2005	PS MFIN appointed Chair of the Decision Group following the replacement of the Design & Build Cost Plus Agreement with the Lump Sum Contract
28 May 2008	Minister for Social Policy replaced PS MFIN as Chair of the Decision Group
December 2008	Various claims were raised by the FMS and the SMJV against each other; however, negotiations in this respect failed
20 December 2008	The President FMS informed the Minister for Social Policy that arbitration was inevitable
26 December 2008	Terms of Settlement Agreement signed
15 January 2009	Terms of Settlement Agreement brought to the attention of and approved by the FMS Board
21 January 2009	Settlement Agreement entered into by the FMS with the SMJV, comprising an additional disbursement by Government of €5,125,000 (excluding VAT), over and above the lump sum and an absolute waiver of rights – the Inquiry Board noted that the FMS Board was not reconvened to sanction the new Terms of Settlement Agreement
19 February 2009	Project Closure Agreement entered into by the FMS, the SMJV and Blokrete Ltd
5 April 2009	President FMS Board refers the Project Closure Agreement to the Minister for Social Policy
26 July 2011	SMJV contest claims by the FMS regarding structural defects, citing clause 9.1 of the Project Closure Agreement
24 November 2011	Release of a pending balance of €200,000 by the FMS, retained due to defective works in 1996
1 June 2015	Mater Dei Inquiry Board report concluded
12 June 2015	Request for investigation by the Minister for Finance submitted to the NAO
15 June 2015	Terms of reference set and limitations on scope highlighted by the NAO
2 May 2016	Initial request for documentation submitted by the NAO to the FMS
8 January 2018	Cut-off date for the submission of documentation

## 3.2 Conclusion

**3.2.1** Despite all efforts by the NAO, a comprehensive investigation of the MDH project was not possible, primarily due to the significant lack of documentation with respect to all stages of the project. This deficiency prohibited the Office from establishing a comprehensive understanding of the project, an essential requirement in formulating an audit opinion for the project as a whole. Notwithstanding the FMS's long-term responsibility for the management of this project, dating back to 1998, it was unable to provide the documentation requested by this Office, including the project's accounting records. The NAO is of the opinion that the Foundation's inability to provide basic information relating to a project of this magnitude represents an institutional failure and gross negligence in the administration of public funds. Moreover,

an inadequate and unreliable audit trail detracts from the expected level of accountability, transparency and governance warranted in this project of national importance.

- 3.2.2 Given the circumstances, the NAO sought to collate information from MFIN, the MHECC, the Treasury Department, the DoC, the Department of Health and the CBM. The NAO acknowledges the collaboration evident on the part of these stakeholders. Despite this and the Office's efforts, the information obtained in this manner was not complete and fragmented. This further limited the Office from establishing a comprehensive understanding of facts, figures and events, prohibiting due analysis. The Office deemed this as a matter of grave concern, undoubtedly compounded when one considers the magnitude of public funds involved and the critical nature of the project.
- 3.2.3 Notwithstanding this, the limited documentation made available to the NAO, together with information obtained from various meetings held with stakeholders, was duly scrutinised and analysed in respect of the terms of reference set. Hereunder are the salient conclusions arrived at.
- 3.2.4 Given the severely limited information made available to the NAO, the Office is not in a position to provide assurance with respect to the completeness of the contractual framework regulating all aspects of the project. This resulted in various concerns emerging with respect to the completeness, validity and accuracy of the ICPs, and the subsequent regularity of payments. Furthermore, the different modes of payment hindered verification of the completeness thereof. Through compliance testing, the NAO noted instances of overpayment.
- 3.2.5 In view of the significant absence of documentation, the NAO is not in a position to provide assurance as to whether applicable public procurement regulations were adhered to and the required approvals sought for all contracts/agreements entered into with respect to the MDH project. The only documentation provided by the DoC in relation to a selection procedure was in respect of the contract awarded for the supply, installation and commissioning of medical equipment and medical furniture and the provision of related services for the new hospital. Despite the decision by the Adjudication Board not to award the tender to the selected supplier, which decision was reaffirmed by the Public Contracts Appeals Board, Government proceeded in this respect regardless. In the NAO's understanding and based on documentation reviewed, the award was conditioned by the source of the funding, that is, the Fifth Italian Protocol. While the authorisation issued by the Minister of Finance and Economic Affairs was permitted by law and based on the conclusion arrived at by the GCC, the NAO contends that the process was vitiated through the procedural anomalies introduced favouring the selected supplier at the expense of other competitors.
- 3.2.6 The NAO was not provided with the documentation necessary in determining whether the formulation of contractual relationships and the subsequent amendments thereto were justified and appropriately authorised. The Office is of the opinion that the choice to adopt the San Raffaele Hospital of Milan as a model remained unclear. The October 1996 change in

Government resulted in a radical change in policy and vision for the project, from a specialised to a general acute hospital. This Office is unable to comment on whether the necessary justifications were made. Furthermore, information regarding possible referral to Cabinet for authorisation, or decisions thereof, with respect to such a drastic change in project scope, was not made available to the NAO.

3.2.7 The September 1998 change in administration perpetuated the haphazard management of the project. With the change in government came a re-evaluation of the scope of the project and again, the NAO was not provided with any documentation regarding justifications put forward and authorisation granted for the SMJV to assume the design function in addition to its existent role in the construction of the hospital. It is with concern that the NAO notes that, within a span of less than two years, responsibility for the design of the hospital was entrusted to three different parties, with significant changes in scope following suit. In the NAO's understanding, the disorganised series of changes reflected poorly on the overall planning and management of the project and bore long-term negative effects.

3.2.8 Between 2000 and 2003, concern regarding major departure from the OTV for the completion of the hospital project emerged. The Gap Analysis Report, commissioned by the FMS to establish an understanding of the circumstances that led to the variance between the OTV and the PFC, Lm82,625,346 (€192,465,283), and Lm120,738,000 (€281,243,885), respectively, strongly recommended agreement with the SMJV on a lump sum cost and timeframe. The matter was discussed during an ad hoc FMS Board meeting, attended by the Minister MHECC and the PS MFIN among others. Also discussed was the implication of the term target value within the Design & Build Contract, which term was interpreted differently by the parties, with the consequence of further amendments to the variance between the OTV and the PFC. Subsequently, the FMS Board resolved to confirm and adopt the recommendations made in the Gap Analysis Report, particularly, the option to resort to a lump sum agreement.

3.2.9 Although documentation supporting the consideration of resort to a lump sum arrangement was deemed adequate by the NAO, authorisation in this respect by the Minister MHECC, the PS MFIN, or any other competent authority was not provided to this Office. This gross shortcoming in terms of documentation prohibited the NAO from ascertaining whether the authorisation provided was appropriate, whether it reflected advice and recommendations made by the FMS and whether authorisation provided was faithfully reflected in the Lump Sum Contract. The NAO's concern is heightened in view of the major change in the nature of the contractual relationship between Government/FMS and the SMJV, from a cost plus modality to a fixed sum. Failure to provide the NAO with the relevant documentation detracts from the required level of accountability, transparency, fairness and governance expected in the case of this project, particularly in view of its high materiality.

3.2.10 While documentation reviewed by the NAO leading to the decision to enter into a Lump Sum Contract imparted the understanding that this contractual arrangement was to cap costs, limiting Government's exposure and therefore finalise matters, this was not the case. In fact, a

Settlement Agreement was entered into by the FMS with the SMJV on 21 January 2009, which comprised an additional disbursement by Government of €5,125,000 (excluding VAT), over and above the lump sum, and more importantly, an absolute waiver of rights. In the NAO's opinion, this effectively compromised the finality of the Lump Sum Contract. A fundamental discrepancy was noted by the Inquiry Board when comparing the Terms of Settlement Agreement endorsed by the FMS Board with that entered into with the SMJV. The change, effected by the President FMS Board, comprised the payment of €5,125,000 by way of a variation order and not as a settlement of claims. The Inquiry Board noted that the FMS Board was not reconvened to sanction the new Terms of Settlement Agreement.

**3.2.11** On 19 February 2009, the FMS and the SMJV entered into the Project Closure Agreement. The NAO reviewed the Project Closure Agreement; however, the Office was unable to identify changes made through comparison with the Terms of Settlement Agreement for the latter document was not made available. The NAO's concern in this respect centres on whether the required ministerial authorisation was sought and obtained prior to the FMS entering into the Project Closure Agreement. The absence of any documentation relating to the justification for entering into the Project Closure Agreement following the Lump Sum Contract and authorisation thereof precludes the Office from establishing a comprehensive understanding of whether this was permissible, warranted and safeguarded government's interests.

**3.2.12** The NAO was unable to determine whether the Lump Sum Contract was permissible and compliant with public procurement regulations for no documentation was made available in this respect. Furthermore, the Office could not establish whether the Lump Sum Contract was the most economically advantageous agreement for Government since no information regarding any related feasibility studies undertaken was forthcoming. Rather than focusing on securing the most economically advantageous way forward, Government was driven by its desire to complete the project within the stipulated timeframe of June 2005.

**3.2.13** Reason would dictate that once a Lump Sum Contract was entered into, the only additional justified payments would be completely new works or services commissioned after the Lump Sum Contract and not included in any way therein. The Office is unable to provide assurance that payments made under the Project Closure Agreement fit this understanding. Aside from the settlement of €5,125,000 in variation orders, the implications of the Project Closure Agreement extended beyond this settlement, with the waiver of all concerns, claims or disputes by the parties. According to the President FMS Board, the waiver clause was inserted on the insistence of the SMJV. Aside from governance concerns relating to the manner by which the waiver clause was introduced, the NAO's attention focused on the resulting implications of this change, with Government exposed to significant risks arising from latent defects and left with severely limited means of recourse to rectify such defects.

**3.2.14** Documentation provided by the FMS in respect of expenditure reported was severely limited, prohibiting the NAO from establishing a comprehensive understanding of facts. Information retained by the FMS was not indexed and not organised in any coherent manner. This concern



assumes greater relevance when one considers the scale of the project, which undoubtedly generated voluminous documentation. The NAO was informed that the FMS commenced referencing of the actual project-related documents in order to entertain the Office's multiple requests for information. Site visits by the NAO confirmed the haphazard mismanagement of the considerable volume of documentation for which the FMSS/FMS was responsible, with loose documents scattered about. When requests were raised by the NAO for certain boxes, referenced as the location of files/documents of particular interest, the FMS indicated that the files/documents were not found and that the said boxes were in fact empty.

- 3.2.15 Aside from requests for project-related documentation, the NAO sought information relating to the financial management of the project. Specifically, the Office requested the FMS to make available the project's transaction listing. Notwithstanding the essential nature of the financial data requested for investigation by the NAO, and the obvious requirement of the same information by the FMS for purposes of project management, the FMS informed the NAO that the transaction listing was not found in their accounting system. Failure by the FMS in this respect reflects a gross shortcoming in terms of financial management, essential in providing a basic level of accountability in the disbursement of substantial public funds.
- 3.2.16 Given the centrality of the transaction listing, the NAO sought to compile this information through data available in central government's accounting system, DAS. However, on occasion, the financial data available on DAS solely comprised aggregate amounts, without the possibility of obtaining a breakdown of figures cited. Furthermore, attempts were made by the Treasury Department, on request by the FMS, to forward to the NAO all accounting information related to the project. The information made available in this respect was limited in terms of detail, provided aggregate data and only corresponded to the period 2006 to 2009.
- 3.2.17 Since the NAO was not provided with a list of bank/Special Accounts, the completeness of accounts reviewed could not be ascertained. In the review of documentation, the Office noted that the FMS held a bridge loan facility with a local commercial bank, through which payments to the SMJV were effected. However, no documentation relating to the loan facility was traced. Notwithstanding these limitations, the NAO identified Special Accounts held at the CBM. The CBM provided bank statements corresponding to these Special Accounts. Insufficient or lack of any details in terms of the transaction narrative further prohibited the NAO from compiling the project's transaction listing.
- 3.2.18 Project accounts were not made available to the NAO, despite requests to this effect. Therefore, the NAO is unable to express an opinion as to whether the project accounts, if prepared, were in accordance with International Accounting Standards and provided a true and fair view of the financial situation of the project for the period of interest. Notwithstanding this limitation, documentation reviewed, specifically the Gap Analysis Report, provided evidence of an element of ex-post control over project expenditure. The Gap Analysis Report placed emphasis on the vital need to carry out a comprehensive internal audit of the SMJV's booked costs. In the NAO's opinion, even if the project accounts were prepared and made available to this Office, in view

of the concerns regarding control over the booked costs, doubt persists as to whether such accounts would have reflected a true and fair view of the project's financial position.

- 3.2.19** In determining whether the project's fixed assets were real and properly evaluated, the NAO sought to establish an understanding of the position at the time of migration to MDH, immediately thereafter and at present. Concerns and difficulties encountered regarding the compilation of a complete fixed asset register at the MDH emerged in 2009. The Office's concern in this respect centres on the MDH having to compile a fixed asset register with incomplete and incorrect information submitted by the FMS, which shortcoming detracts from providing a real and properly evaluated register. No reference to property rights or related beneficiaries' rights was made in the Project Closure Agreement.
- 3.2.20** It was not possible for the NAO to ascertain whether payments made were in relation to eligible goods and services under the relevant contracts since these were not made available to this Office. Of concern to the NAO was the conflicting evidence provided by the President FMS Board to the Inquiry Board regarding the adherence of accepted works to contract specifications.
- 3.2.21** The NAO was not provided with the project contracts and was thereby prohibited from establishing what controls had to be in place. In view of this significant limitation, the Office was unable to determine whether the specifications, bills of quantities, reporting requirements, certifications and payments fully adhered to the stipulated controls. Although specific requests for documentation relating to site inspections were made to the FMS, no information was forthcoming, thereby prohibiting the NAO from undertaking the required verifications. However, the Office's attention was drawn to the findings of the Inquiry Board report, wherein it was stated that although tests were carried out by the Works Division, samples were delivered directly to the laboratory by the SMJV. This procedure introduces an element of doubt in terms of the integrity of the testing process and confidence in results obtained therefrom.
- 3.2.22** Another aspect of the NAO's analysis centred on whether the persons/teams engaged to act as the control mechanism were independent from the contractors during the whole process and the level of independence thereof. The NAO specifically sought to establish the composition of the MTF, the MTF Malta, the Decision Group, the PMO, the FMSS/FMS Board, the FMS Negotiating Team, the Steering Committee and the New Hospital Cabinet Committee. The Inquiry Board report delved into the responsibilities of each stakeholder involved in the MDH project, with shortcomings identified reproduced in section 2.13 of this report. Given the lack of information, the Office could not establish a high-level understanding of the overall framework of project control, the mandate of each group/team/committee, the interrelation, if any, between members of each group, and the level of independence of members from the SMJV. Compounding matters was the extensive duration of the project, conceptualised in 1990 and concluded in 2011.
- 3.2.23** Compliance testing undertaken by the Office confirmed that all invoices made available were supported with the relevant ICP; however the NAO was unable to determine whether

the signatures corresponded to an authorised FMS/Government official, as details of the signatory were not specified. Furthermore, the NAO was not provided with a list and sample of authorised signatories and therefore comparison in this respect was not possible. In addition, given that site inspection reports were not provided, the NAO could not verify whether there were instances when ICPs were signed despite identified shortcomings in terms of the quality of work.

- 3.2.24** Despite the numerous requests made, the NAO was not provided with information indicating whether appropriate mitigating measures were taken on board to address instances of poor workmanship. Although the NAO was not provided with documentation, the information that emerged through the Inquiry Board remains cause for concern. This issue assumes further significance when one considers that the matters highlighted related to shortcomings in quality standards and controls at the initial construction phase. In this Office's opinion, failure to take timely corrective action when attention was drawn created the setting and context within which subsequent shortcomings and concerns were allowed to materialise.
- 3.2.25** The NAO is not in a position to comment as to whether the variation orders addressed shortcomings identified during implementation, or otherwise. Numerous concerns were highlighted by Symonds Group Ltd, who were entrusted with the review of the change control procedures applicable to the MDH project and to identify improvements in this regard. However, it was not possible for the Office to ascertain whether the recommendations by Symonds Group Ltd were adopted, in part or in full, by the FMS, for no documentation was made available in this respect.
- 3.2.26** The NAO was not provided with the contract agreements, which prohibited the establishment of an understanding of the instances of non-compliance and the corresponding penalties that were to be imposed on the SMJV. Requests for information regarding penalties imposed were also raised with the FMS; however, this was to no avail. No direct reference to penalties imposed was traced through DAS and the CBM statements.
- 3.2.27** A reconciliation between the amounts submitted as certified works/goods by the contractors and the Government/FMS accounting records and hospital inventory was not possible due to the insufficient, and at times complete lack of, information made available to the NAO. Notwithstanding this gross limitation, the NAO attempted to construct an understanding based on the partial information obtained from different sources. This allowed the Office to arrive at indications of costs at different phases of the project.
- 3.2.28** In the NAO's overall opinion, the FMS's failure to provide the required information and documentation, together with the various other shortcomings highlighted in this report, represents a scenario characterised by the breakdown of any sense of accountability, transparency and good governance. Reconciliation would have allowed the NAO to provide assurance, or otherwise, to Parliament and the taxpayer of the regularity of public funds availed of to finance the MDH project, as should have been reported in the Government/FMS accounting records.

## Appendix A - Request for Investigation by the Minister for Finance

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MINISTER FOR FINANCE  
MAISON DEMANDOLS, SOUTH STREET, VALLETTA, MALTA

12 June 2015

Auditor General

I refer to the findings of the Report of the Mater Dei Inquiry Board, headed by Justice Emeritus Dr. Philip Sciberras, into the structural defects present at the Mater Dei Hospital (MDH). The said findings raise significant doubts on the levels of good governance, transparency and sound financial management followed during the process leading to the design, building, execution, certification, payment, completion and eventual closure of the entire MDH project, primarily between 1989 and 2011. Doubts are also raised on whether the applicable national and EU procurement and financial directives and regulations were adhered to and whether the cost of the project presents value for money when compared to good-practice (hospital) projects in Europe.

It is Government's view that for the sake of clarity, transparency, fiscal and regulatory accountability, a thorough investigation of the above mentioned processes of the MDH project should be held. Therefore, I kindly request you to carry out such an investigation in accordance with Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act and in line with established Public Auditing Standards and Techniques.

I request that this investigation should give special attention to the issues identified in the Annex attached to this letter.

Yours Sincerely,

**Prof. Edward Scicluna**  
Minister for Finance





## Annex

### Non exhaustive list of areas of particular concern to Government following publication of the Report of the Mater Dei Inquiry Board (June 2015)

To establish whether:

- a) payments in relation to the design, execution and completion of the MDH have been made in accordance with the conditions of the relevant contracts and/or financing agreements, with due attention to economy and efficiency, and only for the purposes for which the financing was provided;
- b) the goods and services procured, namely but not restricted to, those of:
  - Monte Tabor Foundation in 1993 for the designs of the new hospital, construction, supervision services and take over operations;
  - Skanska JV in 1995, for the construction of the Hospital;
  - Norman and Dawbarn in 1998, for the design of the expanded hospital;
  - Skanska JV in 1998 through the Memorandum of Understanding
  - Skanska JV in 2000, for the design, execution and completion of the new hospital;
  - Skanska JV in 2005 through the lump sum Amendment Agreement;
  - Skanska JV in 2009 through the Project Closure Agreementhave been awarded in accordance with the relevant national public procurement regulations and that all procedures, related to public procurement and financial approvals for the relevant competitive procedures (as applicable) were fully followed;
- c) the necessary justifications and authorisations were obtained from the competent authorities in order to add, delete or convert the previous contracts and agreements in particular in 1998, 2005 and 2009;
- d) the amendment in the contract with Skanska JV, in 2005, into a lump-sum contract, was permissible and was not in breach of the original competitive process, in terms of level playing field with the other bidders;
- e) the lump sum contract agreement and the Project Closure Agreements were the most economically advantageous agreements for the Government of Malta and verify whether and how, at the time, the negotiators achieved reasonable assurance of this; to establish also how the lump-sum contract and subsequently the Project Closure Agreement, was determined;
- f) the necessary supporting documents, records, and accounts have been kept in respect of all expenditures reported;
- g) where Special Accounts have been used, these were maintained in accordance with the provisions of the relevant financing agreements;



- h) the project accounts have been prepared in accordance with consistently applied International Accounting Standards and give a true and fair view of the financial situation of the project at the time, and of resources and expenditures for the year ended on that date;
- i) the project's fixed assets are real and properly evaluated and project property rights or related beneficiaries' rights are established in accordance with the conditions of the contracts and the project closure agreements;
- j) payments made are in relation to eligible goods and services under the relevant contracts and against deliverables that can be quantified and accounted for;
- k) there was full adherence to the level of controls established in the contract in terms of specifications, bills of quantities, reporting, certifications and payments;
- l) site inspections were routinely carried out and that the outcome of these inspections was properly documented;
- m) the people/teams engaged to act as the control mechanism were independent from the contractors during the whole process and the level of independence thereof;
- n) site inspections specifically outlined any shortcomings during the implementation phase, and in which sections of the hospital were these shortcomings identified;
- o) interim certificates duly signed by the Architect responsible were prepared for invoices issued by the contractor;
- p) there were instances, if any, where interim certificates were still signed by the Architect responsible for the project even in cases where site inspections outlining any shortcomings in the quality of the work provided by the contractor had already been documented;
- q) in cases where poor workmanship was identified during the implementation, any mitigating measures had been taken on board in order to address the situation, and whether such mitigating measures were properly documented;
- r) in the case of variation orders these variation orders came about in order to address any shortcomings identified during implementation;
- s) in cases where the contractor was not found to be compliant with the Contractor's Obligations as stipulated in the Contract Agreement, any penalties were imposed during the implementation phase as per conditions specified in the contract;
- t) there exists, or sufficient information is available, to enable a reconciliation between the amounts submitted as certified works/goods by the contractors and the Government/FMS accounting records, and the inventory of the hospital. If this exists such a reconciliation is to be undertaken.

## Appendix B - Key Documentation requested by the National Audit Office

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### Initial List of Documents requested by the NAO from the FMS in respect of the MDH Investigation

#### 1. Tenders, Award of Contracts and Contracts/Agreements

All documents supporting Tender Specifications, Calls for Tenders, Tender Adjudication Team(s) Reports and Tender Appeal Board(s), if and where applicable, including details of Tender Board(s) Members, namely regarding:

- Monte Tabor Foundation (1993) for the designs of the new hospital, construction, supervision services and takeover of operations;
- Bovis Europe (1996) regarding the financial audit;
- Norman and Dawbarn for the design of the expanded hospital (1998);
- Concrete supplies; and
- SMJV for the construction of the new hospital (1995); Memorandum of Understanding/Agreement (1998); design, execution and completion of the new hospital (2000); Lump Sum Amendment Agreement (2005) and Project Closure Agreement (2009) – accompanied with the drafted Settlement Agreement by the SMJV and Terms of Settlement Agreement as approved by the Board.

All original signed Letters of Intent, Contracts, Memorandum of Understanding/Agreement and any other agreements. Documents are to include Board Meeting minutes substantiating justifications, authorisations, alterations, of previous contracts and agreements; and any Handing Over Certificates.

Cabinet Decisions in support of any alterations/approvals are to be provided, including Cabinet Decision to turn down offer from the SMJV to take over design under a Design & Build Cost Plus Agreement.

#### 2. Payments

Detailed list of payments, in relation to the design, execution and completion of MDH, with supporting certifications and approvals including, but not necessarily limited to:

- Interim Payment Certificates, including list of authorised individuals (e.g. Architects) of each project responsible for certifying and endorsing works/payments;
- Invoices and Bills of Quantities;
- Site Inspections, and any related follow-up and documentation;
- Variation Orders; and
- Any imposed Penalties.

Details of Bank Account accounting for payment/expenditure transactions. If more than one Bank Account (or Special Accounts) were utilised, please specify further.

### 3. Project Management Office

- Set up of PMO;
- Joint Venture Agreement and Meeting Minutes, if any, between PMO (Works Division) and Malta University Services Ltd; and
- Any documented advice forwarded by Malta University Services Ltd re MDH project management.

### 4. Other Reports

- Master Plan (1993);
- Financial audit report conducted by Bovis Europe (1996), and any other interim / management / external financial audits conducted;
- Final Structural Design Review (1996);
- List of WIPs Reports;
- Development Permits (Outline/Full/Amended);
- Timelines of Project;
- Feasibility study conducted by the Management and Efficiency Unit;
- Documented assurances that works were carried out to Standards, prior to project closure, together with Board's approval and clearance/direction from Government;
- Please inform NAO as to whether the 'Report of the Mater Dei Inquiry Board' dated June 2015 was sent, as recommended in said report, to either the Attorney General and/or the Commissioner of Police. If in the affirmative, kindly forward feedback to NAO;
- Dossier referred to in the Mater Dei Inquiry Board Report dated June 2015; and
- Minister of Finance's request also delved into whether the project presents Value for Money. Hence, any related reports/documentation at your end in this respect is appreciated.

### 5. Groups/Teams

Composition of members of:

- Monte Tabor Foundation;
- Decision Group;
- FMSS Board;
- FMS Negotiating Team; and
- Steering Committee.

Kindly specify dates in cases of reshuffling of members, clearly detailing who the new member(s) is replacing and effective date. Covering approval of appointed members is also required.



### NAO Provisos

- The list is not exhaustive. Further documents may be requested at a later stage in this investigation, as necessary, particularly in respect of the selected sample of transactions and project deliverables of all relevant Contracts and Agreements under investigation.
- Kindly redirect NAO's request to the pertinent Ministry should any of the above requested documents not be available at your end, keeping NAO informed accordingly.
- Where relevant, documents requested are to cover the period 1989 – 2011.

## Appendix C - Excerpt from the Mater Dei Hospital Inquiry Board Report: Civil, Contractual and Criminal Responsibilities

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### **VIII. Civil and Contractual Responsibility**

#### ***Contractor's Responsibility***

It results that the Contractor assumed responsibility for the good quality of the works executed and materials supplied. This is expressed in the Building Contract dated 12<sup>th</sup> of December 1995 as well as in the Design and Build Contract of the 29<sup>th</sup> February, 2000, which, incidentally, according to the Memorandum of Understanding dated 4<sup>th</sup> of December 1998 was to be considered as an addendum to the former contract. In effect it is expressly stated in this same MoU that, primarily, Contractor shall carry out and be responsible for the design, execution and completion of works in accordance with the altered design submitted by Contractor and accepted by Client.

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The facts show that the Contractor engaged White Architects as Design Subcontractor to prepare the altered design and local architects Cassar, Grech and Ebejer to produce the site drawings. The facts also show that the latter roped in Architect Karm Busuttil (now deceased) as the expert structural Engineer to assist them. It transpires that this Architect had originally (1997) made calculations based on Ortesa's original designs and determined that the existing structure could take on a load of two extra floors. Apart from such calculations no physical tests were carried out. In Vince Cassar's own words "taghmel design, taghmel studju fuq dak li ghandek bhala disinn. Issa jekk inti kont qiegħed hemmhekk fuq ix-xogħol u taf ix-xogħol kif sar u taf il-grade tal-konkrit kif inhu, it-testijiet tal-konkrit li ghandek u x'jghidulu, tiddeciedi jekk trid x taghmel xi testijiet ta' xi haga. Normalment kont taghmel testijiet, jigifieri ticcekkja u tara. Isma konkrit grade 30 huwa?" (sitting 22.12. 2014.). All concerned, including the Contractor and his Subcontractors appear to have given weight to Architect Busuttil's calculations and refrained from carrying out any tests. #

On the basis of legal doctrine and jurisprudence, purely from a civil law point of view, it is an accepted principle that the Contractor:-

- (i) "ghandu l-obbligu li jezegwixxi x-xogħol lilu kommess fis-sens li huwa ghandu l-obbligu wkoll li jara li dan ix-xogħol ikun sejjer isir utilment u mhux b'mod li l-quddiem juri difetti....Dan fis-sens li hu "ghandu jiggarantixxi l-bonta' tax-xogħol tieghu (Vol. XL pl p 485);
- (ii) "L-appaltatur li jezegwixxi hazin ix-xogħol li jiffirma l-oggetti ta' l-appalt huwa responsabbli għad-dannu kollu li jigi minn dik l-ezekuzzjoni hazina" (Vol. XXXVII plll p883). Ghax kif jinsab ritenut ukoll "f'kaz bhal dan hu ghandu mill-ewwel ma jagħmel ix-xogħol jew ikollu jirrispondi għad-difetti li jigu l-quddiem" (Mario Blackman vs. Carmelo Farrugia et noe, App. Kumm., 27 ta' Marzu, 1972);
- (iii) Dan huwa hekk avolja jkun hemm l-approvazzjoni tax-xogħol (Vol. XLI pl p667) jew l-appaltatur ikun mexa skond l-ispecifications jew l-istruzzjonijiet lilu mogħtija mill-kommittent. "E' dovere dell'appaltatore di resistere ad ordini che egli vedesse pregiudizievoli alla solidita' o contrarii alle buone regole dell'arte"

*(Vol. XXV pl p727). Kif ahjar imfisser u spjegat, "l-appaltatur hu obbligat u hu dejjem responsabbli li jaghti lill-appaltant opra sodisfacenti, u ma jistghax jallega li x-xoghol sar mhux sewwa ghax hu ghamlu kif ried il-kommittent, billi l-appaltatur hu obbligat jirrezisti ghal kwalunkwe intromissjoni tal-kommittent" (Vol. XLII pl p1003);*

*(iv) Meta allura jirrizultaw dawn id-difetti, l-appaltatur jitqies in kolpa minhabba inadempiment. "Il-kolpa kontrattwali hija dik li tikkonsisti fin-nuqqas ta' l-ezekuzzjoni jew fezekuzzjoni hazina, ta' l-obbligazzjoni rizultanti mill-kuntratt (Vol. XXXVIII pl p292);*

*(v) L-istess regoli huma metru siewi biex ikun accertat ukoll il-bontà, o meno, tal-materjal uzat ghax, kif ritenut, l-ezekuzzjoni tax-xoghol tinvolvi anke l-ghazla tal-materjali u l-appaltatur ma ghandux jadopera materjali mhux tajba (Rebecca Aquilina vs. Giuseppe Sciortino et", App. Kumm., 5 ta' Dicembru, 1955)*

These extracts are taken from the following judgements of our Courts, viz, "Pierre Darmanin vs. Moira Agius et", App. Inf., 6 October 2004 and "Anthony Borg nomine vs. Martin Pillow noe", Civil Court, First Hall, 10 October, 2008.

Besides these highlights what is more fundamental is the fact that as a general principle of Civil law, the contract is law between the contracting parties (art. 992 Civil Code), and as such, in view of what has been expressed above, the Contractor must, all things being equal, abide by the contractual warranty, and, consequently, be held liable for the defects in the works detected in the present day technical reports.

Having stated the above the, Board needs to address the issue of the waiver granted in Clause 9 of the Project Closure Agreement. Before commenting on this particular Agreement, the Board feels that it is worthwhile to register this preamble:-

(i) Following the terms of settlement reached by the respective Senior Heads of Skanska JV and FMS, the former drew up a formal Settlement Agreement. In this

Agreement there was a general Waiver provision (Clause 16) which read as follows:

*Except as explicitly stated in this Settlement Agreement, the parties will not be liable whatsoever for all and any further, past, present or future concerns, claims or disputes that the parties have or may have in respect of the Main Agreement and the Amendment Agreement and each Party waives with binding effect all its rights in relation to the Main Agreement and the Amendment Agreement except in relation to those rights explicitly stated in this Settlement Agreement.*

This waiver clause was extended beyond that agreed in the Terms of Settlement Agreement with the inclusion of the words "and each Party waives with binding effect all its rights ...".

- (ii) This Agreement was examined by FMS's lawyer and a series of variations and amendments followed;
- (iii) Eventually, it results that the parties changed its name to Project Closure Agreement containing only ten clauses. Of note is the fact that this Agreement mentions two waiver provisions; one at Clause 2 entitled Reciprocal Waiver of Rights; and a reproduction of the aforementioned general Waiver at Clause 9;
- (iv) This Agreement was then signed on the 19th February 2009 by Architect Paul Camilleri on behalf of FMS, Lars-Erik Alm for Skanska JV, and Dr Joe Fenech on behalf of Blokrete Ltd.

Without for the time being taking into consideration all the known facts and circumstances relative to the project hereinabove described, one might argue, from a purely legal standpoint and viewing the agreement as a whole, that Clause 9, even as worded, does not hinder the right of FMS to raise further and additional claims against SMJV. This interpretation is borne out by the rationale of Clause 5 headed

"Acceptance", which expressly stipulates that the acceptance of the Works carried out or those to be completed as per Clause 4 of the Agreement, does not withstall any rights which both contracting parties have under Maltese law.

Subject to what will be stated further on, as a matter of Maltese law, if this Agreement is to be considered as one of compromise falling within the definition of article 1718 of the Civil Code

*1718. A compromise is a contract whereby the parties, by means of a thing given, promised or retained, put an end to a lawsuit which has commenced or prevent a lawsuit which is about to commence.*

as ulteriorly qualified by case-law ( "Carmelo Cini vs. John Cini", App. Inf., 22nd March, 2006), it may well be that articles 1725 and 1726 of the Civil Code under the institute of "Compromise" would come into play:

*1725. A compromise shall not extend beyond the subject-matter thereof: a renunciation in a contract of compromise of all rights, actions, and claims, applies only to what relates to the controversy which has given rise to such compromise.*

*1726. A compromise shall only settle the controversies which the parties had in view, whether such parties have expressed their intention in special or general terms, or whether such intention appears as a necessary consequence of what has been expressed.*

On the other hand, viewed from a perspective of the common intent of the parties to the Agreement, another plausible interpretation could be the following. As already stated, in its original format the agreement reached started out as a "Settlement" contract. Eventually, after a number of altered versions it finally dwindled down to a Project Closure Agreement. Apart from significant changes to its opening recitals from those of the Settlement Agreement and head changes (e.g. "Variation order/s" in lieu of "Claims" at Clause 4), the Project Closure Agreement introduced for the first time at Clause 2 thereof a Reciprocal Waiver of Rights which reads as follows:

*2.1 Subject to the terms and conditions of this Project Closure Agreement, SMJV hereby irrevocably waives any and all contestations and claims made, alleged or asserted against FMS before the date of this Project Closure Agreement (the "SMJV Released Claims"), and declares that it has no further claim against FMS under or in connection with the Amended Main Agreement and irrevocably undertakes that it shall not at any time hereafter allege, assert or pursue, or cause or assist any third party to allege, assert or otherwise in any manner pursue or seek to enforce the SMJV Released Claims under or in connection with the Amended Main Agreement, against FMS.*

*2.2 Subject to the terms and conditions of this Project Closure Agreement, FMS hereby irrevocably waives any and all contestations and claims made, alleged or asserted against SMJV before the date of this Project Closure Agreement (the "FMS Released Claims"), and declares that it has no further claim against SMJV under or in connection with the Amended Main Agreement and irrevocably undertakes that it shall not at any time hereafter allege, assert or pursue, or cause or assist any third party to allege, assert or otherwise in any manner pursue or seek to enforce the FMS Released Claims under or in connection with the Amended Main Agreement, against SMJV.*

~~Incidentally, this provision never formed part of the Settlement Agreement.~~

In this context, in view of the reciprocal waiver of claims in clause 2 above reported, one query that logically arises is what induced the contracting parties to retain in the same Agreement the Waiver at clause 9. One plausible argument is that the parties wanted, once and for all, to close the chapter on the project and all and any further, past, present or future concerns, claims or disputes. The notes sent by Arch. Paul Camilleri to Minister John Dalli on the 5th of April 2009 could be understood in this light:

*"In general, FMS accepted works which albeit not being in full accordance to contract specifications, still carried out their intended function – and, in any*

*case, these had been supervised by FMS's staff for the years it took to build the Hospital. As such the ceding of these points, besides being weak to defend in an Arbitration Tribunal (due to the tacit approval by the site staff), will not impinge on the Hospital's efficacy".*

The wording of this clause is wide enough to encompass all sorts of claims and pretensions. Commenting on article 2048 of the French Civil Code, corresponding to article 1725 of our Civil Code, the renowned author Laurent ("Principii di Diritto Civile", Vol. XXVIII, no. 388) makes this important observation: "*Si vede che il legislatore ha poca fiducia nella redazione degli atti; accade raramente che essa sia l'opera delle parti, e coloro che li redigono vi mettono raramente la precisione e la chiarezza desiderabile. Pero' non bisogna spingere le cose a far dire al legislatore cio' che non ha voluto dire. Quando i termini di una convenzione non lasciano alcun dubbio, bisogna stare a quella, allo stesso modo che deve applicarsi la legge nel senso chiaro che presenta. Non vi ha luogo ad interpretazione che quando vi e' dubbio, ed in questo caso devesi tenere conto dell'intenzione, nei contratti ancor piu' che nelle leggi, perche' queste sono generalmente meglio redatte.*" Another author Dalloz (voce Transazione) retains that there could be two kinds of compromises: "*alcune generali, altre particolari. Nelle prime la rinunzia a tutti i diritti, azioni e pretensioni comprende tutti i diritti qualsivogliano di colui che rinunzia, poiche' hanno le parti voluto por termine a tutto; nelle seconde non vi si estende che a quelle relative alla controversia che vi ha dato luogo, poiche' esse circoscrivonsi al loro oggetto*".

From records examined Clause 9 was put to the test in 2011. It has resulted to the Board that when an issue arose in that year regarding defects in water tanks and underlying concrete and FMS expected Skanska JV to make good for the same, the latter rejected such a claim on the strength of Clause 9 stating that "*In response to your correspondence dated 3<sup>rd</sup> March 2011, SMJV maintain their position as previously outlined. Any obligation that may have existed for SMJV to rectify the defect, as highlighted in the attached report, was waived by FMS through Clause 9.1 of the Project Closure Agreement*". At the time, and notwithstanding legal counsel's advice based on



articles 1725 and 1726 of the Civil Code, no further action was pursued by FMS Board still headed by Architect Paul Camilleri.

Moreover FMS, who initially threatened Skanska JV that it would be withholding the payment of the last instalment of the Retention money, acquiesced to Skanska JV's stance and eventually proceeded to make the final payment.

Pursuing further the matter under consideration from a Maltese law perspective under the institute of Prescription, the position is as follows. Being of a contractual nature the prescriptive period to action a claim for damages in the case of "Appalt", that is a contract of works, is five years (see inter alia Art. 2156(f) of the Civil Code; "Carmela Manicolo vs. Philip Hili", Appeal, 5th October, 1998). This prescriptive period starts to run in the case of works not executed "skond l-arti u s-sengha" "mid-data ta' l-ezekuzzjoni tax-xoghlijiet u mhux minn dik li fiha ssir taf bil-htija l-parti danneggjata" ("Joseph Vella et vs. Emanuel Bonello et", Civil Court, First Hall, 14th July, 1971). On the other hand, in the case of works not carried out according to specifications, this same prescriptive period runs from the date the works at issue were completed.

Furthermore, one has to consider article 1638 of the Civil Code which provides as follows:

*1638. (1) If a building or other considerable stone work erected under a building contract shall, in the course of fifteen years from the day on which the construction of the same was completed, perish, wholly or in part, or be in manifest danger of falling to ruin, owing to a defect in the construction, or even owing to some defect in the ground, the architect and the contractor shall be responsible therefor.*

It is more than clear, as so confirmed by Arup's report, that this provision of the law bears no significance to the matter under review. According to local jurisprudence an action based on this disposition of the law "kellha bhala presuppost mhux kwalunkwe lezzjoni għall-edificcju jew difett ta' kostruzzjoni imma r-rovina totali jew parzjali, jew almenu l-perikolu evidenti anke jekk mhux imminenti tar-rovina....La darba ma kienx

*hemm perikolu ta' tigrif, l-art. 1732 (illum, art. 1638) ma setax jigi applikat, ghax kien jonqos wiehed mill-estremi tal-istess disposizzjoni...."* ("Michele Mallia vs. Perit William Micallef et", Appell Kummercjali, 15th November, 1968).

Having considered the above, the facts as they transpired make the matter more complex and convoluted. Considering that:

- the works in question have been accepted over the years, leading to a possible tacit acceptance of the defects, and/or renunciation of right;
- it seems to have been the will of the parties to close off the project once and for all by means of the Project Closure Agreement as evidenced by the words of Arch. Paul Camilleri above referred;
- that FMS already failed to institute legal action against Skanska JV when structural defects were discovered;
- FMS did not rebut to Skanska JV's defence that Clause 9 of the Project Closure Agreement which meant that no further claim could be raised against it; and
- the failure to carry out further physical tests when FMS had, or should have had reasonable grounds to doubt the structural integrity of the site;

any future action, despite the legal principles above discussed, may be hindered and threatened.

Finally however the Board refers to Article 2154 of the Civil Code:

*2154. (1) With regard to the prescription of civil actions for damages arising from criminal offences, the rules laid down in the Criminal Code relating to the prescription of criminal actions shall be observed.*

*(2) Nevertheless, any person who has stolen a thing, or who has become the possessor thereof by means of an offence of fraud, or who has received or bought such thing, knowing it to have been stolen or fraudulently acquired, cannot prescribe for it, notwithstanding any lapse of time.*

If through further investigations carried out by the authorities, criminal responsibility is definitely identified and concretized, future legal actions for civil damages against the perpetrators may still be possible.

### ***Project Management's Responsibility***

A Project Manager was appointed by the Foundation for Medical Sciences and Services whose duties emanate from the Contract dated 12<sup>th</sup> September, 1995. Inter alia, among his multi-task responsibility he had to supervise the Works carried out and, in particular, the quality management and certification of such works. To better perform such duties the Project Manager had a number of Architects to oversee specific building areas. It is worthwhile to point out that as per clause 2.1 (c) of the said Contract it is provided that *"Except as expressly stated in the Contract, the Project Manager shall have no authority to relieve the Contractor of any of his obligations under the Contract."* From this, one can infer that ultimately the responsibility for the correct and proper execution of the works lay with the Contractor, and any verified defects had to be made good by him.

This does not mean that the Project Manager was exempt from any responsibility towards the Client (FMMS). In the Board's view the overall picture resulting from a recital of the facts above detailed seems to show shortcomings, bordering on gross negligence, even though one ought to point out as aforementioned that the Project Manager's team was highly under staffed to supervise the whole range of the works simultaneously carried out *in situ* by the Contractor who, incidentally, had his own supervisors on site.

It has been held by our Courts on the strength of a judgement by the Italian Court of Cassation (28<sup>th</sup> November, 2001, No. 15124) that *"in tema di responsabilita' conseguente a vizi o difformita' dell'opera appaltata, il direttore dei lavori per conto del committente, sebbene presta un'opera professionale in esecuzione di una obbligazione di mezzi e non di risultati, poiche' e' chiamato a svolgere la propria attivita' in situazioni involgenti l'impiego di peculiari competenze tecniche, deve utilizzare le proprie risorse intellettive ed operative per assicurare, relativamente all'opera in corso di realizzazione,*

*il risultato che il committente-proponente si aspetta di conseguire, onde il suo comportamento deve essere valutato non con riferimento al normale concetto di diligenza, ma alla stregua della "diligentia quam in concreto"; costituisce, pertanto, obbligazione del direttore dei lavori l'accertamento della conformita' sia della progressiva realizzazione dell'opera al progetto, sia delle modalita' dell'esecuzione di essa alle regole della tecnica. Conseguentemente non si sottrae a responsabilita' ove ometta di vigilare e di impartire le opportune disposizioni al riguardo, nonche' di controllarne l'ottemperanza da parte dell'appaltatore ed, in difetto, di riferirne al committente."* This extract was reproduced in the case "Joseph Falzon nomine vs. Marquita Briffa et", Civil Court, First Hall, 27<sup>th</sup> April, 2005, confirmed by the Court of Appeal on 4<sup>th</sup> July, 2008. This judgement went on to state "Naturalment dan appena enuncjat jirrigwarda r-rapport intern bejn il-kommittent u d-direttur tax-xoghlijje". In the same sense is the judgement handed down by the Court of Appeal in its Inferior Jurisdiction, "Maria Concetta Stivala et vs. Pierre Buttigieg et", 22<sup>nd</sup> January, 2010.

These responsibilities outlined above by and large were assumed by the Client's Representative under the Design & Build contract.

However it is to be pointed out that the prescriptive period for any action on the basis of the above is also that of 5 years which start to lapse from termination of works. However in the event that fraudulent dereliction of duty is identified through the appropriate legal process, action for civil damages could still be possible.

Having made the above observations, it is the opinion of the Board that the report should be sent to the Attorney General for his further assessment and determination of the civil liabilities of the parties involved and to advise FMS and Government on the best legal action and avenues, if any, available to them.

## **IX. Criminal Responsibility**

As mentioned above the Board is firm in its opinion that the widespread failings uncovered by the present day technical reports indicates that the pervasive weak

concrete found in the site is a result of intended fraudulent actions. However the Board has not found the necessary evidence to link such fraud with any individual or group of individuals.

Moreover the Board, after having analysed all the evidence before it and the witness statements is left with a distinct impression that events as they transpired were not the fruit of coincidence or providence but seem to indicate an element of concertation and direction. Too many occasions have been missed which could have uncovered the extent of such extensive and absolute failings for such to be solely down to unfortunate coincidence. In this regard the words written by Ing. Carlo Mereghetti to Don Verze, and statements made by certain witnesses re-enforce this impression. However once again the Board has not uncovered any evidence that could conclusively indicate, or rather implicate any individual or group of individuals.

The Board also has serious concerns regarding certain statements made under oath and events as they occurred leaving it with reasonable suspicion of wrong-doing. These include statements made by witnesses alleging political intervention in the choice of concrete suppliers, corruption, and alluding to possible fraudulent acts in the conclusion of the Project Closure Agreement.

In light of the above the Board strongly recommends that this report along with the dossier are sent to the Commissioner of Police for further investigations.

## 2017-2018 (to date) Reports issued by the NAO

### NAO Work and Activities Report

April 2018                      Work and Activities of the National Audit Office 2017

### NAO Audit Reports

May 2017                      Performance Audit: Protecting Consumers through the Market Surveillance Directorate's Monitoring Role

June 2017                      Performance Audit: Procuring the State Schools' Transport Service

July 2017                      An Investigation of Property Transfers between 2006 and 2013:  
The Transfer of the Property at 83 Spinola Road, St Julian's

July 2017                      An Investigation of Property Transfers between 2006 and 2013:  
The Expropriation of the Property at Fekruna Bay, St Paul's Bay

September 2017              Performance Audit: Landscaping Maintenance through a Public-Private Partnership

October 2017                 Performance Audit: Maintaining and Repairing the Arterial and Distributor Road Network in Gozo

November 2017                Follow-up Reports by the National Audit Office 2017

November 2017                Performance Audit: Outpatient Waiting at Mater Dei Hospital

November 2017                Report by the Auditor General Public Accounts 2016

December 2017                Annual Audit Report of the Auditor General - Local Government 2016

December 2017                An Analysis on Revenue Collection

January 2018                  The use of IT systems to identify skills and professional development needs within the Public Service

February 2018                 Performance Audit: The designation and effective management of protected areas with Maltese waters

March 2018                    Performance Audit: Evaluation of Feed-In Tariff Schemes for Photovoltaics

May 2018                      An Investigation on anonymous allegation on a Home Ownership Scheme property in Santa Luċija