



Performance Audit: Procuring the Public  
Transportation Service  
July 2022



Performance Audit  
Procuring the Public Transportation Service

Report by the Auditor General  
July 2022

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## List of Abbreviations

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|       |   |
|-------|---|
| ADL   | Autobuses de Leon                               |
| AM    | Arriva Malta Ltd.                               |
| CEO   | Chief Executive Officer                         |
| COLA  | Cost of Living Adjustment                       |
| DB    | Deutsche Bahn                                   |
| DoC   | Department of Contracts                         |
| EOI   | Expression of Interest                          |
| ER    | Evaluation Report                               |
| IT    | Information Technology                          |
| MCA   | Malta Communications Authority                  |
| MPTS  | Malta Public Transport Services Ltd.            |
| MPTSO | Malta Public Transport Services Operations Ltd. |
| NAO   | National Audit Office                           |
| PPR   | Public Procurement Regulations                  |
| PSC   | Public Service Compensation                     |
| S.L.  | Subsidiary Legislation                          |
| TEC   | Tender Evaluation Committee                     |
| TM    | Transport Malta                                 |

# Key Facts

## Key figures portraying the financial and social materiality of the Scheduled Bus Service

|                                   | 2019        | 2020*       | 2021*       |
|-----------------------------------|-------------|-------------|-------------|
| <b>FINANCIAL</b>                  |             |             |             |
| Public Service Compensation (PSC) | €30,481,405 | €37,374,130 | €34,018,028 |
| <b>SOCIAL</b>                     |             |             |             |
| Passengers                        | 56,950,354  | 33,555,465  | 35,207,171  |
| <b>OPERATIONAL</b>                |             |             |             |
| Buses                             | 415         | 416         | 416         |
| Routes                            | 111         | 112         | 115         |
| Average Coverage (km/yr)          | 32,281,980  | 27,330,570  | 28,470,261  |

\* These two operational years were invariably affected by the Covid-19 pandemic



# Executive Summary

A sense of urgency and an incomplete audit trail diluted good governance and transparency in the procurement of the Public Transportation Service

## Why this study?

The scheduled bus service in Malta carries significant social importance since it is the sole large-scale transport service that provides mobility to the general public. This contractual service is expected to cost Government more than €430 million over the contract's 15-year duration.

In view of this, NAO reviewed the adopted procurement process in acquiring the mentioned contract to determine whether it followed the principles of good governance and safeguarded Government's interests, and subsequently that of the taxpayers'.

## What NAO Recommends

As this concession agreement is due to expire in the year 2030, NAO strongly recommends that the identified shortcomings in this report and the presented recommendations are given due consideration by TM in the preparation for any eventual future procurement of such services.

In view of the implications brought about by the overarching sense of urgency in the process under review, this Office also urges the Authority to position itself strongly in any upcoming EOI, by initiating the procurement process well in advance of the current agreement's expiration, thereby allowing for an adequate timeframe for such a process to develop in a more steady-paced and well planned-out manner

## NAO's Key Observations

NAO is primarily concerned with the fact that the scoped process was conducted with a sense of urgency, which generated obvious and otherwise avoidable risks to a sector that carries significant social and financial materiality.

On the other hand, this Office commends Government for having a set preferred direction a priori, that is, to fully favour bids which included the full acquisition of the operating company. Nonetheless, NAO is concerned that the weighting mechanism stipulated in the EOI was not designed to include reasonable quantification of this favourability between different options, but rather opted for absolute preference towards one.

This review also showed that prospective bidders were provided with draft financial statements of the operating company they were invited to procure rather than audited accounts, and that these drafts were presented halfway during the bidding phase. Considering that TM refused to extend the EOI submission deadline when asked to do so by prospective bidders in view of this delay, it is noted that this resulted in a drastic reduction in the time during which the latter could formalise the financial element of their bids. This Office is also concerned with the lack of clarity in Government's intention to deal with major line items in the operating company's balance sheet at EOI stage, which items could have significantly affected the company's capital. These shortcomings risked influencing negatively the attractiveness of this acquisition and possibly hindered the Authority from receiving additional (possibly advantageous) offers.

While acknowledging that the related evaluation report and forwarded ancillary documents present a general view of the main considerations of this process, NAO is concerned by the lack of forwarded documentary evidence showing the Committee's review of the submitted bids with respect to a number of specific EOI requirements. This means that this Office could not conclusively determine the extent of comprehensiveness of the TEC's evaluation and whether these mentioned requirements were adequately adjudicated by the TEC or otherwise.

This Office also reviewed documentation suggesting that the negotiation phase of this procurement process started before the preferred bidder was formally confirmed by the evaluation committee. Though the singularity of the bidder under the preferred option mitigates NAO's concern in this respect, it still believes that the specific requirement stipulated in the EOI for negotiations to be initiated after the selection of the bidder, should have been followed.

NAO was also significantly concerned with the fact that it was provided with practically no documentation related to the negotiation phase of this process. Not being forwarded with a documented audit trail impeded this Office from assessing whether these negotiations were conducted thoroughly in accordance with the principles of good governance or otherwise.

# Chapter 1 | Introduction

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

## 1.1 Why this study?

1.1.1 The scheduled bus service in Malta carries significant social importance, particularly since it is the sole large-scale transport service that provides mobility to the general public. This service is being provided through a contract between Government and a private operator and is expected to cost the former more than €430 million over the contract’s 15-year duration.

1.1.2 In view of these considerations, NAO carried out a review to examine whether the procurement process, adopted in the acquisition of the mentioned contract, followed the principles of good governance and safeguarded Government’s interests, and subsequently that of the taxpayers’.

## 1.2 Background Information

1.2.1 In November 2010, Transport Malta (TM) (which at the time fell within the portfolio of the Ministry for Transport and Infrastructure – now the Ministry for Transport, Infrastructure and Capital Projects) entered into an exclusive ten-year concession agreement (starting from July 2011) with a private operator (Arriva Malta Ltd.) for the provision of scheduled bus services in Malta and Gozo. In January 2014 however, a mutual agreement between this service operator and Government was reached where it was decided that the former desists from operating this concession agreement, and that the latter would acquire 100% of the shares of Arriva Malta (AM) Ltd. This company was subsequently renamed Malta Public Transport Services Operations Ltd. (MPTSO). Within the same month of this acquisition, TM issued an expression of interest (EOI) calling for the submission of offers from parties who were interested in acquiring the exclusive concession rights to operate the Scheduled Bus Service in Malta and Gozo, as well as the operating company (in full or part thereof).

1.2.2 Following the evaluation of the submitted offers and negotiations with the preferred bidder, an agreement between TM and the current operator (that is Autobuses de Leon [ADL]) was signed on the 8<sup>th</sup> of January 2015. The agreement covers the provision of the service in question up to the 7<sup>th</sup> January 2030 and, up till writing of this report, has seen Government paying an average of €30.5 million per annum by way of public service compensation to the current operator since the start of this agreement.

## 1.3 Audit Scope and Objectives

1.3.1 The main objective of this study is to determine whether the public transport concession agreement was secured in a manner which conformed with the principles of good governance and transparency.

1.3.2 While the result of this procurement process is still in effect as at time of writing through the ongoing provision of public transportation service, this report is scoped to include related events that occurred between January 2014 (when Government took over the running of the public transport service), up until the same company was re-acquired by a third-party operator in January 2015. An analysis on the conditions as stipulated in the resultant agreement as well as on the provision of this service, has already been undertaken by NAO in its January 2020 publication titled *“Performance Audit: Assessing the Public Transport Contract and Transport Malta’s visibility on the service”*. To this end, such a review was not re-conducted in this exercise.

1.3.3 This study is a performance review aimed at addressing the abovementioned main objective and not a financial compliance exercise. To this end, while some financial considerations have been included in this analysis, certification on whether actual payments or financial transactions were compliant or otherwise, to contractual conditions or legal provisions fell outside this audit’s scope.

## 1.4 Methodology

1.4.1 As part of its preliminary research the audit team reviewed the agreement currently in vigore which governs the public transport service and proceeded to hold initial meetings with TM’s Management to gain insight on the operations of this service. Through this process, the audit team gathered sufficient information to set a main audit question and could scope its approach. In line with performance audit methodology, a detailed Issue Analysis and Audit Design Matrix were compiled, through which several sub-questions, criteria and intended methodologies emerged. These provided the audit team with a clear pathway towards the successful conclusion of this audit.

1.4.2 Following the above, the audit team conducted a series of semi-structured meetings with incumbent members of TM’s Management, as well as with other officials who were directly involved in the procurement process under review, but who have since vacated their positions within the Authority. In addition, this Office also held a meeting with a representative from the Department of Contracts (DoC) to discuss procurement regulations and principles that were in effect during the scoped period. As the fieldwork phase of this exercise was largely carried out during the COVID-19 pandemic, all these meetings were held online.



- 1.4.3 Throughout this study, the audit team requested copies of various documentation related to the audited area. All documentation received by auditees was meticulously reviewed, and pertinent analysis was carried out to address different aspects of the audit's objective.
- 1.4.4 From the information received through the abovementioned methodologies and subsequent analysis, the audit team proceeded to produce the first draft of the report. This was then presented to the auditee for its feedback prior to publication.
- 1.4.5 NAO conducted this performance audit in line with the Standard for Performance Auditing, ISSAI 3000.

## 1.5 Limitations

- 1.5.1 As stated earlier, the events analysed in this review occurred between January 2014 and January 2015. While NAO maintains that an acquisition process of this scale should have been meticulously and comprehensively documented, the audit team was faced, on multiple occasions, with assertions that details on requests made by this Office could not be cited as a considerable amount of time had elapsed between the scoped period and the time of writing of this report.
- 1.5.2 Depth of analysis in this review was also somewhat hampered by instances in which documentation relating to key stages of this significant acquisition process could not be made available by the Authority (discussed in further detail in Chapter 3).
- 1.5.3 In addition, while voluminous related documentation (even if incomplete) still reached this Office, in some instances this was only done after significant delays.
- 1.5.4 Finally, while the audit team did hold meetings with the then Executive Chairman TM (who also occupied the position of Chairman of the Tender Evaluation Committee) as well as the then Chief Officer of the Land Transport Directorate (who also occupied the position of CEO of MPTSO during its operations), receipt of information from these individuals stalled at one point during the fieldwork stage. Attempts to communicate further with the former, after holding two meetings with the audit team, were not successful as this Officer changed employment and could no longer be traced. With respect to the latter, following a meeting and a subsequent request for information, the audit team was redirected to enquire with TM for any additional requests.

## 1.6 Report Structure

- 1.6.1 Chapter 1 - This introductory chapter starts off with NAO's reasoning for undertaking this study and by presenting a contextual backdrop of the subject under review. The audit's scope, objectives and methodology utilised to complete the required analysis are also laid out, together with a synopsis for each chapter in this report.
- 1.6.2 Chapter 2 – This chapter lays out a chronology of events of the main occurrences, which shaped the procurement process under review. This section provides the reader with a summarised chronology of events through a textual version and then proceeds to present a timeline in graphical format. The aim of this chapter is purely intended to lay out how the events in question unfolded and not to present this Office's related observations.
- 1.6.3 Chapter 3 – The acquisition process under review was complex and multifaceted. While the audit team did review all aspects of this process, this chapter presents NAO's related salient observations. It is important to note that NAO's observations in this chapter are issue-based rather than documented chronologically.

## Chapter 2 | Chronology of Events

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**This chapter lays out a chronology of events of the main occurrences, which shaped the procurement process under review. This section provides the reader with a summarised chronology of events through a textual version and then proceeds to present a timeline in graphical format. The aim of this chapter is purely intended to lay out how the events in question unfolded and not to present this Office's related observations.**

### 2.1 Chronology: A Textual Version

2.1.1 In order to facilitate the understanding of this process, this Office opted to classify the chronology of events into two different parts. Specifically, the first section presents the events directly related to the procurement process (such as the issuing of the relevant documents, signing of contracts etc) while the second section illustrates the events surrounding the corporate and financial environment (such as the setting up of companies, financial transactions etc) which occurred during the process under review.

#### *Part 1 - Chronology of the Procurement Process*

2.1.2 In early January 2014, Government (through a company set up for this specific purpose – Malta Public Transport Services Ltd. [MPTS]) acquired the concession rights to operate the scheduled public bus services in Malta and Gozo, from the then private operator (AM) after an agreement was reached between both parties to terminate this service. Subsequently, on the 27<sup>th</sup> of January 2014, the Authority for Transport issued an EOI aimed at encouraging interested parties to submit new offers to acquire the exclusive rights to operate this service as well as the operating company, in part or in full.

2.1.3 This EOI established that the submitted bids were to take the form of one of the following three options:

- Option A - Acquire the operating company (i.e. the then Government operated company MPTSO) including all its assets and liabilities;
- Option B - Acquire the exclusive concession rights to operate the services in their entirety (i.e. the entire route network) including the assets of MPTSO; or
- Option C - Operate a group of routes as identified in the EOI itself (i.e. not all, but part of the network) with the option to also acquire some or all the assets of MPTSO.

2.1.4 The EOI also categorically stated that the evaluation committee shall give preference to the bids submitted under option A, with submissions for options B and C being given second and

third priority respectively. It must also be noted that the EOI further stated that “*should the Authority be satisfied with submission received under option A all remaining options will not be considered. Same methodology when moving through remaining options*”. The closing date of the EOI was set as the 7<sup>th</sup> April 2014.

2.1.5 Before the closing date of the EOI, a clarification process was held by the Authority. Documentation reviewed by this Office shows that numerous clarifications were sent to TM, to which the latter provided corresponding replies. It is however noted that on the 10<sup>th</sup> of March 2014, the Authority published MPTSO’s documented financial position (as at 2<sup>nd</sup> January 2014). This, together with a number of the forwarded clarifications indicate that this important information was not communicated to the bidders before this point. The deadline for this clarification process was set to the 14<sup>th</sup> of March 2014.

2.1.6 Four bids were submitted for this EOI, one of which was received late and therefore disqualified. The three successful bids were opened during the first meeting of the Tender Evaluation Committee (TEC), held on the 9<sup>th</sup> April 2014. These consisted of:

- Bid 1: Autobuses de Leon (ADL) – under Option A
- Bid 2: Gozo First Travel – under Option C
- Bid 3: Island Bus Services – under Option B

2.1.7 The TEC read out the economic and compensation part of all submitted bids. After determining that the bid submitted by ADL was the only one under Option A, the TEC sealed the other bids and proceeded to perform initial analysis on the ADL bid only. This initial analysis was intended to ascertain that, amongst others, ADL’s submission satisfied the bid bond requirement, had a duly filled-in tender form, included a documented legal position and power of attorney, as well as presented certification of economic and financial standing.

2.1.8 During the evaluation processes, the TEC sought expert advice on the scheduling of operations as well as on the IT infrastructure and tracking systems being proposed by ADL. In addition, the committee also commissioned an external audit firm to conduct a financial analysis of the bid and sought a legal opinion on its decision to focus the evaluation solely on the offer for Option A.

2.1.9 While the legal opinion confirmed that this decision was in line with the terms of the EOI, consultations with the other experts mentioned above raised a number of questions on the operational, technical and financial perspectives, which needed to be addressed. In view of this, the committee invited ADL to give feedback, with this being provided through a series of meetings between TEC and a technical team from ADL during the week of 19<sup>th</sup> to the 25<sup>th</sup> of May 2014. During these meetings the TEC decided to send a delegation to Spain to experience and obtain a better understanding of ADL’s operations. Documentation reviewed by this Office suggests that this delegation, consisting of the then Minister for Transport together with three

members of the TEC, was planned to visit Spain between the 10<sup>th</sup> and 12<sup>th</sup> of June 2014. On the other hand, the bidder was invited by the TEC to start a due diligence process on MPTSO, seeing its intent to acquire this company as per Option A. Additionally, TEC further agreed to engage a legal expert to forward a draft contract to ADL for their review.

- 2.1.10 Following initial negotiation meetings with ADL on the route network, the financial proposal forwarded by the bidder, as well as on the operational, legal and financial due diligence considerations, the TEC eventually proposed that ADL are declared as the preferred bidders and that the other bidders should be informed of this decision accordingly. Documentation reviewed by this Office suggests that letters informing the bidders of the committee's decision, were delivered on the 12<sup>th</sup> August 2014, though copies of these letters could not be secured by NAO (issue to be discussed further in subsequent parts of this report). This Office however notes that the formal evaluation report was dated 1<sup>st</sup> September 2014, that is, after these letters were sent.
- 2.1.11 Through its fieldwork, particularly through meetings with TM management of the time as well as the review of limited indicatory documentation, NAO determined that negotiations between TM and ADL were ongoing throughout the period after the latter was identified as the only bidder to go for Option A. However, as major gaps prevailed in the documentation forwarded to NAO on these negotiations (issue to be discussed further in subsequent parts of this report), the audit team is not in a position to accurately determine when these negotiations were initiated and when they came to a close.
- 2.1.12 In November 2014, one of the unsuccessful bidders sought legal action against Government on the selection of ADL as the preferred bidder. In December 2014, the Court handed down its sentence in favour of Government.
- 2.1.13 The final agreement between the Authority, MPTSO and ADL was signed on the 8<sup>th</sup> of January 2015.

# Timeline 1: Chronology of the Procurement Process

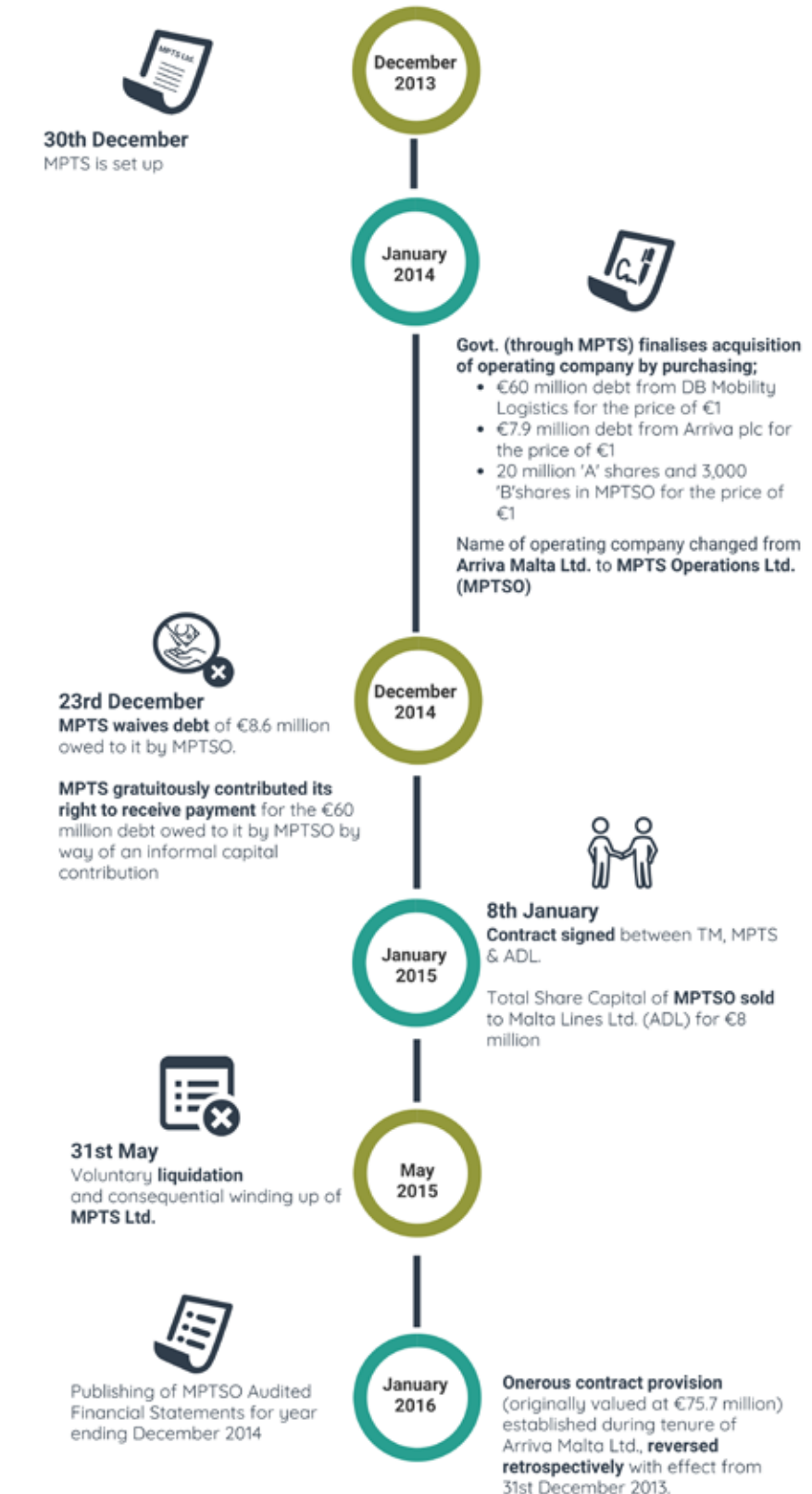


## *Part 2 - Chronology of the Corporate and Financial aspects of the Procurement Process*

- 2.1.14 On the 30<sup>th</sup> December 2013, Government set up the company MPTS. On the 2<sup>nd</sup> of January 2014, Government, through MPTS, acquired AM and renamed it MPTSO. Specifically, Government acquired:
- a. All of AM's issued share capital, amounting to 20,005,999 Ordinary 'A' shares and 3,000 Ordinary 'B' shares for a total price of €0.99;
  - b. A debt, together with all its rights, title, interest and benefits amounting to €7,937,753, from Arriva p.l.c (an AM creditor) for €1;
  - c. A debt, together with all its rights, title, interest and benefits amounting to €60,031,739 from DB Mobility Logistics (another AM creditor) for an additional €1.
- 2.1.15 On the 20<sup>th</sup> December 2014, the company MPTS signed a share purchase agreement with ADL, through which it agreed to sell all its MPTSO shares to the latter for the price of €8 million. This agreement was to come into force on 8<sup>th</sup> January 2015.
- 2.1.16 On the 23<sup>rd</sup> December 2014 (that is, before the abovementioned share purchase agreement came into force), MPTS waived a debt of €8,868,068 due to it from MPTSO. In addition, MPTS gratuitously contributed to MPTSO (by way of an informal capital contribution) its right to receive payment of the debt amounting to €60,034,141. This was done on the basis that both MPTS and MPTSO were owned by the Government at the time.
- 2.1.17 The share purchase agreement allowing ADL to take over MPTSO came into force on 8th January 2015. MPTS was wound up and liquidated on the 31<sup>st</sup> May 2015.
- 2.1.18 In January 2016, MPTSO's audited financial statements (for the year ending December 2014) were filed. These documents, amongst others, show that an onerous contract provision (originally valued at €75.7 million) that was established by AM during its tenure due to unfavourable performance forecasts at the time, was reversed retrospectively with effect from the 31<sup>st</sup> December 2013, as the change in situation was not expected to give rise to onerous contract loss provisions.

## Timeline 2: Chronology of the Corporate and Financial Aspects of the Procurement Process

### MALTA PUBLIC TRANSPORT - PROCUREMENT PROCESS (CORPORATE ASPECT)





## Chapter 3 | Observations

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**The acquisition process under review was complex and multifaceted. While the audit team did review all aspects of this process, this chapter presents NAO's related salient observations. It is important to note that NAO's observations in this chapter are issue-based rather than documented chronologically.**

### 3.1 Scoped procurement process was exempted from PPR at the time

3.1.1 At the time of the procurement process in question, the provision of the scheduled bus service was governed by a concession agreement operated by AM (which, as discussed in Chapter 2, was eventually taken over by MPTSO). This procurement process revolved around the restating of this concession agreement to a new operator, with the objective of the latter acquiring exclusive concession rights to operate the scheduled bus services in Malta and Gozo for the remaining term of the original concession (that is until the 2<sup>nd</sup> July 2021), with the immediate option to extend this by an additional 10 to 15 years.

3.1.2 Being a public service concession agreement, NAO observed that this procurement process was exempt from the standing Public Procurement Regulations (PPR) at the time. More specifically, LN 296.10, which was in vigore during this scoped period stated, through Article 17 paragraph 2, that *"these regulations shall not apply to public service concession contracts"*. In fact, this Office observed how this process was carried out through an EOI, followed by a negotiated procedure rather than a formal call for tenders as would normally be required for a procurement process of such financial materiality. In addition, NAO also notes that this EOI was issued directly by TM, with DoC confirming with the audit team that it was not involved at any stage<sup>1</sup>.

3.1.3 Notwithstanding this concession being exempt from PPR at the time, NAO believes that principles of good governance still needed to be adhered to. During a meeting with the DoC, NAO confirmed that while PPR regulations did not apply for this acquisition, the process was still required to follow the basic principles governing public procurement, such as non-discrimination, equality of treatment, transparency, mutual recognition and proportionality. The DoC also highlighted that, while different procurement models to those established in the PPR could have been adopted by the issuing entity for such a concession (as long as the above principles are observed), it is understood that any requirements set and established in the Eoi are to be adhered to, by the same entity, throughout the respective procurement process. To this end, these principles will be used as guidance in NAO's analysis of the different aspects of the scoped procurement process (as presented in subsequent parts of this chapter).

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<sup>1</sup> DoC informed the audit team that it was only consulted to confirm that this concession was exempt from PPR prior to its issuance. It did not actively participate in any phase of this procurement process.

- 3.1.4 NAO feels it is pertinent to point out that, since this procurement process, PPR now do regulate public service concession agreements. More specifically, the enactment of S.L 601.09 in October 2016 established a set of regulations for concession contracts *“to regulate the award of works and service concessions to economic operators”*

### NAO Observation

- 3.1.5 This Office positively notes the inclusion of public service concessions in PPR since the scoped process, as this ensures that such procurement processes are subject to a more robust framework of regulation.

## 3.2 A sense of urgency prevailed throughout this procurement process

- 3.2.1 In its review of documentation related to the procurement process in question, the audit team noted that a sense of urgency prevailed throughout. Documentary evidence reviewed by this Office showed that on the 10<sup>th</sup> of December 2013, the Attorney General replied to a query put to his Office by TM regarding Government’s right to acquire shares in AM. The audit team further observed that the acquisition of these shares did occur shortly afterwards (with the newly acquired operating company being renamed MPTSO), as evidenced by a copy of the share transfer instruments dated 2<sup>nd</sup> January 2014. In addition, NAO took note of the fact that the EOI intended to attract offers for the acquisition of the public transport concession agreement (as well as the acquisition of the operating company in full or part thereof) was published on the 27<sup>th</sup> of January 2014, that is just over three weeks after the formal acquisition by Government.

- 3.2.2 As will be discussed in further detail in subsequent parts of this chapter, this sense of urgency could also be observed through the fact that, even though the EOI was published in late January 2014 and called for offers for the acquisition of MPTSO (in full or part thereof), no related financial statements of this company were originally issued with the EOI. Through its review the audit team noted that such information was only provided to prospective bidders on the 10<sup>th</sup> of March 2014, which was only one month short from the EOI 7<sup>th</sup> April 2014 deadline. This Office also observed that even if this financial information was issued late in the process, it did not feature audited accounts, but rather draft versions. Finally, forwarded documentation on the clarification phase of this EOI showed that prospective bidders asked for an extension in the deadline of the EOI in view of the late publication of the draft financial statements. In reply however, the Authority asserted that no such extensions will be granted.

- 3.2.3 In view of the abovementioned observations made through the review of forwarded documentation, NAO held meetings with the then Executive Chairman TM (who also occupied the position of Chairman of the TEC) as well as the then Chief Officer of the Land Transport

Directorate (who also occupied the position of CEO of MPTSO during its operations). Asked to verify whether a sense of urgency prevailed during this process, these officials highlighted that, following the dissolution of the agreement with the previous operator, the Government and the Authority were looking to secure another service provider as quickly as possible. The audit team was further informed that this was due to three key factors namely; the Authority being apprehensive that it would not be able to secure an agreement for the public transport service for the foreseeable future given the unfavourable resulting situation with the previous provider; the Authority not wanting to be responsible for such an operating company and subsequently run the public transport service itself for a prolonged period and; the risk that MPTSO's expenses as a Government owned company would be unmanageable.

**3.2.4** NAO sought to substantiate the claims made by these two officials through documentary evidence. However, documentation forwarded to NAO by TM on this scoped process did not feature any communication or other information in this respect. In view of this, the audit team enquired with the Ministry whether it could produce such trails. In reply however, the latter stated that it is not in a position to retrieve documentary evidence which indicate the urgency related to this procurement process as mentioned by these two former TM officials.

**3.2.5** NAO here highlights that, as this sense of urgency prevailed throughout the process under review, the related salient considerations presented in subsequent parts of this chapter are to be viewed with this context in mind.

### *NAO Observation*

**3.2.6** NAO considers the award of the long term concession agreement of the national public transportation service as a major process due to its financial and social implications. To this end, it is inevitably concerned that such an event was conducted under urgency which would bring with it obvious and otherwise avoidable risks.

## **3.3 EOI's selection criteria could have been better weighted**

**3.3.1** As already outlined in Chapter 2, the EOI gave the possibility to interested parties to root their offers in one of three different options as follows:

- Option A -** Acquire the operating company (i.e. the then Government operated company MPTSO) including all its assets and liabilities;
- Option B -** Acquire the exclusive concession rights to operate the services in their entirety (i.e. the entire route network) including the assets of MPTSO; or
- Option C -** Operate a group of routes as identified in the EOI itself (i.e. not all, but part of the network) with the option to also acquire some or all of the assets of MPTSO.

**3.3.2** This Office however observed that the EOI specifically declared that "*should the Authority be satisfied with the submissions received under the first option (paragraph A above), all*

*submissions received for the remaining options will not be considered*". NAO notes that through this wording, an adequate weighting system to determine best value for money on offers received across all options was lacking. Specifically, while this Office acknowledges that an option may be perceived as more favourable to Government over the rest, it still believes that all submitted offers should be given due consideration. NAO understands that this should be done through the application of an objective weighting mechanism which gives every offer the opportunity to present itself as the most advantageous one overall, irrespective under which option it was submitted, rather than be completely omitted solely by virtue of another offer being submitted under what Government perceives as the most favourable option a priori.

3.3.3 The EOI's stated absolute preference for offers submitted under option A, is further substantiated by legal advice received by the evaluation committee during the initial phases of the bids' evaluation. Specifically, this Office reviewed correspondence between the TEC and its legal advisor, with the former requesting guidance on the legality should it evaluate bids received under option A first and not the others. In reply, the legal advisor stated that should "*the Committee find that such submission is both administratively compliant and advantageous, then it can choose to process this submission without considering the other offers. If the Committee is not satisfied with the submission received under the first option, it may then consider the submissions received under paragraph (b), and so on*".

3.3.4 Seeing that a more objective weighting mechanism could have been used in the evaluation of the offers in question, NAO enquired with TM's Official responsible for drafting this EOI, on the reason why such an approach was adopted. In reply, this Official stated that it was Government's preferred way forward to divest itself from MPTSO at the earliest as it was not deemed favourable for Government to retain a public transportation service company under its ownership. To this end, it was decided that bids falling under option A should be given absolute preference.

3.3.5 In determining how the TEC went about this initial stage of the adjudication in question, the audit team reviewed the evaluation report and it noted that all the submitted bids were duly opened<sup>2</sup>, with the Chairman of the TEC proceeding to read out all the economic and compensation bids. Subsequently, the TEC unanimously agreed that in view that ADL's offer fell within the criteria of the preferred bid option as mentioned above, the evaluation process was to start solely on this bid, while the other bids were to be sealed off.

3.3.6 Given this Office's already stated reservations on the lack of an objective weighting mechanism between the different options, it conducted a cursory review on the other two successfully submitted bids to ascertain whether they could have presented themselves as competitive even if submitted under different options. This exercise however, prima facie showed that the economic offers found in the other two bids did not present themselves as being competitive when compared with the ADL submission.

<sup>2</sup> As already stated in Chapter 2, a fourth bid was submitted, but after the set EOI deadline. To this end, this bid was disqualified by the TEC.

## NAO Observation

**3.3.7** While NAO commends Government to have had a set preferred direction a priori with respect to which option of the three proposed to bidders would be more favourable, it nonetheless is concerned with the fact that the weighting mechanism stipulated in the EOI was not designed to include reasonable quantification of this favourability between the different options, but rather opted for absoluteness. While NAO’s cursory review of the other submitted bids resulted that these were not deemed to be sufficiently economically competitive when compared to the winning bid, this Office still notes that this shortcoming could have inhibited any potentially favourable offers, which could have been submitted under other options, from presenting themselves as more advantageous.

### **3.4 MPTSO draft financial position was unclear and was presented halfway through the EOI process**

**3.4.1** NAO notes that, to varying extents, all three options presented in the EOI, included the requirement (or possibility in the case of Option C) of acquiring MPTSO in its entirety, or all/part of its assets. Notwithstanding, this Office observed that the EOI, upon its issuance on 27<sup>th</sup> January 2014, did not present MPTSO’s financial position upon which prospective bidders could base their offers insofar as acquiring MPTSO or all/part of its assets was concerned. Rather, the EOI stated that a *“draft copy of the financial statements of the Operating Company for the year ended 31<sup>st</sup> December 2013 together with the list of assets and liabilities of the Operating Company, will be made available throughout the clarification process”*.

**3.4.2** During NAO’s review of the process, it observed that details on the financial position (including a proforma Balance Sheet as at 2<sup>nd</sup> January 2014) of the mentioned company, were only presented to prospective bidders on the 10<sup>th</sup> of March 2014. During a meeting with the Official who was responsible for drafting the EOI at the time, NAO was informed that the mentioned information was not submitted immediately with the EOI’s issuance since only a short period of time (approximately three weeks) had elapsed from when Government had taken over the company from the previous operator. In fact, as illustrated in Chapter 2, this Office observed that the EOI was issued only 25 days after MPTSO started operating the concession agreement.

**3.4.3** Given that the deadline for submission of offers for the EOI in question was set for the 7<sup>th</sup> of April 2014, it is noted that the time afforded to bidders to compile their respective offers to acquire the mentioned company or all/part of its assets, was essentially reduced by half. In fact, this Office noted that a number of prospective bidders voiced their concerns through the clarifications process and asked for an extension of the submission deadline. However,

despite receiving a number of such requests, the Authority clearly stated that there will be no extension.

- 3.4.4 During NAO's review of the information that was eventually presented to the bidders, this Office additionally noted that MPTSO's unaudited draft financial information as disclosed at that stage, differed significantly from the company's actual position at the point in which it was effectively taken over by the successful bidder on 8<sup>th</sup> January 2015. Most notably, the presented pro forma balance sheet (as at 2<sup>nd</sup> January 2014) showed a total negative equity of €120.4 million for the company in question, while audited accounts (filed in 2016) as at 31<sup>st</sup> December 2014 (that is eight days prior to the effective take over by ADL) showed a positive equity of €6.9 million.
- 3.4.5 While as already stated in Chapter 1, this audit exercise did not include a financial compliance assessment of the transactions in question, seeing this significant difference in MPTSO's equity between what was presented at EOI stage and at the point which the company was actually taken over by the successful bidder, this Office endeavoured to follow the transactions which resulted in this variance. In its review, NAO most notably observed that, the pro forma balance sheet featured two major line items which were heavily affected between the two mentioned time points.
- 3.4.6 The first of these line items cited in the proforma (presented on the 10<sup>th</sup> of March 2014), related to a debt of €68.7 million which, AM had accumulated with its ultimate beneficiary owner (that is, Deutsche Bahn AG)<sup>3</sup>. This Office however noted that, with the presentation of this pro forma balance sheet, Government had already indicated to prospective bidders that it was "*assessing different options including capitalisation or waiver of these dues*". In fact, as can be seen in Figure 1 below which represents part of this pro forma balance sheet, bidders were presented with a prospective adjustment in this respect should this debt be capitalised (marked in red). No such information was provided in the event that Government opted to waive this debt at the time.

<sup>3</sup> From the review of the deeds of transfer of debts and trade receivables, it transpired that Arriva Malta Ltd (eventually MPTSO) had a debt of €60 million with DB Mobility Logistics AG and a debt of €7.9 million with Arriva p.l.c.

Figure 1: Snapshot from the Proforma Balance Sheet presented to bidders on the 10<sup>th</sup> of March 2014 - depicting debt to be capitalised

| ASSETS                              | 2013<br>(€ '000) | Adj.<br>(€ '000) | Pro forma<br>(€ '000) | Comments                       |
|-------------------------------------|------------------|------------------|-----------------------|--------------------------------|
| Non-Current Assets                  | 10,903           | -                | 10,903                |                                |
| Current Assets                      | 6,190            | -                | 6,190                 |                                |
| <b>TOTAL ASSETS</b>                 | <b>17,093</b>    | <b>-</b>         | <b>17,093</b>         |                                |
| Capital and Reserves                | (120,371)        | 68,664           | (51,707)              | <b>€68.7m debt capitalised</b> |
| Non-Current Liabilities             | 115,400          | (68,664)         | 46,736                |                                |
| Current Liabilities                 | 22,064           | -                | 22,064                |                                |
| <b>TOTAL EQUITY AND LIABILITIES</b> | <b>17,093</b>    | <b>-</b>         | <b>17,093</b>         |                                |

3.4.7 It must be noted that, during its subsequent review of MPTSO’s audited accounts as at 31<sup>st</sup> December 2014 (filed in 2016), NAO observed that in the latter part of 2014, the company’s capital base was indeed restructured through the reduction of €69 million in the company’s obligations to its shareholder (that is, the Government of Malta after the signing of the deeds of transfer of debts and trade receivables with DB Mobility Logistics AG and Arriva p.l.c. respectively), through the capitalisation into share capital of €60 million and the waiver of a balance of €9 million.

3.4.8 The second line item in question was an onerous contract provision which was established by AM during its tenure due to unfavourable performance forecasts at the time. This provision for the entire concession (until 2021), amounted to €75.7 million and was meant to be split annually. As at end December 2013 (that is, as reflected in the financial information presented to the prospective bidders on the 10<sup>th</sup> of March 2014 – Figure 2 refers), this provision stood at €46.7 million.

Figure 2: Snapshot from the Proforma Balance Sheet presented to bidders on the 10<sup>th</sup> of March 2014 - depicting liabilities

| LIABILITIES                    | 2013<br>(€ '000) | 2012<br>(€ '000) |
|--------------------------------|------------------|------------------|
| Onerous Contract Provision     | 46,736           | 59,679           |
| Amounts Owed to Parent Company | 68,664           | 39,101           |
| <b>TOTAL NON-CURRENT</b>       | <b>115,400</b>   | <b>98,780</b>    |
| Trade and Other Payables       | 9,121            | 12,611           |
| Onerous Contract Provision     | 12,943           | 16,018           |
| Amounts Owed to Parent Company | -                | 16,534           |
| <b>TOTAL CURRENT</b>           | <b>22,064</b>    | <b>44,983</b>    |
| <b>TOTAL LIABILITIES</b>       | <b>137,464</b>   | <b>143,763</b>   |

3.4.9 In its review, the audit team however noted that, in the information provided to bidders on the 10<sup>th</sup> of March 2014, Government's intent with respect to this provision was not made sufficiently clear. Specifically, NAO observed that, at that point, prospective bidders were informed that Government *"did not reassess this provision at the time of compiling these financial statements and adopted the provision included in the 2012 audited financial statements which were approved by the previous board on the 2<sup>nd</sup> January 2014"*.

3.4.10 However, while reviewing the audited accounts as at 31<sup>st</sup> December 2014 (filed in 2016), this Office identified a note in these statements which highlighted that this provision had been reversed, particularly as the original concession agreement with AM was replaced by a restated agreement which was not expected to give rise to onerous contract loss provisions.

### NAO Observations

3.4.11 This Office notes that the presentation of audited financial statements is considered critical in a transaction such as that of purchasing a company for prospective bidders to come forward with reasonable offers for its acquisition. To this end, this Office perceives as a shortcoming the fact that prospective bidders in the acquisition process under review were not provided with such audited statements, but rather with a draft. This concern is additionally compounded



with the facts that MPTSO's financial position was presented halfway during the process in question, and that requests by bidders for an extension of the submission deadline were not granted. This situation drastically reduced the time during which prospective bidders could formalise their financial offers.

**3.4.12** Additionally, NAO is concerned with the lack of clarity of Government's intention to deal with major line items at EOI stage, which could have varied the company's presented capital significantly depending on the course of action chosen by Government. NAO feels that such a situation presented significant additional uncertainty at this stage for prospective bidders to what is conventionally expected out of draft financial statements.

**3.4.13** This Office further observes that these shortcomings may have negatively affected the attractiveness of this acquisition for potential bidders. This situation could have hindered the Authority from receiving additional (possibly advantageous) offers for the EOI in question.

### **3.5 Negotiations started before formally confirming the preferred bidder**

**3.5.1** Documentation reviewed by this Office suggests that unsuccessful bidders were informed of the EOI's outcome through a letter dated 12<sup>th</sup> August 2014. While NAO was not forwarded with a copy of this letter, it was furnished with a formal decree issued by the Civil Courts of Justice relating to court action initiated by one of the unsuccessful bidders to contest the EOI's evaluation outcome. In reviewing the aforementioned decree, this Office observed a reference being made to an official notification from the TEC (dated 12<sup>th</sup> August 2014) to the unsuccessful bidders informing them of the EOI's evaluation outcome. As the Courts found against the complainant, NAO does not deem this case as relevant to this audit's scoped considerations and it therefore did not delve into its merits.

**3.5.2** However, as already reported in Chapter 2, the audit team could trace evidence of negotiations with the preferred bidder at least as early as the week between the 19<sup>th</sup> and 25<sup>th</sup> of May 2014. Specifically, NAO reviewed correspondence dated 9<sup>th</sup> May 2014 between the then Chairman of the TEC and ADL, in which the former invited the latter to provide further clarifications on the submitted offer, as well as to hold meetings (during the week 19<sup>th</sup> to 25<sup>th</sup> May 2014) at TM's offices to discuss: the financing of the bid; driver complement issues; fleet issues and fleet management systems; and level of subsidies. Furthermore, during its review of the TEC's evaluation report, the audit team noted a reference which was made to a meeting held between the TEC and ADL on the 22<sup>nd</sup> of May 2014 in which, amongst other issues, the bidder explained various possibilities of different route networks. During meetings with this Office, the Chairman of the TEC corroborated this by stating that discussions and negotiations with ADL were ongoing, even before the latter were officially confirmed as the preferred bidders.

3.5.3 As it is usually expected for an evaluation committee to officially award a contract prior to the relevant entity engaging in further negotiations to fine tune the final agreement, NAO enquired with DoC about this sequence of events. In reply DoC asserted that negotiations with bidders prior to the award of the contract is acceptable, particularly if the acquisition in question would involve products or services of a more complex nature. The audit team was further informed that negotiations are an integral part of such a process and should be justified and documented accordingly. Notwithstanding, DoC further stated that to encourage transparency, equal treatment and non-discrimination, the EOI should indicate at which point negotiations shall take place.

3.5.4 NAO's review of the EOI showed that section 3.2 of this document called for negotiations with the preferred bidder to start after the latter is selected. Specifically, in this respect the EOI stated that the *"ultimate aim of this Notice is to identify a professional and competent Candidate that is able and willing to operate the Scheduled Bus Services in Malta and Gozo subject to a concession agreement, which will be negotiated with the Authority once the preferred Candidate is selected"*. Given that, as already stated in section 3.1.3, DoC specifically stated that any provision listed in the EOI should have been adhered to, NAO notes that the sequence of events as evidenced by documentation made available to this Office, did not strictly follow the provision as laid out in section 3.2 of the EOI.

### NAO Observation

3.5.5 This Office understands that the sequence of events in question did not present significant divergence from good practice as there was only one bidder who submitted an offer under the preferred option A. In view of this, NAO does not feel that the initiation of negotiations prior to official notification of the EOI's outcome to all bidders, may have had a real adverse impact on the process's integrity. Notwithstanding, this Office strongly believes that adherence to the requirements as stipulated in the EOI should have been strictly maintained to preserve transparency and good governance, particularly in a scenario in which the procurement process in question was not governed by PPR.

## 3.6 Evaluation of a number of EOI requirements is not adequately covered in documentation forwarded to NAO

3.6.1 As part of its review, NAO analysed the evaluation report prepared by the TEC to determine whether the adjudication of the successful bid was carried out comprehensively and adequately. To this end, the audit team collated the salient requirements as published in the EOI and compared them with the considerations included in the evaluation report and its ancillary documentation. This ancillary documentation largely relates to reports from external experts (commissioned by the TEC) presenting professional opinions on specific aspects of the bid, namely related to financial, legal, operational and technological considerations.

- 3.6.2 Through this exercise this Office concluded that the TEC did approach this evaluation from multiple angles and that the compiled report does present a good overview of this process. Notwithstanding, NAO could not determine the extent of comprehensiveness of the committee's approach to this evaluation as the related documentation forwarded to it did not cover all the requirements stipulated in the EOI.
- 3.6.3 Specifically, the audit team observed a number of instances in which particular requirements set in the EOI were not mentioned at all in either the TEC's evaluation report per se, nor in any forwarded ancillary documentation. This Office also observed other instances in which requisites in the EOI were referred to in the evaluation report, however such mentions do not afford the reader comprehensive detail on the committee's thought process, nor are they conclusively substantiated with forwarded ancillary documentation (Appendix 1 of this report provides further detail on the abovementioned instances). However, NAO notes that ADL's bid did include documentation pertaining to these identified requirements and that, prima facie, these were largely complete.
- 3.6.4 This Office nonetheless acknowledges that the cursory mention or absence of certain EOI requirements in the forwarded documentation pertaining to this evaluation, does not necessarily mean that the TEC did not actively take such requirements into account.

### *NAO Observation*

- 3.6.5 While NAO acknowledges that the TEC's evaluation report and forwarded ancillary documents present a general view of the main considerations of this procurement process, it is concerned by the lack of forwarded documentary evidence which should have substantiated a number of specific EOI requirements. This essentially means that this Office could not conclusively determine the comprehensiveness of the TEC's evaluation and whether these mentioned requirements were adequately adjudicated by the TEC or otherwise.

## **3.7 Negotiation phase not adequately covered by documentation forwarded to NAO**

- 3.7.1 During the course of this audit exercise, NAO requested TM to provide all documentary evidence related to this acquisition process. A compilation of documentation reached this Office and the audit team set about reviewing it for completeness. This review however revealed that the provided documentation featured multiple gaps in the scoped process. To this end, the audit team made further requests to the Authority for the latter to forward such missing documentation. However, while some of these instances were duly addressed through the provision of additional information by TM, substantial gaps still prevailed, particularly with respect to negotiations which occurred between the Authority and the preferred bidder prior to the signing of the contract.

3.7.2 In view of this, the audit team held a meeting with the then Chairman TEC to enquire whether he is aware of any existing documentation regarding these negotiations. In reply, Chairman TEC confirmed that negotiations did occur with the preferred bidder but, to his knowledge, no minutes were kept of meetings held. Chairman TEC further asserted that he considers the contract itself as evidence of the outcome of these negotiations.

3.7.3 In view of the lack of documentation detailing the negotiation phase of this process, this Office sought to establish the effect that this phase had on the final contract by comparing this document with ADL's originally submitted bid. Through this exercise, the audit team identified the three most salient areas in which the requirements of the contract were influenced by negotiations namely, the PSC, the route network, and the price for the acquisition of MPTSO.

### *Negotiations influencing the PSC element*

3.7.4 During its review of the EOI, NAO noted that the concession agreement with the previous operator (Arriva) provided for a financial subsidy. Specifically, this took form of a monthly public service compensation (PSC) to be paid by Government as compensation for public service obligations relating to reduced concessionary fares and a minimum route network. This Office also notes that the EOI invited potential bidders to submit their financial offer for a fixed PSC while clearly highlighting that the successful bidder shall have to absorb full commercial and operational risks including fluctuations in both fuel and labour costs.

3.7.5 Despite these assertions however, NAO noted that during the clarifications phase, queries were put to the Authority on what protection mechanisms will the chosen operator be afforded to cover substantial rises in fuel, wages and/or other considerations outside of the latter's control. In reply, and in contrast to the EOI's original position highlighted above, the Authority stated that it would be willing to consider a system that will provide for *"a mechanism to compensate for changes in legislation which have a direct impact on costs, changes in the Cost of Living Adjustment (COLA) announced by Government from time to time, and changes in the tax/duty on fuel, by either increasing the maximum fares, or the subsidy that would have been agreed to, or both."*

3.7.6 In its review, NAO noted that ADL's bid cited pre-determined PSC amounts for projected years of operation, as well as a declaration that the operator shall not bear the inflationary effects on its costs during the term of the agreement, implying that formulas must be sought by mutual agreement with the Government to correct that effect. To determine whether negotiations in this respect occurred after the submission of this bid, the audit team analysed the final contract to identify any divergences in this document when compared to the submitted bid. Through this exercise NAO observed that the final contract features a fixed and a variable element to the PSC. The annual fixed PSC amounts cited in the contract exceed ADL's original PSC offer by circa €900,000 for every operational year. Insofar as the variable aspect is concerned, this Office noted that, amongst others, this covers inflationary aspects (such as changes in the

indices relating to salary, fuel cost, fleet price, general inflation and COLA), adjusted payments in view of modifications to the service (such as provision of new routes or extension thereof) and economic adjustments made to the system as a result of exogenous factors.

- 3.7.7 In view of the above, NAO notes that negotiations on the PSC element did occur between TM and the selected bidder, even if no related documentation reached this Office.

### *Negotiations on the route network*

- 3.7.8 As part of this exercise, NAO sought to establish if the route network as originally submitted in ADL's bid was also affected by the cited negotiations. As no documented trail of related negotiations was forwarded to this Office, the audit team sought to confirm the occurrence of negotiations in this respect through an exercise aimed at identifying variances between the routes cited in the submitted bid, and those featuring in the final contract. However, route details in the submitted bid were presented differently than those in the final contract, to an extent which rendered a direct comparison by the audit team an impractically laborious task.

- 3.7.9 As the audit team had no documentary evidence with which it could ascertain the occurrence, or otherwise, and the extent of negotiations with respect to the route network, it had no option but to rely on verbal assertions by TM officials that these did indeed take place.

### *Negotiations on the purchase price of MPTSO*

- 3.7.10 In reviewing ADL's bid the audit team noted that, while this bidder had opted for Option A (that is, to acquire the operating company including all its assets and liabilities) it also included a caveat stating that the offered amount of €10,096,000 only relates to the operating company's assets and therefore does not consider its debts and liabilities. The bid further stated that the final amount payable to the Authority will be adjusted by the debts and liabilities as determined and agreed by a subsequent due diligence process.

- 3.7.11 A review of the initial financial analysis on ADL's bid compiled by a financial expert outsourced by the TEC, showed that this bidder eventually calculated that, when MPTSO's debts and liabilities are taken into account, the offer to acquire this operating company is reduced to €3.8 million. This notwithstanding, the formal share purchase agreement which saw ADL officially taking over MPTSO in January 2015, cited a price of €8 million in respect to this acquisition. This yet again means that, even if NAO was not forwarded with documentation which records negotiations undertaken in this respect, this observed variance confirms that negotiations did actually occur.

## NAO Observation

**3.7.12** NAO considers this scoped procurement process as one of significant financial and social value and, consequently, expects that negotiations which were undertaken to arrive at the final agreement should have been meticulously documented to preserve an adequate audit trail. To this end, the fact that NAO was provided with practically no documentation related to this phase is serious cause for concern as it impinges particularly on the transparency of the process. Not being forwarded with a documented audit trail also impeded this Office from assessing whether these negotiations were conducted thoroughly in accordance with the principles of good governance.

### **3.8 PSC amount and agreed price for MPTSO seem, prima facie, reasonable, despite related negotiations not adequately covered in documentation forwarded to NAO**

**3.8.1** As part of this review, NAO also endeavoured to assess whether the financial aspect of the final contract, prima facie, can be considered as reasonable or otherwise. To do this, NAO assessed the two main factors which comprised this bidder's financial offer, that is, the PSC and the economic offer for the acquisition of MPTSO.

**3.8.2** Insofar as the PSC is concerned, NAO sought to compare the offer submitted by ADL with a benchmark. The conditions as set in the contract governing the concession with the previous operator could not be considered as a viable yardstick as it eventually resulted that that agreement was not considered workable by both parties involved and, as already stated, was in fact terminated. Similarly, while the financial review commissioned by the TEC to assess ADL's offer did not, as such, result in a negative outcome, it still featured a number of points in its analysis which, in NAO's view, were inconclusive.

**3.8.3** In view of the above, NAO considers the subsidy injected into MPTSO during the year in which this was operated by Government (that is during 2014) as the most viable benchmark with which to compare the PSC as stipulated in the contract under review. After reviewing the financial statements for the year ending 2014 (which were published in 2016) the audit team observed that, in total, the audited concession income injected into MPTSO during this year amounted to around €29 million. While this Office understands that differences may have prevailed in the provision of public transportation service between that as provided by MPTSO in 2014<sup>4</sup> and that agreed to in the contract in question, it notes that this figure lends reasonable justification to the contractual fixed PSC amount of €29.2 million per annum.

**3.8.4** With respect to the variable element of the PSC, NAO did not carry out a benchmarking exercise to assess whether it is justified or otherwise as this Office considers the indices and factors out of which it is comprised (listed in more detail in section 3.7.5) as reasonable.

<sup>4</sup> NAO is not in possession of the MPTSO's details of operations and overall route network for 2014

- 3.8.5** Insofar as the economic offer for the acquisition of MPTSO is concerned, NAO compared the share purchase agreement which was signed between Government and ADL in this respect, with the 2014 MPTSO audited financial statements (which were published in 2016). Through this exercise, the audit team observed that the share purchase agreement cited a total amount of €8 million for the company's acquisition, while providing for adjustment based on the eventual audited working capital determined by the still to be compiled audited accounts. On the other hand, the 2014 audited financial statements (published in 2016) valued MPTSO's equity at €6,948,935 for that financial year. While, as already mentioned in this audit's scope, NAO did not pursue actual financial transactions and is therefore not in a position to determine whether the aforementioned working capital adjustments were actually affected or otherwise, it did observe that the share purchase agreement called for the agreed amount to be paid in nine annual instalments of €888,889 each. Given that the total of these instalments amounts to €8 million in absolute terms, this Office observes that inflationary effects for this nine year payment period were not factored in. This notwithstanding, NAO is of the opinion that, prima facie, the agreed price for MPTSO's acquisition was reasonable when compared with the valuation of the company's equity in the 2014 audited financial statements.
- 3.8.6** Despite the above assertions regarding the PSC as well as MPTSO's set price however, NAO is not in a position to certify whether Government could have negotiated better deals in these respects, as this Office was forwarded with practically no documentation regarding the negotiations of this procurement process (consideration discussed in detail in previous parts of this report).

### *NAO Observation*

- 3.8.7** NAO positively notes that both the PSC amount as well as the agreed price for the acquisition of MPTSO seem, prima facie, reasonable. This notwithstanding, it once again expresses concern on the fact that the audit team did not feel it was forwarded with sufficiently comprehensive documented evidence to ascertain whether better value could have been obtained by Government in this process.

## **3.9 Recommendations**

- 3.9.1** NAO understands that any procurement process (particularly those of significant financial and social implications, such as that related to the procurement of public transportation services) has to be carried out without unnecessary delays. Notwithstanding it recommends that reasonable time still has to be allowed for all related processes to be completed diligently and comprehensively. While this Office does not contend Government's stated decision to not opt to operate MPTSO for an extended period of time, it still is of the opinion that the overarching sense of urgency which prevailed in this procurement process could have been

mitigated if this transition period (in which MPTSO was operated by Government) was allowed a more reasonable timeframe, particularly during its initial phases. NAO also notes that such an extension of this period would have required that the temporary running of MPTSO is duly covered with robust operational and administrative plans.

**3.9.2** This Office strongly urges TM to ascertain that any future call for offers features all relevant information from the start, particularly that as important as financial information related to a company being offered for purchase. NAO further stresses the importance that such information needs to be as accurate and complete as possible (and audited where applicable) when being presented to prospective bidders. This is to: ensure clarity; enable interested parties to put forward reasonable offers; and reduce the risk of having potential bidders opting not to submit offers due to incomplete information.

**3.9.3** While NAO understands that Government had a stated preferred way forward of awarding this concession agreement to a bidder whose offer included the acquisition of MPTSO in full, it still recommends that different options are objectively weighted rather than giving one absolute preference over the rest. Such a weighting mechanism would ensure that, in the event that a significantly advantageous bid is submitted under a different option, this would be afforded the possibility of being duly considered rather than being dismissed outright in favour of bids submitted under the preferred option.

**3.9.4** This Office reiterates that, for this particular process, the initiation of negotiations prior to the official notification of the EOI's outcome to all bidders did not present significantly concerning divergence from good practice as there was only one bidder who submitted an offer under the preferred option A, and since this process was not regulated by PPR. Notwithstanding NAO still recommends that established good practices should be invariably followed even in such instances in which noncompliance would not be expected to result in adverse effects (particularly insofar as fair evaluation is concerned) so that transparency and good governance is preserved throughout. This becomes even more pressing in a scenario as that presented in this procurement process, in which the published EOI specifically stated that negotiations with the preferred bidder were to start after the latter is selected.

**3.9.5** Finally, this Office strongly urges the Authority to ascertain that processes, not least significant procurement processes such as the one under review, are comprehensively documented and adequately archived. This would preserve an adequate audit trail and, by implication, the expected level of transparency particularly in the event of potential future audits.





## Concluding Remark

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As this review has shown, the scoped procurement process featured a number of shortcomings (as presented in this report's observations) which could have had significant implications on the process' good governance and value for money. While, despite these shortcomings, this Office could not pinpoint any significantly concerning outcomes which resulted from this particular process, it still could not certify that comprehensive compliance to good governance prevailed throughout this process, as documentation forwarded to NAO featured significant gaps. These gaps in documentation also inhibited NAO from assessing whether Government could have achieved a better deal with the selected bidder. In this Office's opinion, when considering the substantial social and financial value of this process, the gaps in the information made available for review are significantly concerning.

As this concession agreement is due to expire in the year 2030, NAO strongly recommends that the identified shortcomings in this report and the presented recommendations are given due consideration by TM in the preparation for any eventual future procurement of such services. In view of the implications brought about by the overarching sense of urgency in the process under review, this Office also urges the Authority to strongly position itself in any upcoming EOI, by initiating the procurement process well in advance of the current agreement's expiration, thereby allowing for an adequate timeframe for such a process to develop in a more steady-paced and well planned-out manner.

This notwithstanding, NAO notes that TM has positively received the recommendations set out in this report, as well as the latter's stated commitment that these will be duly followed in any such future agreements.

## Appendix 1: Comparison of EOI requirements with factors considered in evaluation and documents found in ADL's bid

| EOI   | EVALUATION REPORT (ER)  | ADL BID DOCUMENTS | ANCILLARY DOCUMENTATION  |
|---|---|-------------------|--|
| To present an EOI that meets the minimum information and requirements stipulated  | x   | √                 | x  |
| To provide sufficient information to the Authority to be able to select the preferred Candidate with whom to negotiate the final concession agreement.  | x   | √                 | x  |
| To submit the Financial Submission Form which includes a financial bid for (i) the amount payable to the Authority for the acquisition of the exclusive concession rights to operate the Scheduled Bus Services in Malta and Gozo (or parts thereof); and (ii) the public service compensation payable by the Authority for the remaining term of the exclusive concession agreement, which bids will form part of the award criteria   | √   | √                 | TEC minutes dated 09/04/2014 and 11/04/2014 & report drawn by Third-Party Expert commissioned by TEC |
| To include an unconditional bid bond (bank guarantee) issued by a Maltese bank or a financial institution licensed to operate in a Member State of the European Union for the amount of fifty thousand Euro (€50,000) in the Expression of Interest, which shall have a validity period of six months from the Closing Date for Submissions, and which shall be forfeited in favour of the Authority in the event that the Candidate withdraws its submission during the validity period, or fails to enter into the acquisition contract if and when called upon to do so by the Authority. This bid bond will be returned to the Candidates upon the adjudication and finalisation of the acquisition contract. | <i>Not specifically mentioned in the ER however, NAO considers this as part of the initial analysis with respect to the financial and technical compliance of the bid</i> | √                 | TEC minutes dated 09/04/2014 and 11/04/2014  |

|  |   |   |   |
|--|---|---|---|
| To meet all national and international regulatory and policy requirements, including but not being limited to the Passenger Transport Services Regulations (SL.499.66) | x | x | x |
|--|---|---|---|

## LEGAL POSITION

|  |  |   |   |                   |
|--|--|---|---|-------------------|
| Candidates may be an individual, a single entity having legal personality, or a consortium (i.e. either a permanent, legally-established grouping, or a grouping which has been constituted informally for this specific EOI procedure).   | <i>ER only mentions that the experts commissioned by the TEC stated that the bid makes legal sense</i> | v | x | Chapter 1         |
| Candidates that are individuals shall submit an official identification document issued by a competent authority in their country of residence or of which they are nationals.   |  | v | x |                   |
| Candidates which are legal persons will have to show that they are legally constituted and for this purpose shall submit a certificate of registration and a certificate of Good Standing issued by the registrar of companies and partnerships (or similar institution), in their country of constitution, accompanied by a signed legal opinion confirming that the legal entity is duly constituted and is capable of entering into obligations. This opinion shall furthermore identify the legal and judicial representatives of such legal entity. The legal opinion shall be dated not earlier than three months prior to the date of publication of this Notice. |  | v | x | Chapter 2         |
| Candidates must clearly identify a single individual to act as the official contact person and must include primary contact point details including name, designation, contact phone numbers, address and email address. This shall be done by means of a Power of Attorney authorizing the identified person to represent the Candidate in all matters relevant to the Expression of Interest and the subsequent negotiations of the acquisition contract and concession agreement, unless the Candidate formally notifies the Authority in writing of any change in the contact person.  |  | v | x | Chapter 3         |
|  |  |   |   | Concluding Remark |
|  |  |   |   | Appendix          |

**FINANCIAL POSTION**

|   |  |     |  |
|---|--|-----|--|
| To show that it is of sound financial standing which will permit it to operate the Scheduled Bus Services under a concession agreement in the event that this is awarded to it.   | √  | √   | <i>Report drawn up by Third-Party Expert commissioned by TEC</i> |
| To present a certificate drawn up by a person holding a warrant of public auditor or accountant, issued in any member state of the European Union, attesting the Candidate's capacity to make an investment of at least ten million Euro (€10,000,000) and to sustain the same over the term of the concession agreement.                                     | x  | √   | x  |
| To present a signed letter of intent drawn out by a bank or other credit institution licensed as such in a Member State of the European Union attesting the Candidate's ability to obtain the financing necessary to operate the Scheduled Bus Services, based on the presumption that this entails an investment of at least ten million Euro (€10,000,000). | x  | √   | x  |
| The Financial Score (lowest offer being awarded the most points) = (lowest Financial Offer (within option) / Candidate's Financial Offer) x100  | x<br><i>(ER only states that the offer made financial sense)</i> | N/A | x  |

**OPERATIONAL**

|  |   |   |   |
|--|---|---|---|
| To submit an organisation profile outlining the range of services which they offer and their major corporate achievements. | x | √ | x |
|--|---|---|---|

|  |   |          |          |
|--|---|----------|----------|
| <p>To show that the organisation has provided some form of Bus and/or Coach Services over a continuous period of at least five years. Candidates that do not have this minimum experience in Bus and/or Coach services shall be disqualified and their submission will not be considered any further. More points will be awarded when this experience is specifically in Scheduled Bus Services.</p>  | <p>x</p>  | <p>√</p> | <p>x</p> |
| <p>To submit a list of Bus and/or Coach Services and related services provided between 2009 and 2013, including the total quantity or scope of such services, dates and contracting parties and whether these were public or private entities. In so listing the end clients, the Candidates are agreeing that the Authority may contact the relevant clients at any stage in order to confirm references given and/or supply further information as may be required</p> | <p>x</p>  | <p>√</p> | <p>x</p> |
| <p>To submit a report showing the Candidate's manpower and the number of managerial staff for the last five years, distinguishing between different posts involved in a bus operation (drivers, maintenance and engineering, support, etc...), and other operations if applicable</p>  | <p>x</p>  | <p>x</p> | <p>x</p> |
| <p>To submit a detailed description of how the bidders intend to operate the Scheduled Bus Service in order to demonstrate that they have (i) a clear understanding of the requirements of the Scheduled Bus Service; and (ii) the capacity and capability of carrying out the Services</p>  | <p>x</p> <p><i>ER states that a delegation from Malta visited the bidders' headquarters in Spain to observe their operations – no details on observations where mentioned in the ER</i></p> | <p>√</p> | <p>x</p> |

Executive Summary

Chapter 1

Chapter 2

Chapter 3

Concluding Remark

Appendix

|  |   |     |  |
|--|---|-----|--|
| Candidates are advised that an inspection of the operational capacity, facilities and quality control measures of the Candidate may be carried out by the Authority or by a person(s) acting on its behalf'                          | x<br><i>ER states that a delegation from Malta visited the bidders' headquarters in Spain to observe their operations</i> | N/A | x  |
| To estimate full commercial and operational risk including fluctuations in costs including but not limited to fuel and energy costs, labour costs, maintenance costs and other costs which are to be borne fully by the bus operator | x   | x   | <i>Report drawn up by third-party expert commissioned by TEC implies that these were still being calculated at evaluation stage</i>                        |
| To establish the operation of the agreed route network at minimum frequencies  | √<br><i>Mentioned in the ER however with no detail</i>  | √   | √<br><i>Only copies of ad-hoc working papers (containing route and vehicle figures) were forwarded. These were not endorsed by the commissioned expert</i> |
| To establish the charging of maximum fares including concessionary reduced fares for specific categories of users like old age pensioners, disabled persons, children and students   | x   | √   | x  |

### BUSES MINIMUM REQUIREMENTS

|   |                                |   |   |
|---|--------------------------------|---|---|
| Be at least Euro 5 and A26:A31 compliant, fully accessible (low-floor), and air-conditioned             | x<br><i>Only hinted</i>        | √ | x |
| Be fitted with CCTV systems covering the entire seating area including the driver                       | <i>that fleet requirements</i> | √ | x |
| Be suitable for the route they are operating on, and must not exceed 12.5m in length and 4.5m in height | <i>will be discussed</i>       | √ | x |

|   |   |   |  |
|---|---|---|--|
| Comply with the requirements of EU legislation, with particular reference to the Emission Standards stipulated in Regulation 595/2009 and Directive 2007/146 for buses being registered for the first time in any European Member State |   | √ | x  |
| Comply with procurement legislation as may be applicable with regard to Directive ZOO13S/Ec transposed into local legislation by means of LN.175 of 2017  |   | √ | x  |
| Not be older than 15 years at any point throughout the concession agreement term  |   | √ | x  |
| The bus operator must have an effective vehicle tracking and locating system providing real time access to the Authority and other stakeholders as may be required  | √ | √ | <i>High level Report by expert (MCA) engaged by the TEC and correspondence between the then Chairman of the TEC and the mentioned expert</i>   |
| The Authority must have real-time access to all services (including vehicle tracking and locating data) together with all recorded data for at least three months.  | √ | x | <i>High level Report by expert engaged by the TEC (MCA) and Correspondence between the then chairman of the TEC and the mentioned expert</i>   |
|   |   |   | <i>Bid presents substantial information on the real time access of vehicle tracking and location data, but does not specifically state that the Authority will be granted access</i> |



**TECHNICAL SCORING**

|  |   |     |   |
|--|---|-----|---|
| Length of preparation period between the signing of the acquisition contract and the start of the services which cannot exceed three months. Highest points will be allocated to the shortest preparation period | x | √   | x |
| Suitability of buses with more points being allocated for more suitable buses in terms of size   | x | √   | x |
| Age and emission standard of buses with more points being allocated for newer, cleaner and lower emitting buses  | x | √   | x |
| Effectiveness and robustness of vehicle tracking, locating and monitoring system   | x | √   | x |
| Experience in running Bus and/or Coach Services'   | x | √   | x |
| Overall operational effectiveness<br><br>- Robustness of business plan<br>- Robustness and effectiveness of operational strategy<br>- Realistic and Robust implementation plan                                   | x | √   | x |
| Technical Score = (Candidate's Score / Highest Technical Score (within the option)) x 100  | x | N/A | x |

**OVERALL SCORING**

|   |  |     |   |
|---|--|-----|---|
| Final Overall score = (Technical score x 60%) + (Financial Score x 40%) | x<br><i>The only reference to an overall score within the ER was that "Following operational, financial and legal meetings held with the bidders, the experts expressed their view that the bid made financial and legal sense."</i> | N/A | x |
|---|--|-----|---|

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May 2021 National Audit Office Annual Report and Financial Statements 2020

### NAO Audit Reports

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