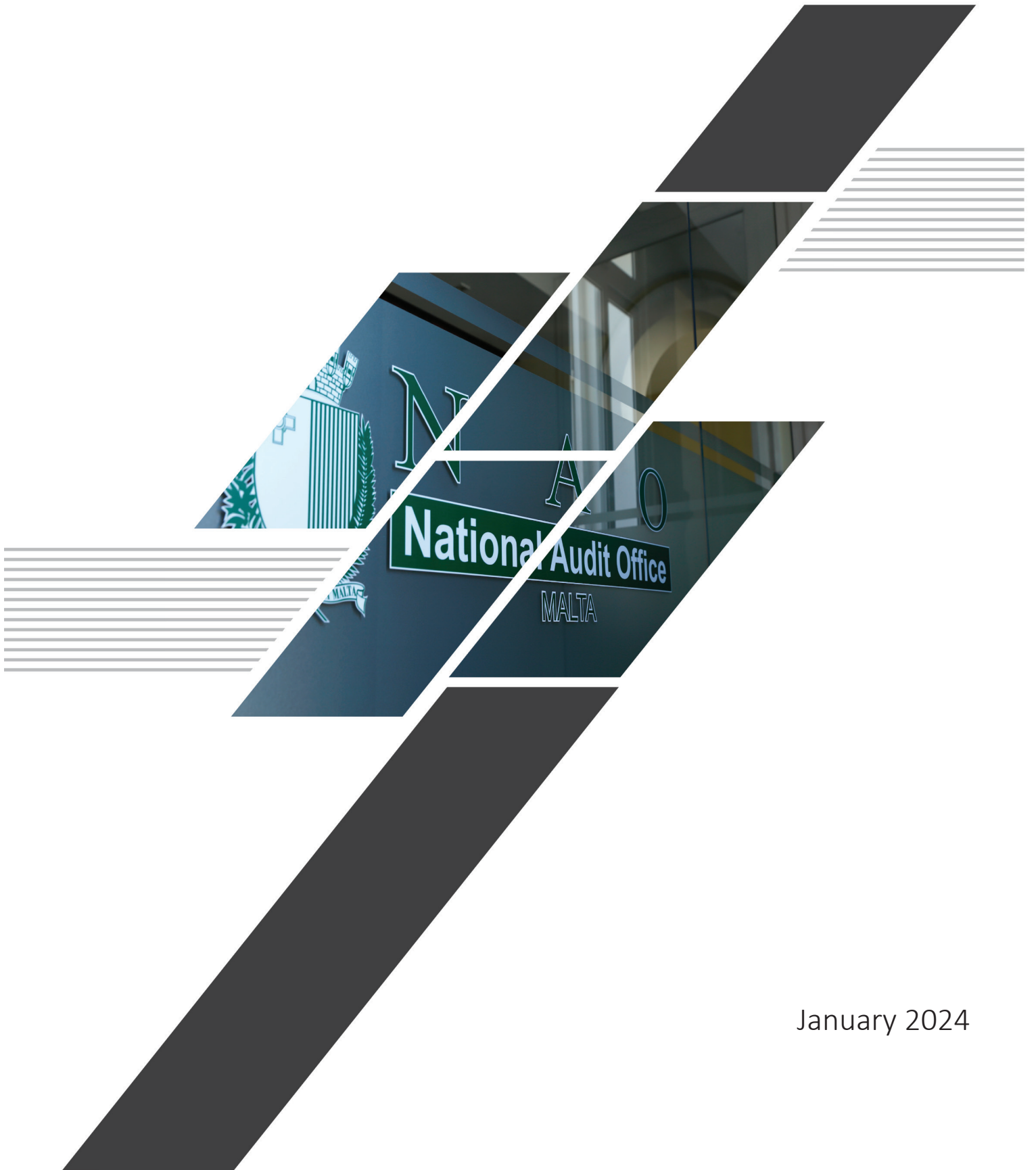


An audit of the contract for the
provision of food and beverage services
at the Malta Life Sciences Park



January 2024



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of food and beverage services at the
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Report by the Auditor General
January 2024

Table of Contents

List of abbreviations	6
Executive summary	7
Chapter 1 Introduction	16
1.1 A request to audit	16
1.2 Methodology	17
Chapter 2 The request for proposals for the provision of food and beverage services at the Malta Life Sciences Park	19
2.1 The objectives of procurement were generally defined through a request for proposals	19
The setting up of the Malta Life Sciences Park	19
The request for proposals	24
A revised request for proposals	28
2.2 Although the applicable regulations were not specified, it was within the remit of Malta Enterprise to issue the request for proposals	29
2.3 On balance, the site was insufficiently described, with key elements of information relating to its permitted use and infrastructural requirements were not adequately disclosed	31
2.4 Potential bidders were not provided with the opportunity to view the site prior to bidding, detracting from the transparency of the tendering process	36
2.5 The obligations that were to be borne by the service provider were, in the main, defined in the request for proposals	37
2.6 Certain obligations to be borne by Malta Enterprise were defined in the request for proposals; however, other requirements were not	39
2.7 The evaluation process undertaken by Malta Enterprise was in line with that set in the request for proposals; however, shortcomings in governance and fairness were noted	40
Chapter 3 The lease agreement	44
3.1 While the deliverables and obligations specified in the lease agreement generally reflected those of the request for proposals, concerns emerge regarding the state of the premises and the responsibility to render it suitable for its intended use	44
The works	44
The premises	45
The obligations of Cook & Co Ltd	46
The rights of Cook & Co Ltd	53

The obligations of Malta Digital Hub Ltd	54
The rights of Malta Digital Hub Ltd	55
Termination	56
Notices, disputes, confidentiality, force majeure and data protection	57
Overview of the comparison between the request for proposals and the lease agreement	58
3.2 The deliverables specified in the lease agreement reflected those of the bid	59
3.3 Malta Enterprise did not provide for and Cook & Co Ltd did not request to inspect the premises prior to entering into the lease agreement	61
3.4 The rights and obligations of Malta Digital Hub Ltd, as landlord, were stipulated in the lease agreement	63
Rights and obligations of Malta Digital Hub Ltd in respect of the common areas	63
Rights and obligations of Malta Digital Hub Ltd in respect of the leased premises	64
Overall consideration of the rights and obligations of Malta Digital Hub Ltd in respect of the common areas and the leased premises	65
3.5 The rights and obligations of Cook & Co Ltd, as tenant, were stipulated in the lease agreement; however, the agreement was silent should the permits or licences required to operate not be secured	66
Rights and obligations of Cook & Co Ltd in respect of the leased premises	66
Rights and obligations of Cook & Co Ltd in respect of the common areas	72
Overall consideration of the rights and obligations of Cook & Co Ltd in respect of the leased premises and the common areas	72
Chapter 4 Adherence to contractual obligations	75
4.1 Access to the leased premises was possible on the transfer of the site; however, delays were noted in the handing over of the keys	75
4.2 Cook & Co Ltd commenced operations several months after the stipulated timeframe, pending planning permission, the undertaking of works and operating clearance	77
4.3 In some respects, Malta Digital Hub Ltd honoured its obligations as landlord; however, in some instances, it failed to abide by the provisions of the lease agreement, while in others the agreement was ambiguous rendering the assignment of responsibility complex	84
4.4 Cook & Co Ltd did not honour several obligations set in the lease agreement, key among which were the undertaking of works without planning authorisation and in breach of procedures established in the agreement, operating without a licence, and the failure to settle rent and other dues	95
Permits and licences	95
Rent and other payments	114
Alterations to the premises	117

Maintenance and cleaning of the premises	122
Risk assessment	124
Health and safety	124
Insurance	125
Final points of note	126
Chapter 5 Key events and conclusions	128
5.1 Timeline of key events	128
5.2 Conclusions	134
The request for proposals for the provision of food and beverage services at the Malta Life Sciences Park	134
The lease agreement	136
Adherence to contractual obligations	138

List of figures

Figure 1 MLSP project components by zone	20
Figure 2 Site plan illustrating the layout of zones	21
Figure 3 LS3 section drawing highlighting the location of the childcare facility	22
Figure 4 LS3 floor plan highlighting the location of the childcare facility	22
Figure 5 LS4 section drawing highlighting the location of the catering facility	23
Figure 6 LS4 floor plan highlighting the location of the catering facility	23
Figure 7 Request for Proposals – Mark allocation	26
Figure 8 Request for Proposals, Revised mark allocation	28
Figure 9 Overall site plan included in the RfPs	32
Figure 10 Photos of the proposed food and beverage site, external	32
Figure 11 Photos of the proposed food and beverage site, internal	33
Figure 12 Plans attached to the RfPs	33
Figure 13 Incongruence regarding the passenger lift in the planning application and the RfPs	34
Figure 14 Rental payable by Roots Integrated Services Ltd to Malta Enterprise	41
Figure 15 Rental rate proposed by Roots Integrated Services Ltd	59
Figure 16 Amounts claimed by the MDH as payable by Cook & Co Ltd, September 2016 – July 2020	111

List of Abbreviations

CEO	Chief Executive Officer
COO	Chief Operating Officer
ERA	Environment and Resources Authority
EU	European Union
F&B	food and beverage
MDH	Malta Digital Hub Ltd
MEPA	Malta Environment and Planning Authority
MLSC	Malta Life Sciences Centre
MLSP	Malta Life Sciences Park
MTA	Malta Tourism Authority
NAO	National Audit Office
PA	Planning Authority
RfP	request for proposals
VAT	Value Added Tax

Executive Summary

1. On 21 July 2020, the National Audit Office (NAO) received a complaint from Cook & Co Ltd regarding a request for proposals (RfP) issued by the Malta Life Sciences Park (MLSP) for the provision of food and beverage (F&B) services at the Malta Life Sciences Centre and the Malta Digital Hub Ltd (MDH). The RfP invited prospective bidders to present their capabilities and capacities to operate the MLSP's onsite F&B service. Cook & Co Ltd contended that the RfP was fraudulent from its inception, arguing that the condition of the leased premises was not as described in the RfP. Moreover, Cook & Co Ltd alleged that the premises did not comply with established health and safety codes, thereby rendering it impossible for the company to commence operations until the related health, structural, plumbing and electrical issues were addressed.
2. Following the review of this complaint, the NAO decided to undertake an audit, focusing on the review of the relevant RfPs issued, the analysis of the lease agreement entered into by the MDH and Cook & Co Ltd, and the adherence to obligations imposed on the parties through this agreement. Having considered the relevant facts, hereunder are the salient conclusions arrived at by the NAO.
3. The procurement of F&B services at the MLSP formed part of the wider development of the Park and was intended as an ancillary service provided to tenants housed therein. Malta Enterprise sought to engage the services of an F&B operator through an RfP issued on 11 September 2015. Key elements of the service to be provided were outlined in the RfP, as were details of the site, the rent to be charged and other obligations that were to be borne by the service provider. Also specified were the documents that were to be submitted with the bid and information relating to the evaluation process. No bids were received, resulting in a revised RfP being issued by Malta Enterprise on 20 November 2015. Key changes between the RfPs were intended to encourage interest. Nevertheless, two concerns regarding the RfPs emerge. First, the heading of the RfPs was ambiguous in that, rather than procuring an F&B service, Malta Enterprise was leasing a site from which such a service was to be provided. Second, the lack of detailed plans for the site, which point assumes relevance when one considers that the use of the premises to be leased had just been changed from a childcare centre to a catering establishment, rendering the utility of such plans even more important. Aside from these points, the NAO deemed the objectives of procurement as sufficiently defined in the RfP.
4. The RfPs issued by Malta Enterprise did not refer to the regulations that were to govern the calls. In essence, Malta Enterprise was leasing a site for a specific function, that is, the provision of F&B services. The NAO ascertained that Malta Enterprise could exercise such a function as this was within the remit of its empowering legislation. However, this Office considered the indirect reference to the Public Procurement Regulations, through the obligation to submit a

tender form and subscribe to its several requirements, as introducing an element of ambiguity. The source of incongruence emerges as Malta Enterprise was not seeking the procurement of any goods or services but leasing property.

5. Aspects of the site to be transferred were sufficiently disclosed in the RfP, with its setting, location and period of control specified. However, other key elements of information, particularly in terms of the envisaged and permitted use of the site and its infrastructural requirements, were not adequately disclosed. In addition, there were inconsistencies between the actual layout of the premises, the plans annexed to the RfPs and the plans submitted by Malta Enterprise to Malta Environment and Planning Authority in its planning application for the change of use of the site from a childcare centre as originally designated to a catering establishment. These omissions and discrepancies were of concern to the NAO as the adequacy of information provided by Malta Enterprise in the RfPs was called into question. This assumes more relevance when one considered the obligation imposed on the prospective F&B operator to start operating within two months from notification of award.
6. The fact that Malta Enterprise did not offer the possibility of a site visit prior to the submission of bids curtailed the visibility of prospective bidders over the site and impacted their ability to assess its condition and suitability for the tendered F&B service. Although the NAO takes cognisance of the meeting and site visit held with one of the bidders during the evaluation of bids, concerns emerge as to the timing of this visit and that similar access was not afforded to the other bidder. This Office is of the opinion that since no site visit was provided for prior to the deadline for bid submission, this detracted from the transparency of the tendering process, with bidders precluded from developing a full understanding of the premises and Malta Enterprise not capitalising on the return from this tender. The incongruencies between that presented in the site plans annexed to the RfPs and the actual premises aggravate these concerns.
7. The NAO established that the legislative and regulatory framework that prospective bidders were to comply with was not specified in the calls. Obligations associated with permits, licences and insurances required by the operator were broadly specified in the RfPs, as were other operational and specific requirements sought by Malta Enterprise. Notwithstanding this, certain gaps were noted by this Office in relation to these requirements and in connection with the periodical reporting necessary to ensure the maintenance of service standards.
8. In the NAO's opinion, certain obligations that ought to have been placed on Malta Enterprise were defined in the RfP; however, other requirements were either not stated or imprecisely represented. Specified in the calls were the requirements in terms of the F&B service sought as well as other aspects of service, the evaluation criteria that were to be applied in selection, as well as key commercial considerations such as the lease term and rental rates. However, a shortcoming identified by this Office was the omission of reference to the legislative and regulatory framework that ought to have guided Malta Enterprise in the sourcing of the F&B

service. Other deficiencies in the setting of obligations to be borne by the contracting authority were largely of a general nature. Also not included in the RfPs was a sample contract.

9. The process of evaluation undertaken by Malta Enterprise adhered to the conditions established in the RfP, with the criteria set and relevant weightings fairly applied to both bids received. The evaluation led to the selection of the bid that was the most economically advantageous to Malta Enterprise, that is, the bid submitted by Roots Integrated Services Ltd, the rights to which were later assumed by Cook & Co Ltd. Nevertheless, certain shortcomings in the process of evaluation were noted. First, were the gaps in documentation that limited a comprehensive understanding of when key developments in the evaluation process occurred, namely, the date of the evaluation report and that of its endorsement by the Board of Directors Malta Enterprise. Second, was the meeting held solely with Cook & Co Ltd during the evaluation process. While the Evaluation Committee justified this meeting as a means to obtain additional information, the NAO contends that both bidders should have been treated in the same manner. Third, was that Cook & Co Ltd was informed of the successful outcome of its bid prior to the referral of the evaluation report for the endorsement of the Malta Enterprise Board of Directors.
10. A lease agreement was entered into by the MDH and Cook & Co Ltd on 20 May 2016. Generally, the deliverables and obligations specified in the lease agreement reflected the parameters established in the RfP. The key provisions relating to the lease term, use of the site, the obtaining of permits and licences, and rent and other charges due, were consistent in both documents. Other points of consistency were noted by the NAO. Nevertheless, instances of omission were identified, with the RfP silent on matters such as the tenant's obligation to ensure the premises' upkeep, breaches of the lease, and the return of the site on expiry.
11. The main concern that emerged following the NAO's comparison of the lease agreement and the RfP related to the state of the premises and the onus of the works required to render it suitable for the envisaged use. While the lease agreement specified that the property was being transferred on a tale quale basis, the RfP only provided a limited understanding of the condition of the premises and did not specify that the site was being transferred 'as is'. Furthermore, the lease agreement did not provide any warranty to the tenant that the premises could be used as intended, which exclusion was not reflected in the RfP. This anomaly created a scenario where Cook & Co Ltd agreed to take over and adapt the leased site for a specific use, despite having only limited visibility over its state. Linked to this point is the undertaking of works required to render the premises appropriate as a catering establishment. While the lease agreement and the RfP did not specify the extent of works necessary, the agreement stipulated the procedure that Cook & Co Ltd was to adhere to when carrying out such works, and that the cost was to be borne by the tenant.
12. When considering the lease agreement in terms of the bid submitted by Roots Integrated Services Ltd, the NAO deemed the link between the two, as captured in a clause in the agreement, as

sufficient in regulating the use of the site and the level of F&B service that was to be provided to the MDH. Furthermore, the rental rates stipulated in the lease agreement matched those proposed in the bid; however, a discrepancy in terms of the investment to be made was noted, with the bid stipulating €76,000 and the lease agreement indicating €150,000. Regardless, no major concerns emerge in this respect.

13. Of note to the NAO was that the premises was not inspected prior to entry into the lease agreement, with Cook & Co Ltd maintaining that it was only viewed from the outside during the evaluation process. The right of Cook & Co Ltd to inspect the property prior to it assuming control was a basic and legitimate expectation and ought to have been exercised by it. In this context, it would have been of benefit had Malta Enterprise granted adequate access to the premises at any point prior to entry into the lease agreement. However, Cook & Co Ltd was not without fault, for it was in its interest to access and assess the property to be leased prior to entering into any commitment.
14. The NAO noted that the lease agreement clearly defined the pertinent aspects associated with the MDH's role as landlord in respect of the common areas. The agreement provided well-defined terms relating to access and use, as well as cleaning, upkeep, maintenance and health and safety.
15. Similarly clear were the provisions of the lease agreement relating to the rights and obligations of the MDH in connection with the leased premises. Fundamental in this respect was that the MDH was leasing the site on a tale quale basis. The term 'tale quale' implied that the property was being leased as is, without any warranties or guarantees regarding its existing condition. The NAO is of the understanding that since the agreement stipulated that the MDH was handing over the premises to Cook & Co Ltd on a tale quale basis, this indicated that the former was generally not responsible for repairs or improvements required to the property following entry into the agreement.
16. The lease agreement did not include any assurance from the MDH that the premises was fit for the use it was intended for. This was deemed somewhat anomalous by the NAO since the MDH was leasing the premises specifically for the operation of a catering establishment, for which planning and other regulatory permits were required. Given the specific intended use and the tight timeframe for the commencement of operations, it was in the landlord's interest to ensure that the premises could lawfully be used as such.
17. As regards the obligations of the tenant, the NAO is of the opinion that the agreement clearly specified the responsibilities that were to be borne by Cook & Co Ltd, contributing to the clarity in roles and duties that ought to have been assumed by it. Notwithstanding this, several observations are warranted.

18. Specified in the lease agreement was that the premises was being transferred on a tale quale basis, without any warranties or guarantees as to its existing condition. Although the agreement included a report on the condition of the premises, one could argue that more information would have better captured the state of the site. Nonetheless, Cook & Co Ltd accepted the premises 'as is', regardless of its adequacy as a catering establishment. By entering into the lease agreement, Cook & Co Ltd accepted the responsibility to adapt the premises for the intended use and therefore undertake the works required.
19. In addition, the lease agreement indicated that Cook & Co Ltd was to secure the necessary permits and licences. The NAO noted that the agreement was silent in a scenario where the required permits and licences were not issued or delayed. This observation assumes relevance when one considers that the premises was not covered by a planning permit to operate as a catering establishment at the point of entry into the lease agreement. Moreover, Cook & Co Ltd was obligated to commence operations within three and a half months from signing.
20. In terms of the rights and obligations of Cook & Co Ltd during the lease term, the NAO is of the opinion that the lease agreement was clear. Key provisions relating to the payment of rent and utility charges, the use of the premises, the level of activity and investment expected, as well as reporting requirements were outlined. Other provisions covered matters concerning health and safety, insurance and access to the premises. The onus to maintain the leased site in good condition and repair and the commitment to seek the MDH's approval for any alteration works were also cited in the agreement. The works were to be paid for by Cook & Co Ltd and, unless otherwise specified, were to become the property of the MDH on completion. Aside from these obligations, the agreement granted Cook & Co Ltd the right to access the premises for all purposes connected with its use and enjoyment.
21. Also clear was the regulation of the lease towards the end of its term. Specified were provisions regarding the vacation of the premises by Cook & Co Ltd and the state in which the premises was to be left. The agreement provided for circumstances where Cook & Co Ltd failed to relinquish the premises, with the provisions that were to come into effect should such a situation materialise specified.
22. Whether the lease agreement was equitable in terms of the rights and obligations that it imposed on the MDH and Cook & Co Ltd is another matter. Nonetheless, the NAO acknowledges that the agreement was a private writing that allowed the parties to set the terms and conditions to the contract. More crucial was that both parties signed.
23. The final aspect considered by the NAO in this audit was whether the MDH and Cook & Co Ltd adhered to the contractual obligations entered into by virtue of the lease agreement. The first aspect considered was the handing over process. Both parties agreed that the keys to the premises were not handed over on signing, since works on the site were still ongoing; however,

these were provided several weeks later. Notwithstanding this, Cook & Co Ltd and the MDH confirmed that the premises could be accessed through the MLSP security personnel following entry into the lease agreement. Although this arrangement created an element of inconvenience to Cook & Co Ltd, it could effectively access the premises when it assumed tenancy.

24. Cook & Co Ltd did not commence operations on 1 September 2016 as stipulated in the lease agreement. Nevertheless, the NAO is of the opinion that the delay could not be solely attributed to Cook & Co Ltd for several defects were noted when assuming ownership of the premises, with necessary repairs extending beyond the period allowed in the agreement for the commencement of operations. While Malta Enterprise initially acknowledged certain deficiencies, this stance was eventually revisited, with the current administration negating the claims by Cook & Co Ltd and maintaining that the premises was adequate for the intended use.
25. The Planning Authority permit for the change of use of the site, allowing the leased premises to be used as a catering facility, was issued on 24 August 2016, that is, a mere week prior to the established commencement of operations date. Moreover, the planning permit was subject to several conditions that necessitated the undertaking of works to adapt the premises to its newly revised use. The extent of works required to render the premises in line with the planning permit remained a contentious issue between Cook & Co Ltd and Malta Enterprise. The delay in the issuance of the planning permit inevitably prolonged the process of obtaining an operating licence, with a temporary licence secured from the Malta Tourism Authority on 12 December 2016, several months after the originally designated commencement date of 1 September 2016. The NAO established that Cook & Co Ltd started operating the Zenzero restaurant in January 2017.
26. In terms of the lease agreement with Cook & Co Ltd, the MDH, as landlord, bore obligations relating to the common areas of the MLSP. Certain obligations were met without concern, with cleaning, waste disposal and health and safety-related requirements as cases in point. Nonetheless, other aspects concerning the repair and maintenance of the site, the provision of utilities, and signage remained contentious between the parties.
27. As regards the leased premises, any necessary adaptation works required by the tenant were to be approved in advance and documented in the lease agreement on completion. The agreement outlined the procedure to be followed in this respect. While the NAO reviewed evidence corresponding to the authorisation of works sought by Cook & Co Ltd and provided by the MLSP, this Office noted that these exchanges did not correspond to all works undertaken and did not comply with the provisions stipulated in the agreement regulating the registration of adaptations to the premises. To honour this obligation, Cook & Co Ltd was to submit duly certified drawings and work method statements relating to the alteration works. No evidence of such submissions to the MDH was provided to the NAO. The MDH's claim that it was the tenant's responsibility to ensure that works carried out were included in the agreement was considered erroneous by the NAO, for the MDH was, by its own admission, aware of the works

being undertaken by Cook & Co Ltd. Therefore, the MDH, as the landlord, did not comply with the provisions outlined in the lease agreement that governed such works.

28. Irrespective of concerns relating to the authorisation and registration of works not being in line with the terms of the lease agreement, another point of contention in connection therewith was whether these works were the responsibility of the MDH or Cook & Co Ltd. Central to the contention between the parties was that although the lease agreement indicated that works of a structural nature were to be borne by the MDH, the agreement failed to define what constituted works 'of a structural nature'. While some works could be clearly classified as falling under this definition, others were less evident, creating uncertainty about which party was to bear responsibility. Works that could less clearly be defined as structural, but more infrastructural in nature, were those undertaken in connection with the drainage and electrical systems. It can be argued that these infrastructural deficiencies led to structural defects in the building, thereby rendering the landlord accountable. The latent nature of these deficiencies further complicated matters.
29. The inclusion of the 'tale quale' provision in the lease agreement and that no warranty was provided as to the adequacy of the premises in terms of its intended use add other layers of complexity to this contractual relationship. The NAO asserts that these conditions should have prompted Malta Enterprise to disclose all information concerning the premises in a comprehensive and transparent manner before entry into the lease agreement. Nevertheless, this Office is of the opinion that Cook & Co Ltd bore responsibility to thoroughly assess the condition of the premises to be leased prior to its commitment to the contract, especially in view of the tale quale conditionality and the lack of warranty provided. Again, the latent nature of certain defects, also acknowledged by Malta Enterprise, further compounded the contestations between the parties.
30. The lease agreement stipulated several obligations that Cook & Co Ltd was to adhere to. The NAO established that the permit relating to the change in use of the leased premises was obtained by Malta Enterprise within the period stipulated in the agreement for the commencement of operations, hence regularising the use of the premises as a catering establishment.
31. Notwithstanding this, multiple concerns emerge in the NAO's review of the sanctioning of the works undertaken at the leased premises. The origin of the matter can be traced to the initial attempt by Cook & Co Ltd to regularise the 'minor amendments' to the internal layout of the premises. This drew attention to the discrepancy in terms of the area of the site which was not in conformity with the planning permit in hand that covered the change in use of the premises, as well as to the extent of the structural alterations carried out. As regards the discrepancy in the area of the leased premises, the NAO established that this incongruence was not attributable to Malta Enterprise or Cook & Co Ltd, but erroneously arose during the planning application screening process undertaken by the PA. The documentation reviewed by this Office imparted an understanding that Malta Enterprise and Cook & Co Ltd were initially unaware of this error.

32. The NAO is less tolerant of the structural alterations to the leased premises carried out by Cook & Co Ltd without the prior sanctioning of the PA. Notwithstanding the endorsement of Malta Enterprise for alterations carried out, Cook & Co Ltd did not obtain the necessary planning permit before undertaking the works. The argument put forward by Cook & Co Ltd, that its role as specified in the RfP was merely that of an operator and did not include the responsibility to obtain the necessary permits, was deemed incorrect by the NAO. The RfP as bid for by Cook & Co Ltd stipulated that the tenant was to “Provide all necessary permits to operate the facility/ies”. Cook & Co Ltd’s stance when arguing that its role was merely that of an operator was rendered incongruent by the fact that it had carried out all the works to the leased premises that later required sanctioning, with subsequent action intended to sanction these works proving futile when sought by Cook & Co Ltd in November 2016 through its request for a minor amendment. The MDH is not without blame in this matter. The NAO is of the opinion that the MDH, acting as a responsible landlord, ought to have ascertained that the alteration works undertaken by Cook & Co Ltd were covered by a planning permit, more so when one considers that the MDH had visibility over the works carried out. Although Malta Enterprise sought to regularise the leased premises through the submission of a planning application in January 2019, the substantial lapse between the undertaking of the works and their subsequent sanctioning drew this Office’s attention. Malta Enterprise contended that it was constrained to assume responsibility for the planning application since Cook & Co Ltd failed to pay the architect engaged to aid in the process of sanctioning alterations already made to the leased premises. While the NAO concedes that the obligation to obtain such a permit fell squarely on Cook & Co Ltd, it was the duty of the MDH to ensure that the works undertaken were legal.
33. The failure to obtain a planning permit resulted in Cook & Co Ltd’s inability to secure the licence from the MTA required to operate a restaurant, as a valid permit was one of the requirements set for a licence to be issued. While the initial months of operation were covered by a temporary licence, once this expired in March 2017, Cook & Co Ltd continued to operate the restaurant for several years despite not having a valid licence to do so. While primary responsibility for this failure rests with Cook & Co Ltd, for the lease agreement stipulated that it was the tenant who was to ensure that operations were covered by the relevant licences, an element of concern emerges in that the MTA and Malta Enterprise were aware that the restaurant did not have the required licence yet continued to operate for a three-year period regardless. Nevertheless, the NAO is cognisant of the effect that the misrepresentation of the site in the planning permit for the change in use had, for this error led to complications in later efforts to sanction the site with the PA and secure the required operating licence.
34. The NAO is of the understanding that Cook & Co Ltd’s failure to pay the rent due and other ancillary charges constituted a breach of the lease agreement. The contention that the premises had several latent defects that resulted in disbursement by the tenant to rectify does not provide justification to withhold the payment of contractual dues. More so, when one considers that Cook & Co Ltd was operating from the premises for several years. On the part of the MDH,

scope for the better management of this contractual relationship existed. While the MDH had the option to enforce the lease agreement and institute unilateral action to terminate the lease, the context to the relationship between the parties ought to have encouraged greater dialogue leading to settlement. The change in management of Malta Enterprise and the MLSP adds another layer of complexity to the relationship between the landlord and the tenant. Originally, the MDH conceded that it too had erred in certain respects, such as in its decision to engage the architect originally tasked with responsibility for the project to verify the defects alleged by Cook & Co Ltd, whose impartiality could readily be challenged. The stance adopted following the change in management at Malta Enterprise and the MLSP was less amenable to seek compromise. The several instances of non-adherence to the contractual obligations by the tenant and the landlord must be seen against this tense relationship that existed between the parties.

35. As regards the possible termination of the agreement between the MDH and Cook & Co Ltd, the NAO noted that there existed several grounds for the rescinding of the lease. Action in this respect was taken by the MDH in September 2020, when the landlord instigated judicial action for the eviction of Cook & Co Ltd for unpaid rent and utility charges. This development ensued referral to the Rent Regulation Board by Cook & Co Ltd for breaches of the lease agreement by the landlord that rendered it impossible for the tenant to operate the catering establishment at the MLSP. The judicial proceedings were still ongoing at the time of reporting.

Chapter 1 | Introduction

1.1 A request to audit

1.1.1 On 21 July 2020, the National Audit Office (NAO) received a complaint from Cook & Co Ltd regarding a request for proposals (RfP) issued by the Malta Life Sciences Park (MLSP) for the provision of food and beverage (F&B) services at the Malta Life Sciences Centre (MLSC) and the Malta Digital Hub Ltd (MDH). The RfP invited prospective bidders to present their capabilities and capacities to operate the MLSP's onsite F&B service.

1.1.2 In its submission to the NAO, Cook & Co Ltd contended that the RfP was fraudulent from its inception. In correspondence to this Office, Cook & Co Ltd contested several aspects relating thereto, mainly, that the condition of the leased premises was not as described in the RfP. Moreover, Cook & Co Ltd alleged that the premises was not in line with established health and safety codes, thereby rendering it impossible for it to commence operations until the related health, structural, plumbing and electrical issues were addressed. In its submission, Cook & Co Ltd condensed the key concerns affecting the project as follows:

- a. design and planning deficiencies, including no floor drains in the kitchen, inappropriate ducting and filtration systems, and no electrical points or supply;
- b. latent defects in drains and pipework, which necessitated the installation of a new drainage system;
- c. inadequate electrical service, with no electricity supplied through the allocated distribution board which, moreover, was unsafely positioned near a water supply;
- d. plumbing concerns, with no plumbing legends provided necessitating new works to be carried out prior to the commencement of operations;
- e. structural deficits that required address through the opening of a service door, the opening of a door in the shaft, the relocation of restrooms, the construction of a ceiling at mezzanine level, and the opening of windows to create ventilation;
- f. no gas supply, necessitating the creation of floor gutters and the obtaining of permits for the installation of a gas storage tank; and
- g. other miscellaneous items, including road signage, new aluminium apertures, new restroom furnishings, the partitioning of the kitchen and the supply of hot water.

1.1.3 The request for an audit was accepted by the NAO in terms of Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Chapter 396). The audit commenced in late 2021, guided by the following terms of reference:

- a. review of the RfPs to operate the MLSP's onsite F&B service issued by the MLSP with a deadline for the submission of offers set for 30 October 2015 and 4 December 2015;
- b. analyse the lease agreement entered into by the MDH and Cook & Co Ltd on 20 May 2016;
- c. examine the obligations of the parties emanating from the lease agreement; and
- d. assess whether these obligations were adhered to by the parties.

1.2 Methodology

1.2.1 This audit was conducted in accordance with Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act (Act XVI, 1997) and in terms of practices adopted by the NAO. Pertinent legislation reviewed, in force at the time, were the Public Procurement Regulations (Legal Notice 296 of 2010) and the Disposal of Government Land Act (Chapter 268).

1.2.2 Findings presented in this report are based on the documentation submitted to the NAO. Substantial documentation was submitted to this Office as part of the request for investigation made by Cook & Co Ltd. This information was supplemented through requests for documentation made by the NAO to Malta Enterprise, given its pivotal role in the contracting of services and the subsequent oversight thereof. The NAO sought further information from the Malta Tourism Authority (MTA) and the Environmental Health Directorate. Key information was also obtained from the Planning Authority (PA) in relation to the planning applications for the site.¹ Further documentation was obtained from the Courts in relation to the ongoing litigation between the parties.

1.2.3 In this report, reference is at times made to Roots Integrated Services Ltd. This Company originally submitted a bid in response to the RfP for the provision of F&B services at the MLSC and the MDH. Cook & Co Ltd informed the NAO that some of the assets and brand representations of Roots Integrated Services Ltd were purchased by Actif Ltd in early 2016. One of the assets purchased was the rights to this tender which, at that point, had not yet been awarded. Once the bid by Roots Integrated Services Ltd was selected, Actif Ltd decided that a separate company was to be set up and assume responsibility for the bid and the subsequent contract. The new company was Cook & Co Ltd.

¹ In April 2016, the PA was constituted following the demerger of the Malta Environment and Planning Authority into the PA and the Environment and Resources Authority.

- 1.2.4 Aside from documentation reviewed, in line with established procedures, the NAO held interviews, under oath, with persons who were directly involved in the RfPs and the lease agreement. These included officials from Malta Enterprise and representatives of Cook & Co Ltd. All interviews held were transcribed by the NAO and a copy submitted to the interviewee, who was requested to endorse the transcript and submit clarifications, if required. It must be noted that, unless otherwise indicated, officials cited in this report are referred to according to their designation at the time being reported on. To differentiate between the Chief Executive Officer (CEO) MLSP at the time being reported on and the current CEO MLSP, reference is made to the former as 'former CEO MLSP' and the latter as 'CEO MLSP'. It is to be noted that the former CEO MLSP and the CEO MLSP contemporaneously held the post of CEO MDH; however, for reasons of consistency, the two are referred to as former CEO MLSP or CEO MLSP, as the case may be, throughout this report.
- 1.2.5 In addition to the review of documents and interviews held, the NAO carried out a site visit in June 2023 to inspect the premises. Pertinent to note was that the premises was closed in March 2020 and has not reopened since. Cook & Co Ltd facilitated access to the premises, with Malta Enterprise maintaining that it did not have access thereto.
- 1.2.6 In line with its guiding principles of independence, fairness and objectivity, the NAO sought to ensure that the allegations brought to its attention were duly scrutinised and the resultant findings objectively reported on. The relevant documentation and information required were, in most cases and to the best of the NAO's knowledge, made available to this Office by the various parties. 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. The NAO sought to identify any possible shortcoming or irregularity in the use of public resources.

Chapter 2 | The request for proposals for the provision of food and beverage services at the Malta Life Sciences Park

2.1 The objectives of procurement were generally defined through a request for proposals

The setting up of the Malta Life Sciences Park

2.1.1 In 2007, Malta Enterprise, in line with the Government’s strategic vision of establishing high value-added sectors in Malta, commissioned a study regarding the viability of a life sciences park. In addition, a cost-benefit analysis on the viability of such a centre was carried out in 2009 and revised in 2013 to reflect the then economic situation. The 2007 study and the 2009 analysis resulted in the initiation of the MLSP project, which was submitted for European Union (EU) funding. On 23 May 2012, a Grant Agreement was approved for part-financing through the European Regional Development Fund. In essence, the Grant Agreement stipulated that the building of the MLSP close to the Mater Dei Hospital and the University of Malta would allow focus on life sciences and associated technologies and would incorporate pharmaceutical and biotechnological laboratories and research facilities intended to support the pharmaceutical industry and spur the growth of a life sciences ecosystem. The objectives of the project were to:

- a. create, incubate and attract new knowledge-based companies;
- b. support new and existing enterprises to invest in knowledge-based activities;
- c. increase collaboration between knowledge institutes and Maltese enterprises; and
- d. develop a currently unutilised area designated as an employment node around the Mater Dei Hospital and the University of Malta in generating high value-added activities.

2.1.2 The benefits of the project comprised the housing of several new enterprises on site, the clustering and sharing of knowledge, an increase in research and development, and access to laboratories and incubation facilities. In addition, the MLSP was to provide common facilities consisting of an exhibition space, a childcare centre, a cafeteria and coffee area, a multi-purpose auditorium and meeting rooms. The envisaged project cost was estimated at €38,000,000, of which €22,000,000 was to be financed through EU funds. Noted in the Grant Agreement was that the project commenced in July 2008 and was to be completed by September 2015.

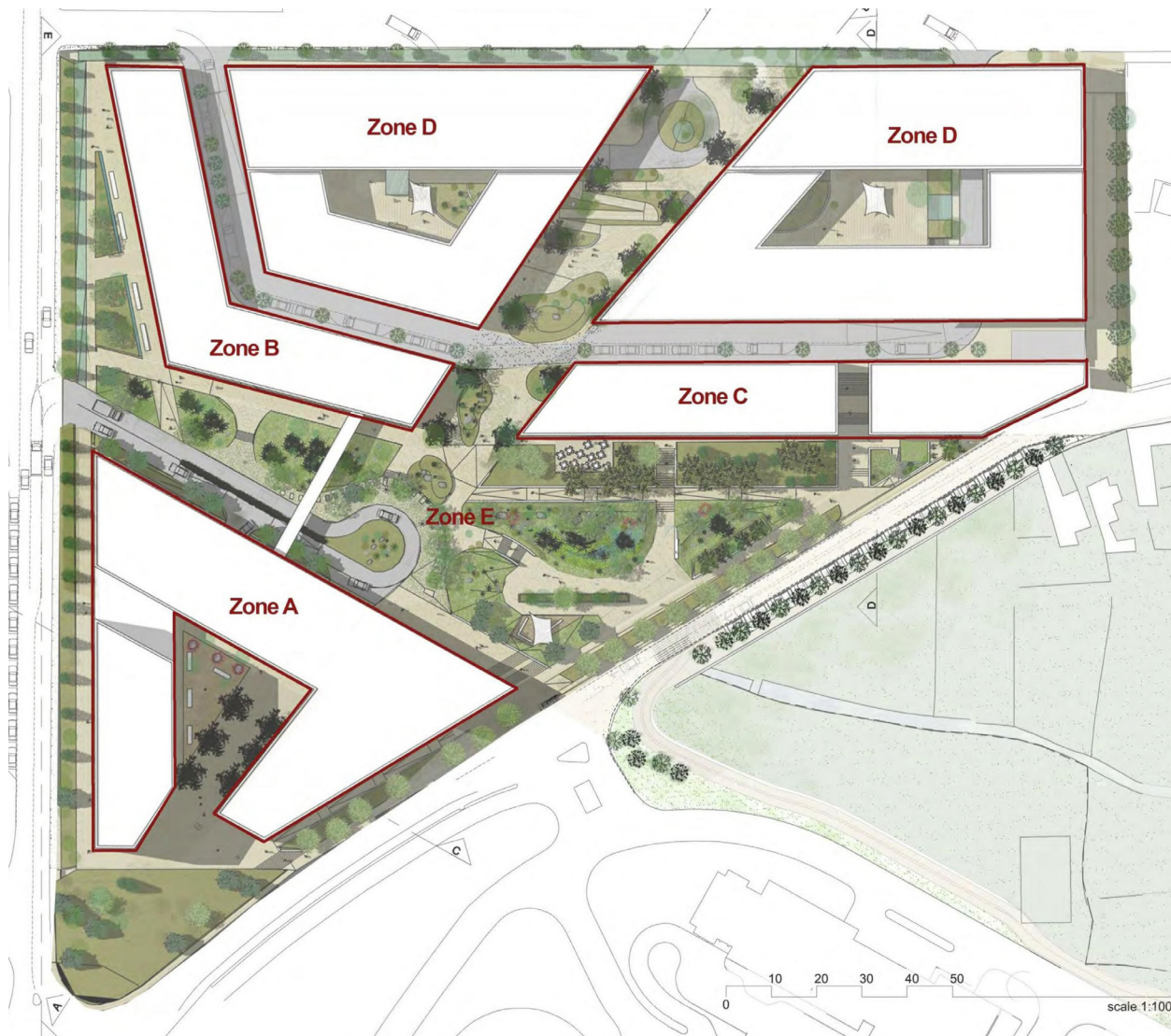
2.1.3 An outline development application bearing reference PA/1179/10 was submitted to the Malta Environment and Planning Authority (MEPA) in March 2010, with a full development application for enabling works (demolition and site preparation) under reference PA/3947/10 referred to MEPA in July 2010. Both applications were approved on 30 June 2011. Another full development application (PA/4523/10) for the construction of the MLSP was submitted to MEPA on 30 September 2010 and approved by the Authority on 13 September 2012.

2.1.4 Through PA/1179/10, the MLSP took more definite form, with the main components of the project identified as a Life Sciences Centre, a Business Incubation Centre, Support Facilities, an Enterprise Centre and landscaping. Details corresponding to each of these components are presented in Figure 1, while a layout of the zones and buildings (indicated as LS in Figure 1) is provided in Figure 2.

Figure 1 | MLSP project components by zone

Zone	Function	Area
Zone A (LS1 & LS2) Life Sciences Centre	The Centre was to accommodate a main reception area, meeting rooms, working spaces, a conference room, commercial spaces, offices, plant, storage and waste management areas, specialised testing laboratory, research and development laboratories, innovation laboratories, and New Technology Based Firms working space.	
Zone B (LS3) Business Incubation Centre	The Centre was to accommodate units for growing businesses.	3,560m ²
Zone C (LS4 & LS5) Support Facilities	The Facilities were aimed to provide networking opportunities for tenants of the MLSP and marketing opportunities.	1,605m ²
Zone D (LS6, LS7, LS8 & LS9) Enterprise Centre	The Centre was intended to accommodate a mix of small, medium and large enterprises through longer lease periods to the private sector. The Enterprise Centre was planned for Phase 2 of the project.	20,560m ²
Zone E (external areas) Landscaping	This consisted of the West-East and North-South landscape spines and all external areas not included in the other four Zones. The zone incorporated some internal landscaped areas, an internal road and parking areas.	3.7 hectares

Figure 2 | Site plan illustrating the layout of zones



- 2.1.5 Of interest in this audit are buildings LS3 and LS4, located in Zone B and Zone C, respectively. Part of the LS3 was earmarked for a childcare centre, while a section of LS4 was to be used as a canteen facility.
- 2.1.6 At an organisational and functional level, Malta Enterprise indicated that the MLSP consisted of two core units, namely the MLSC and the MDH. The MLSC comprised two adjacent blocks, part of LS3 and LS4, which were intended for use as meeting spaces and laboratories among other ancillary facilities. On the other hand, the MDH was to occupy another part of LS3, and was primarily intended to spur the development of digital technology in collaboration with the life sciences sector. The F&B services subject to this review were to be provided from the MDH.
- 2.1.7 The MLSP is operated by MLSC Ltd and MDH Ltd, two companies wholly owned by Malta Enterprise. In terms of governance, the MLSP is overseen by a Board of Directors, which provides direction and is responsible for high-level decisions concerning the Park. In turn, the day-to-day management and operation of the MLSP is assigned to a management team.

2.1.8 On 19 September 2012, MEPA informed Malta Enterprise of the development permission granted in accordance with the application bearing reference PA/4523/10. Through this correspondence, several drawings capturing the intended development of the site were approved. Of note was that a childcare facility was to be situated on the east end of the LS3 at level 0 (Figure 3 and Figure 4 refer), while canteen facilities were to be sited on the west end of LS4 also at level 0 (Figure 5 and Figure 6 refer).

Figure 3 | LS3 section drawing highlighting the location of the childcare facility

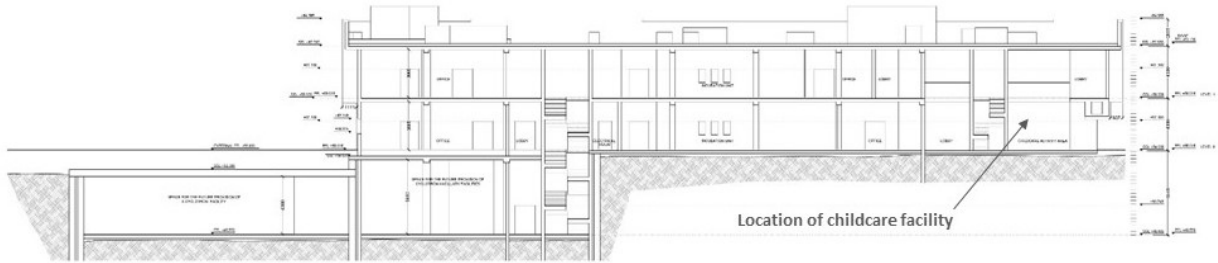
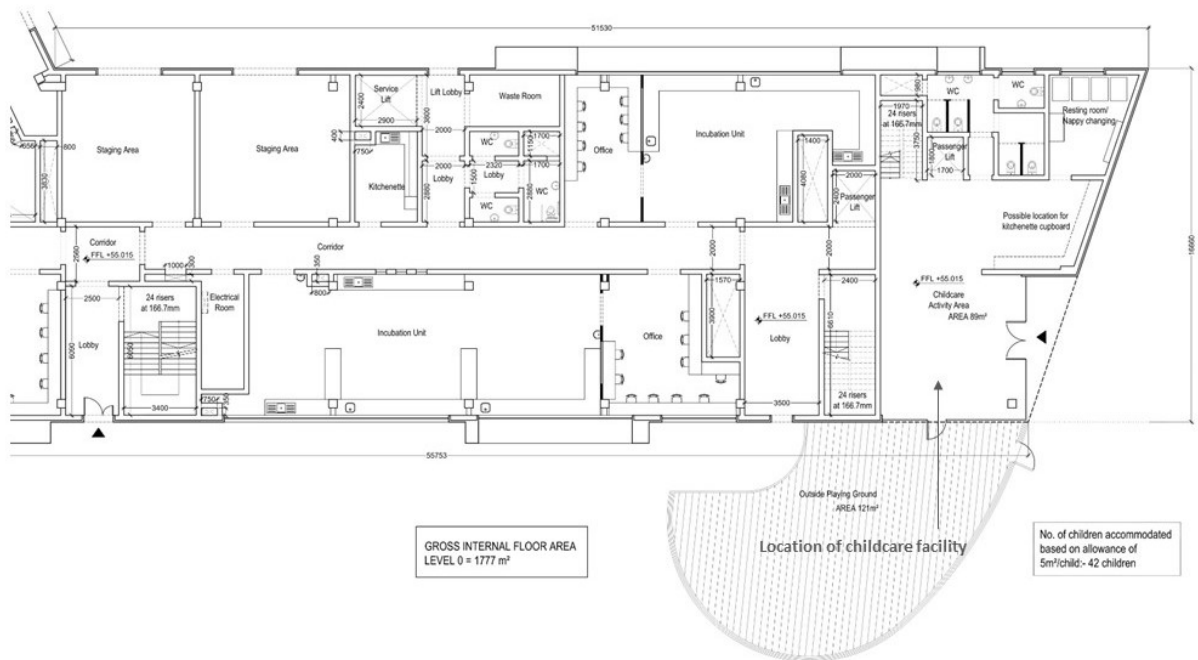


Figure 4 | LS3 floor plan highlighting the location of the childcare facility



2.1.9 It is to be noted that drawings corresponding to the catering facility at the LS4 referred to the earmarked site through different terms. The site was referred to as a 'Restaurant' in the LS4 section drawing (Figure 5 refers) and as a 'Canteen for Life Sciences Centre' in the LS4 floor plan (Figure 6 refers). In addition, the room adjacent to the canteen was labelled as a food preparation area where no formal cooking was to be carried out. This imparted an understanding that the catering facility was more in line with a canteen-type set-up rather than a restaurant.

Figure 5 | LS4 section drawing highlighting the location of the catering facility

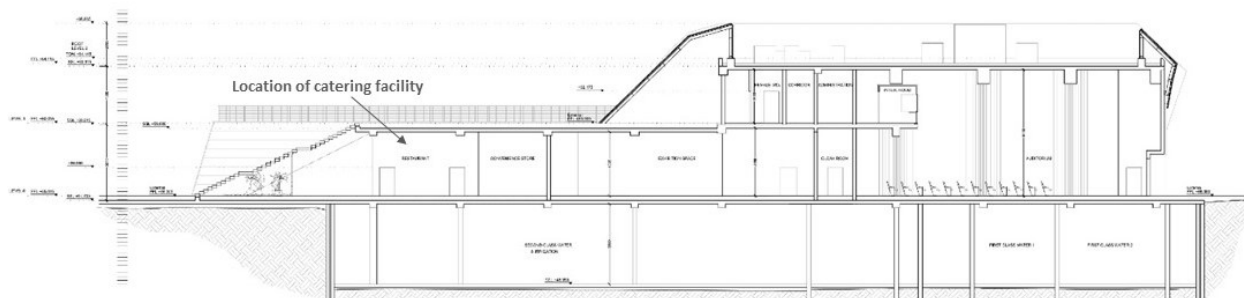
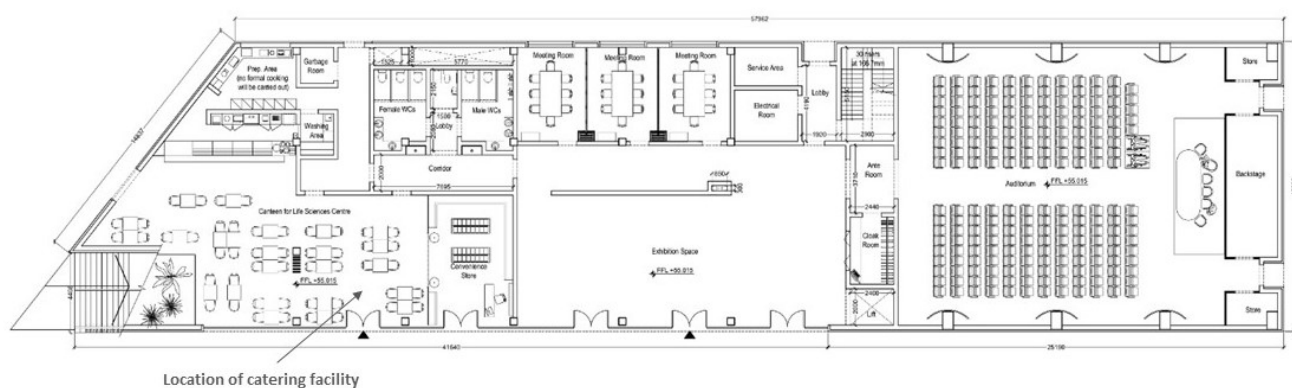


Figure 6 | LS4 floor plan highlighting the location of the catering facility



2.1.10 On 27 August 2015, Malta Enterprise submitted an application to MEPA for a change of use of the area earmarked as a childcare centre in LS3 to a food and drink establishment. Cited in the application bearing reference PA/2220/16 was that the establishment was to operate in terms of Class 4D, that is, as a premises where the preparation and sale of hot or cold food or drink for consumption and cooking was allowed. MEPA approved the application on 24 August 2016; however, in the interim, in September 2015, Malta Enterprise published an RfP for the provision of F&B services at the MLSP.

2.1.11 Although the NAO has limited visibility over developments that occurred between September 2012 (when permission was originally granted by MEPA) and August 2015 (application for the change of use), during this period, with the construction of several zones of the MLSP completed, Malta Enterprise decided to replace the childcare centre at the LS3 with a catering establishment. In response to the clarification sought by the NAO in this respect, the former CEO MLSP raised concerns regarding the siting of a childcare centre within the confines of the Park, given the potential exposure to health hazards. Providing further context, the former CEO MLSP indicated that the origin of the childcare centre stemmed from the fact that such facilities were a requirement imposed on all projects funded through the European Regional Development Fund. However, this requirement was waived following the concerns raised by the former CEO MLSP. The NAO noted that in the project’s closure report, reference was made to the relocation of the childcare centre to a site outside of the Park.

- 2.1.12 Also noted by the CEO MLSP and the former CEO MLSP was that the construction of the LS4 was cancelled in 2013. This zone within the MLSP was to be funded through national funds, with the building to be constructed intended for the hosting of conferences. However, this part of the MLSP project was deemed not economically feasible, resulting in the sole construction of the basement, which housed the reservoirs, plant and equipment that were to service the other buildings. In submissions to this Office, the former CEO MLSP explained that following the cancellation of the construction of the LS4 and the elimination of the childcare centre, the cafeteria originally intended at the LS4 was relocated to the LS3, thereby replacing the childcare centre. The reasoning leading to the change in use was captured in the project closure report dated 20 March 2018, wherein it was indicated that the “childcare facility has been discouraged and abandoned as a plan due to the presence of bio and chemical hazards”.
- 2.1.13 It was in this context that Malta Enterprise decided to issue an RfP for the provision of F&B services at the MLSP. The former CEO MLSP argued that a cafeteria within a science park was a standard feature, as it facilitated networking between tenants, increasing the possibility of technology transfer and innovation, while simultaneously improving the quality of the tenancy at the Park. Elaborating on the decision to issue an RfP, the former CEO MLSP noted the distinction between the operator of the F&B facility and other tenants of the Park. Since the catering facility was to service a yet unknown level of custom, given its interdependence with the general occupancy of the MLSP, and that the service was to be provided by one operator, Malta Enterprise deemed recourse to an RfP as the preferred procurement method. The outcome of this competitive call was to eventually be referred to and approved by the Malta Enterprise Board of Directors.

The request for proposals

- 2.1.14 On 11 September 2015, Malta Enterprise published an RfP in the Government Gazette for the provision of F&B services at the MLSP. The advert indicated that the RfP was a “Public call to invite prospective providers of food and beverage to present their capabilities and capacity in order to be considered for providing F&B services at MLSP.” Notice of the RfP was also posted on a social media account administered by Malta Enterprise on 15 September 2015.
- 2.1.15 Indicated in the RfP was that the MLSP was offering the life sciences market approximately 7,000 square metres of rentable space and was providing an international class facility in life sciences including laboratories, offices, seminar rooms, meeting rooms and equipped shared facilities. Through the Park, the Government and Malta Enterprise intended to spur the growth of the life sciences industry. The MLSP offered premises for start-ups and existing companies and was geared towards advanced research and business development. It was envisaged that the Park would host between 200 and 300 employees over the following three years, with the Park’s main goal being that of intensifying cooperation in the areas of education, research and innovation by providing state-of-the-art infrastructure, creating access to scarce expertise and increasing access to grants and funds.

2.1.16 The life sciences facility in San Ġwann, as described in the RfP, consisted of two core units, namely the MLSC and the MDH. The MLSC comprised two adjacent blocks, understood by the NAO as corresponding to part of LS3 and LS4. The Centre was to host activities related to biology and chemistry, and provide meeting rooms, seminar facilities and laboratory training rooms. The MDH, which comprised one block, was intended to provide space to digital technology companies, particularly those intending to work in synergy with the life sciences sector. This Office established that the MDH was to operate from the remaining part of LS3. The sought F&B services were to be provided from the MDH.

Food and beverage services

2.1.17 By means of the RfP, the MLSP sought suitably qualified companies, organisations or individuals to operate the Park's onsite F&B service. The service's minimum opening hours were set between 08:00 and 17:30. The interested party was to enter into a three-year lease agreement, renewable for a further three years. The F&B service was to comprise onsite cooking and serving through the provision of a diverse menu of ready-made food, snacks and beverages. The menu was to include hot and cold items, a healthy section (targeting individuals having special dietary requirements) and daily specialities. The selected operator was to provide high quality F&B services to staff, tenants and visitors, while onsite delivery to MLSP employees was also to be proposed.

The site and rate of lease

2.1.18 The selected bidder was to operate from a facility of 413 square metres. This area was to consist of an internal space for the kitchen, restrooms and seating, totalling 165 square metres, and offered at a minimum rate of €65 per square metre per annum (excluding VAT). In addition, a patio area of 121 square metres was being offered at a minimum rate of €35 per square metre per annum (excluding VAT). The service provider could also opt for an upper level of 127 square metres that was accessible by one flight of stairs or a lift, which area was being offered at a minimum rate of €65 per square metre per annum (excluding VAT). This area was described as secluded and could be used for business functions.

The obligations of the food and beverage service provider

2.1.19 The obligations of the F&B service provider were noted in the RfP. The service provider was to equip the facility and the kitchen with quality furniture and décor. Furthermore, the operator was to equip the area with infrastructural facilities, including mechanised cooking equipment, counter, freezer, and cafeteria and other necessary equipment, except for the air-conditioning facilities, which were already installed. The facility was to have its own electrical and water metering, the cost of which was to be borne by the chosen service provider.

- 2.1.20 The service provider was responsible for the procurement of all the raw materials and consumables required for the catering and serving of food, including ready-to-eat food, snacks and beverages. Groceries and similar retailing services were excluded. The service provider was to offer hot and cold snacks, healthy alternatives comprising fresh fruit and salads, and items suitable for individuals with food intolerances. The cleaning of the leased areas also formed part of the responsibilities assigned to the service provider.
- 2.1.21 An insurance cover was required for the operations and custom, a copy of which was to be submitted to the MLSP. The service provider was to obtain all necessary permits to operate; however, acknowledged in the RfP was that the required planning permit for operation was in the process of being issued. Of note was that the service provider was to sign and start within two months of being formally advised of the successful proposal.

Submission of proposals and evaluation

- 2.1.22 The RfP required the submission of several documents and information with the bid. Submissions were to comprise a brief description of the service operator/company, including its status (propriety/partnership/registered company or cooperative society), contact details, an organisational chart, its number of employees and details of other operations where the operator was deployed. In addition, a business plan for the site, covering a three-year forecast, was to be provided. This was to include the financial information detailing the capital investment, profitability and the equipment to be installed. Prospective operators were also to provide a list and job descriptions of the personnel to be deployed at the site, including the necessary certifications and licences.
- 2.1.23 Furthermore, prospective operators were to present documentation substantiating experience in the F&B industry and, ideally, include references of at least three reputable companies, institutions or firms who were familiar with the services rendered by the operator. Bidders were to include a brief write-up of the menu, including price list and serving options. The brief was to also indicate how the operator planned to provide the F&B services through onsite cooking and serving, and providing ready-made food items. An onsite delivery option was to be included. Moreover, bidders were to indicate whether any discounts would be given to the MLSP staff.
- 2.1.24 Prospective operators were to provide visuals for the layouts and décor of the sites. The rental offer was to be stipulated in the bid and could not be less than €65 per square metre per annum for the internal area, kitchen, restrooms and upper floor, and not less than €35 per square metre per annum for the patio area. The higher the rate offered, the more marks would be awarded.
- 2.1.25 The mark allocation for each requirement, comprehensively totalling 100 marks, was included in the RfP (Figure 7 refers).

Figure 7 | Request for Proposals - Mark allocation

Criteria	Marks allocated
Business plan	20
List of personnel and job descriptions	5
Documented experience	10
Write-up and menu	20
Indication of discount to employees	10
Visuals for layouts and décor	15
Rental offer	20
Total marks	100

2.1.26 Noted in the RfP was that applicants could be requested to provide additional information to that submitted. Bids were to be ranked in order of scoring, following which the parties could enter into a period of discussion during which the terms and conditions of the concession were to be finalised. On agreement, the MLSP was to announce the award of the concession through the identification of the successful candidate.

2.1.27 The original proposal, together with a copy, were to be submitted in a sealed envelope to the MLSP by not later than noon, 30 October 2015. Proposals were to be signed by an authorised representative who had a corporate or board resolution authorising him/her to sign the lease contract. A copy of the resolution was to be attached to the proposal.

2.1.28 Applicants were also requested to provide a signed copy of the declaration provided in the RfP document, which declaration included several terms and conditions. One of the conditions was that the operator was to pay a deposit equivalent to six months' rent (including VAT) on the signing of the agreement. Rental payments were then to start two months after signing and were to be paid in advance by direct debit every quarter.

2.1.29 The services providers were to confirm that, if selected, they could not, without the prior consent in writing of the MLSP, assign or make over this lease, whether in whole or in part, or sublet all or any part of the premises. The MLSP's consent could be granted or withheld at its absolute discretion.

2.1.30 Also included in the RfP was a checklist of the documents and information that were to be provided by the interested parties. Several photographs of the site, together with site plans of the floors, were attached to the RfP.

2.1.31 In submissions to the NAO, the former CEO MLSP indicated that by the closing date of this RfP, no bids were received by Malta Enterprise. Consequently, another RfP was issued shortly thereafter, with Malta Enterprise seeking to encourage bids by changing some of the requirements relating to the operation of the cafeteria. The former CEO MLSP noted that, at that time, the take-up of the Park was unknown, possibly inhibiting the response to the RfP.

Executive Summary

Chapter 1

Chapter 2

Chapter 3

Chapter 4

Chapter 5

A revised request for proposals

- 2.1.32 On 20 November 2015, a revised RfP was issued by Malta Enterprise, with the deadline for submissions now set for noon, 4 December 2015. The same provisions as those provided in the previous RfP were cited except for some, yet key, differences.

- 2.1.33 One of the changes was that the lease period in the revised RfP was extended from three to five years, renewable for a further five years. Another change was in the rate payable for the patio area, comprising 121 square metres. This was previously set at a minimum rate of €35 per square metre; however, was now available free of charge. Noted in the revised RfP was that rental rates under the threshold originally established for the other areas were also being considered by Malta Enterprise.

- 2.1.34 Another difference noted related to the sourcing of permits. Reference to the fact that the MEPA permit for operation was in the process of being issued was removed from the revised RfP. Hence, the responsibility to obtain the required permits shifted onto the operator. In submissions to the NAO, the former CEO MLSP indicated that all the Park’s tenants were individually responsible for any permits required for their operations, as stipulated in their contracts of lease.

- 2.1.35 There were also some changes in the submissions to be made and in the allocation of marks (Figure 8 refers). The need for the submission of a business plan was replaced by an outline proposal which, this time, was to provide a five-year forecast of the capital investment to be undertaken and the equipment to be installed on the site. Despite this revision, the same marks were allocated to this requirement. However, changes in the allocation of marks in respect of other requirements were made. The criterion relating to the list of personnel to be deployed at the facility and relevant job descriptions was now allocated 10 marks, rather than the previously assigned five marks. Moreover, the marks to be awarded for discounts provided to MLSP employees were removed. The NAO also noted that, in respect of documented experience, the requirement to submit the reference of at least three reputable companies that made use of the operator’s services was also eliminated in the revised RfP. The final change was that the rental offer for the area was now allocated a maximum of 25 marks.

Figure 8 | Request for Proposals, Revised mark allocation

Criteria	Marks allocated	
	Original RfP	Revised RfP
Business plan/Outline proposal	20	20
List of personnel and job descriptions	5	10
Documented experience	10	10
Write-up and menu	20	20
Indication of discount to employees	10	-
Visuals for layouts and décor	15	15
Rental offer	20	25
Total marks	100	100

2.1.36 Stipulated in the revised RfP was that interested operators were to submit a tender form as part of their bid together with the other documents previously listed. A proforma tender form was included in the RfP.

2.1.37 The NAO sought the views of Malta Enterprise regarding the changes made to the RfP. When queried as to the reasons for the revisions made, the former CEO MLSP reiterated that these measures by Malta Enterprise were intended to spur interest in the RfP.

2.1.38 Having reviewed the RfP, the NAO noted an element of ambiguity between what was advertised in the Government Gazette and on social media, and what was sought in terms of F&B services in the call. In this Office's opinion, the advert lacked clarity as to the nature of the F&B service. This understanding emerges from the fact that reference to the operational element of the site, whereby the service provider was to run a catering establishment, was unstated.

2.1.39 Another aspect noted by the NAO was that while site plans of the areas to be leased were included in the RfP, these were not sufficiently detailed. For example, the plans lacked service drawings (such as those for mechanical services, lighting, water, drains and air conditioning vents) that not only aid property management but are essential in the design and layout of a kitchen that is appropriate for a catering establishment. This was compounded by the fact that no site visits were provided for in the RfP.

2.2 **Although the applicable regulations were not specified, it was within the remit of Malta Enterprise to issue the request for proposals**

2.2.1 The NAO sought to determine whether the RfP was issued in line with applicable regulations. While the first RfP issued on 11 September 2015 made no reference to applicable regulations, the revised RfP published on 20 November 2015 indirectly did. Stipulated in the revised RfP was the obligation of prospective bidders to complete a tender form. The form, which was included in the revised RfP, necessitated the submission of information relating to the tendering party and the endorsement of several declarations in connection with the bid. The obligation to complete this form and subscribe to the various requirements imposed therein tied the RfP to the Public Procurement Regulations.

2.2.2 At the time of issue of the revised RfP (November 2015), public procurement was regulated by Legal Notice 296 of 2010, namely, Subsidiary Legislation 174.04 – Public Procurement Regulations. According to the Regulations, Malta Enterprise fell within the portfolio of the Ministry of Finance, the Economy and Investment and was listed under Schedule 2, which indicated the contracting authorities falling within the competence of the Department of Contracts in terms of procurement.

2.2.3 The understanding of the RfP within the context of the Public Procurement Regulations was deemed incongruent by the NAO. The source of incongruence emerges when one considers that

the contracting authority, in this case Malta Enterprise, was not seeking the procurement of any goods or services. Hypothetically, the purchase of F&B services for staff at the MLSP, whereby Malta Enterprise paid the contractor for services rendered, would have fit within the parameters of procurement. However, the model envisaged in the RfP entailed a different business model, where the contractor was to pay Malta Enterprise for use of a particular site. One could argue that, under this model, the applicability of the Public Procurement Regulations was to be seen from a services concession perspective, whereby Malta Enterprise made available a site for the contractor to render a service from. Yet, three concerns emerge in this respect. First is that the RfP did not refer to the term 'concession' or, more pertinently, 'service concession'. Second, at the time of issue of the revised RfP, service concessions were not regulated by the Public Procurement Regulations or any other enforceable legislation. Third, the payment received for the use of the site was tied to the disposal of the site, which disposal fell outside the scope of the Public Procurement Regulations. Therefore, the NAO concluded that although the RfP had the modality of a service concession, the text of the call and, more so, the absence of an applicable legal framework and the nature of the payment being made, ruled out this understanding.

2.2.4 Notwithstanding this understanding, the NAO sought to establish whether the Department of Contracts was involved in this process. In reply, the Department of Contracts indicated that public service concessions were not regulated in 2015 and that there was no obligation on government departments or entities to submit any documentation for scrutiny. The Department of Contracts noted that regulations governing concessions came into force in 2016.

2.2.5 In its essence, the nature of the transaction contemplated in the RfP entailed the provision of public land for use by third parties. The risks and rewards that emerged in connection with the commercial use of the public land were to be borne by the third party, while Government, through its agent Malta Enterprise, was to secure an income for the access granted thereto. The legislation regulating the granting of public land to third parties in force at the time of issue of the RfP was the Disposal of Government Land Act (Chapter 268). The Act defined 'disposal' as "the transfer or grant of any land under any title whatsoever, including, ... (a) any lease or encroachment or other right of use as well as any grant of any real or personal right in or over any land." Furthermore, the Act specified the modality by which government land could be disposed of. One provision stipulated in this regard was "... (a) after a call for tenders published in the Gazette in respect of the property proposed to be disposed of". The NAO deemed the RfP issued by Malta Enterprise as conforming to these provisions; however, since the call made no reference to the enabling legislation under which it was issued, this Office sought further clarification from the Lands Authority (at the time the Government Property Department) and Malta Enterprise.

2.2.6 The Lands Authority indicated that the land in question was transferred to Malta Enterprise on 1 January 1992 by virtue of the Commissioner of Land Ordinance (Chapter 169) and Legal Notice 73/1992. Article 3 of the Legal Notice stipulated that the rights and liabilities in respect of the land were to be exercised by the Malta Development Corporation. The rights and liabilities of the Corporation were eventually assumed by Malta Enterprise following the setting up of

the latter in terms of the Malta Enterprise Act (Chapter 463). In its submission to the NAO, the Lands Authority highlighted that, by virtue of Legal Notice 73/1992, Malta Enterprise was and remained bound to comply with the law regulating the disposal of Government property. Elaborating in this respect, the Lands Authority noted that, through the Legal Notice, Malta Enterprise assumed the same obligations of the Commissioner of Land at that time, and of the Lands Authority at present.

2.2.7 Given that the applicable legal regime under which the RfP was issued was unclear to the NAO, this Office sought the views of Malta Enterprise. The former CEO MLSP referred to the Malta Enterprise Act, citing Article 8(1)(g), which comprised the function “to provide and manage land, sites, premises, services, and facilities for business enterprises”. Also noted by the NAO was Article 8(2)(b), which granted Malta Enterprise the authority to “acquire, sell or otherwise dispose of or lease land, plant, machinery and equipment, and other property and to otherwise make available property for use by other persons”.

2.2.8 In sum, the RfPs issued by Malta Enterprise made no reference to the regulations that governed the calls. Essentially, through the RfPs, Malta Enterprise sought to lease a site to third parties from where F&B services were to be provided. While the NAO established that this was within the remit of Malta Enterprise, emanating from its enabling legislation, the indirect reference in the RfP to the Public Procurement Regulations brought about an element of ambiguity. This incongruence results from the fact that Malta Enterprise was not seeking to procure any goods or services, but to lease land to third parties who in turn were to provide F&B services.

2.3 **On balance, the site was insufficiently described, with key elements of information relating to its permitted use and infrastructural requirements were not adequately disclosed**

2.3.1 The NAO assessed whether the site to be transferred was adequately defined in the RfP through the consideration of five criteria. Details of the site deemed essential by this Office were those that materially affected the feasibility and sustainability of the bid, and comprised information relating to its location, dimensions and layout, permitted use, infrastructure and its period of control.

2.3.2 Through the review of the RfPs, the NAO established that the location of the site was appropriately identified, with ample context-related information disclosed, thereby providing prospective bidders with a suitable understanding of what the broader project entailed and how the F&B service being tendered for fit within this setting.

2.3.3 A site plan highlighting the location of the F&B service within the MLSP was appended to the RfPs. This is seen as the area marked in yellow in Figure 9.

Figure 9 | Overall site plan included in the RfPs



2.3.4 Also provided were several photos of the site as seen externally (Figure 10 refers) and internally (Figure 11 refers).

Figure 10 | Photos of the proposed food and beverage site, external

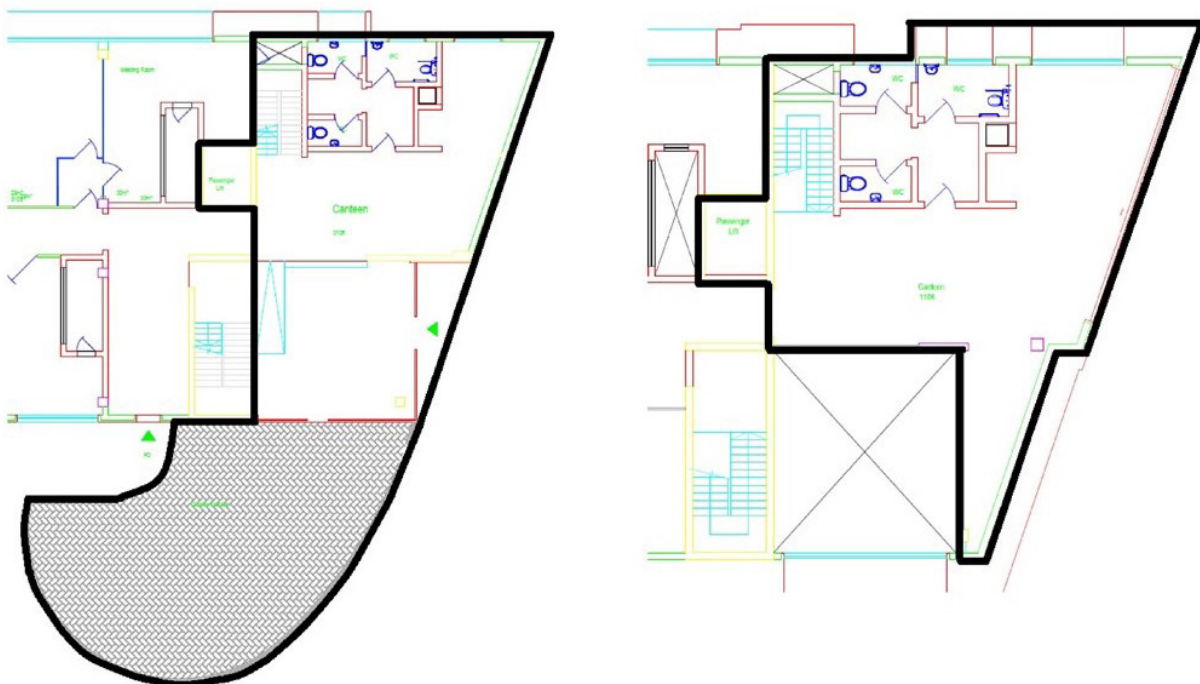


Figure 11 | Photos of the proposed food and beverage site, internal



2.3.5 The dimensions of the site were outlined in sufficient detail in the published RfPs. Noted in both instances was that the F&B facility was to comprise 413 square metres. The layout entailed an internal area for the kitchen, seating and ancillary facilities of 165 square metres at ground floor level, a patio area of 121 square metres, and an optional internal area of 127 square metres at first floor level. Site plans of both levels illustrating the general layout of the facility were included in the RfPs (Figure 12 refers). As indicated earlier, the rate for the internal areas was set at an annual €65 per square metre, while that of the outdoor area was initially set at a yearly €35 per square metre but later revised to free of charge.

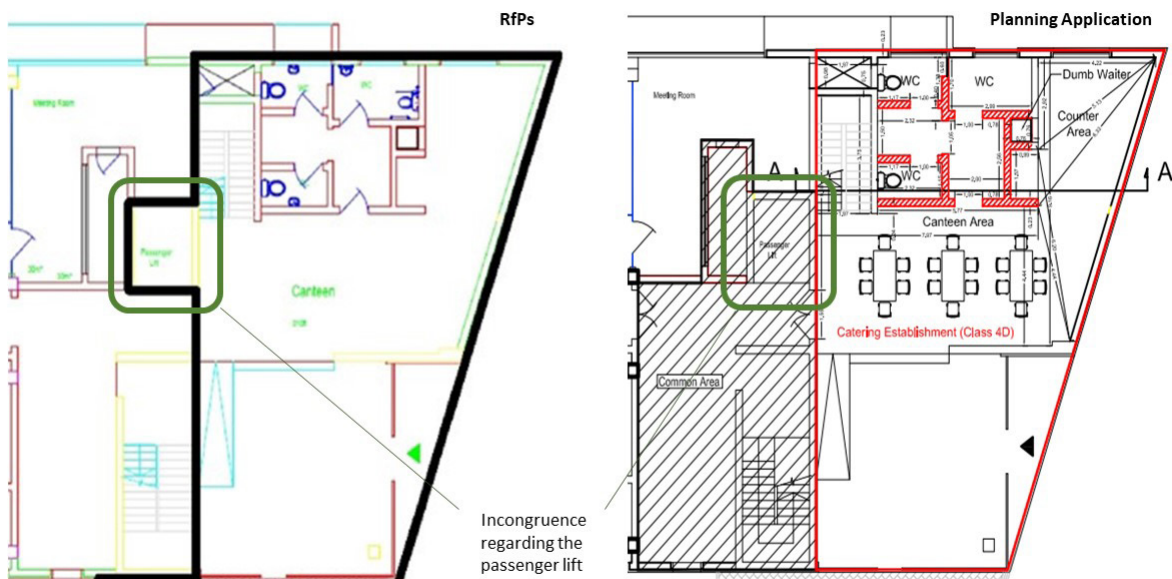
Figure 12 | Plans attached to the RfPs



2.3.6 Of concern to the NAO was the fact that the areas specified in the RfPs (issued in September 2015 and November 2015) were incongruent with those indicated by Malta Enterprise in its application for change of use from a childcare facility to an F&B establishment submitted to MEPA in August 2015 (with relevant drawings submitted in September 2015). According to later submissions made by the PA, the approved drawings, as submitted by Malta Enterprise in its application for a change of use, corresponded to 101 square metres at ground floor level and 120 square metres at first floor level. This excluded the patio area at ground floor level. Evident is the discrepancy in the dimensions of the site at ground floor level, for while the RfP cited an internal area of 165 square metres, the area applied for by Malta Enterprise comprised 101 square metres. A smaller discrepancy arose at first floor level, with 127 square metres cited in the RfP, yet 120 square metres indicated in the planning application. Other concerns regarding discrepancies in the dimensions of the site were raised by Cook & Co Ltd, which contended that the extent of the premises was overstated in the RfP.

2.3.7 Aside from concerns regarding the dimensions of the site were other incongruities identified in the layout of the premises. One such incongruence was whether the passenger lift formed part of the site to be leased or part of the common areas. According to the plans submitted to MEPA by Malta Enterprise, the passenger lift was located in a common area; however, according to the plans appended to the RfP, the lift formed part of the premises to be leased (marked in green in Figure 13). A site inspection by the NAO confirmed that the passenger lift formed part of the common areas within LS3.

Figure 13 | Incongruence regarding the passenger lift in the planning application and the RfPs



2.3.8 Another incongruence identified by the NAO related to the internal staircase essential in connecting the internal areas of the premises to be leased at ground and first floor levels. Although this element of the property featured in the plans submitted to MEPA and in the RfPs, in effect, the construction of the staircase was not undertaken. An additional discrepancy concerned the placement of the kitchen within the premises. While the plans submitted to MEPA showed a kitchen at the first-floor level, the RfP indicated that the kitchen was to be housed at the ground floor level.

2.3.9 The NAO is of the opinion that these incongruencies could have been addressed by incorporating plans reflecting the actual property in the RfPs. Moreover, any necessary amendments could have been made to the plans submitted to MEPA, especially considering that the application was approved after the deadline for the submission of bids established in the RfP. Such measures would have provided bidders with better visibility of the premises and ensured that the planning permit accurately reflected the state of the property.

2.3.10 The intended use of the site was specified in both RfPs, with prospective bidders informed that the F&B service sought was to comprise onsite cooking and the serving of a diverse menu. A distinction is made in terms of the intended use of the site and the permitted use of the site. In this context, the RfP issued on 11 September 2015 indicated that the F&B service provider was to obtain all required permits to operate the facility. Nonetheless, noted in this RfP was that the necessary MEPA permit for operation from the site was in the process of being issued. Of interest to the NAO was that, in the revised RfP published on 20 November 2015, reference to the MEPA permit being sought was omitted.

2.3.11 The NAO reviewed records retained by MEPA to understand the permitted use of the site earmarked as a catering facility at the time of publication of the first RfP. This Office noted that the permitted use of the site prior to September 2015 was that of a childcare centre. This was in line with the planning permit issued in respect of PA/1179/10. However, it is pertinent to note that another site (forming part of LS4, while the site advertised formed part of LS3) within the MLSP was identified as a canteen facility in PA/1179/10. Also of note is that, shortly prior to the issuance of the first RfP, that is, on 27 August 2015, Malta Enterprise submitted another planning application (PA/2220/16) for a change of use of the site indicated in the RfP from a childcare centre (Class 2C) to a food and drink establishment (Class 4D).² The MEPA case officer reported that the proposed change of use from a Class 2C childcare centre to a Class 4D food and drink establishment was in conformity with the North Harbour Local Plan, which designated the site as an industrial estate wherein Class 4D use was permitted without any floor space restrictions. The proposed internal modifications were deemed in line with the North Harbour Local Plan, in that the proposed use of the site was to serve the employees of the operating building and was therefore ancillary to the existing facility. It was in this context

² The MEPA categories for commercial properties in Malta, issued in February 2014, define the activities and operations that are permitted under each class. Class 2C relates to education, with one particular use noted as 'kindergarten, creche, day nursery or day centre'. Class 4D corresponds to food and drink establishments where cooking is allowed.

that MEPA approved the application corresponding to PA/2220/16 on 24 August 2016. The NAO noted that the total area indicated in the case officer report was cited as 50 square metres, when the RfP highlighted that this was 413 square metres.

2.3.12 Having reviewed the applications submitted by Malta Enterprise for use of the site and the permits issued by MEPA, the NAO established that at the time of issue of both RfPs, the approved designation of the site was that of a childcare centre. The incongruence between the intended use of the site and its permitted use assumes further relevance when one considers the onus placed on the F&B service provider to secure the required permits to operate and to commence operations within two months of notification of award. This incongruence in the intended and permitted use of the site was not highlighted in the RfP.

2.3.13 Although the distinction between intended and permitted use may be construed as a bureaucratic nuance, this distinction assumes real relevance when one considers the infrastructural adaptations required when changing use of a site. The RfP specified that the F&B service provider was to “equip the area with infrastructural facilities including mechanised cooking equipment, counter, freezer and cafeteria equipment and other necessary equipment ... (AC facilities are already installed. The facility will have its own electrical and water metering ...)”. Nonetheless, the RfP made no reference to the fact that the site was originally planned and constructed as a childcare centre and that the yet to be approved change of use entailed additional infrastructural alterations. Aspects of alteration later raised in this respect included the need for a separate entrance for goods, the designation and separation of areas to ensure food hygiene, and the need for adequate ventilation required in commercial kitchens. This omission raised the NAO’s concern regarding the adequacy of information disclosed in the RfP. More so when one considered the obligation imposed on the prospective F&B operator to start operating within two months from notification of award.

2.3.14 The prospective bidder’s period of control over the site was specified in both RfPs issued by Malta Enterprise. In the RfP published in September 2015, the lease period was set as three years renewable for a further three, while the revised RfP issued in November 2015 stipulated a five-year lease period extendable by an additional five years.

2.4 Potential bidders were not provided with the opportunity to view the site prior to bidding, detracting from the transparency of the tendering process

2.4.1 The RfPs did not provide for a viewing of the site prior to the submission of bids. Notwithstanding this, the NAO noted that an overall site plan of the MLSP, site plans corresponding to the ground floor and first-floor level as well as photos of the external and internal areas of the property earmarked for lease were included in the RfPs. Supplementary information that could have been of use to prospective bidders but was not made available in the RfPs included an inventory of fixtures and fittings, and their condition, at the site. Nevertheless, this Office is of the opinion

that the information provided, despite its use, did not afford prospective bidders with the same level of insight that a site visit would have provided.

2.4.2 In view of the lacuna in the RfPs regarding possible site visits by potential bidders prior to the submission of bids, the NAO sought further information from Malta Enterprise. The former CEO MLSP indicated that he had no recollection or records of any site visits held during the tendering period. Notwithstanding this, he informed this Office that a meeting was held with one of the bidders (eventually awarded the contract) on 14 January 2016, whereby supplementary information was sought. In submissions to the NAO, the former CEO MLSP indicated that during this meeting, the bidder was shown the site and provided with information relating to the envisaged use of the premises to be leased. It must be noted that this visit occurred after the closing date for the submission of bids and during the evaluation process.

2.4.3 Cook & Co Ltd, the bidder awarded the contract and referred to in the preceding paragraph, confirmed attending such a meeting; however, indicated that the leased premises was only seen from the outside. According to Cook & Co Ltd, during the bidding stage, the site was still undergoing finishing works as could be attested from the images annexed to the RfPs. Cook & Co Ltd maintained that they relied on the plans provided with the RfPs and assumed that these were factually correct. It was only later in the process that Cook & Co Ltd realised that the plans annexed to the RfPs did not reflect the actual layout of the premises, citing anomalies relating to the passenger lift and the internal staircase as examples in this respect. The NAO has no information relating to whether a site visit was held with the other bidder, although the evaluation report imparts an understanding that no such visit was held.

2.5 **The obligations that were to be borne by the service provider were, in the main, defined in the request for proposals**

2.5.1 The NAO sought to determine whether the obligations that ought to have been placed on the F&B service provider by Malta Enterprise in relation to the service sought were comprehensively defined in the RfP.

2.5.2 The first criterion considered by the NAO in its assessment of the obligations imposed on the service provider related to compliance with relevant legislative and regulatory requirements. Both RfPs were curt in terms of information relating to legislative and regulatory compliance. As regards the legislative aspect, the RfPs were unclear under which regime the tendering process was being undertaken.

2.5.3 The guidance provided in the RfP was limited to, "The MLSP F&B service provider has to ... Provide all necessary permits to operate the facility/ies;". Although the requirement to obtain all necessary permits to operate the facility may be understood to be all encompassing, this Office noted that the RfP did not highlight the necessity of adherence to other aspects of legislation and regulation, such as health and safety codes directly associated with food safety

regulation that would regulate matters associated with the handling, preparation and service of food, and environmental regulation, such as the disposal of waste and the use of resources like water and energy.

- 2.5.4 In contrast with the level of detail provided in respect of the legal and regulatory obligations that were to be imposed on the F&B service provider, obligations of an operational nature were more amply established in the RfPs. The tender documents included reference to several obligations that were to be borne by the F&B service provider, foremost among which were specifications relating to the equipment and facilities. Obligations cited in this respect comprised the requirement imposed on the F&B service provider to equip the facility, including the kitchen, with quality furniture and décor. In addition, the service provider was to equip the area with mechanised cooking equipment, food counter, freezer and cafeteria equipment and other necessary equipment, all in good operating condition. Furthermore, the facility was to have its own electrical and water meter, which cost was to be borne by the selected operator.
- 2.5.5 Also stipulated in the RfPs were provisions relating to the sourcing of ingredients and the setting of menus. Obligations specified in the call imposed on the service provider the responsibility for the procurement of all types of raw materials and consumables necessary for the catering and serving of food, that is for onsite cooking and serving with the option to serve ready-to-eat food, snacks and beverages. The operator was to provide Malta Enterprise with a menu and a corresponding pricelist, which menu was to comprise a mix of items.
- 2.5.6 Other obligations of the service operator specified in the RfP related to the deployment of the required manpower to operate the facility, the adherence to a service schedule – specified through the setting of the facility’s minimum opening hours – and aspects associated with ensuring service quality, such as through the specification of responsibility for the cleaning of the ancillary facilities forming part of the site. The period of commencement of operations was also stated, with the F&B service provider to commence within two months from being formally advised of award. The NAO’s reservations in this respect have already been addressed.
- 2.5.7 Gaps identified by the NAO in relation to the operational aspect of obligations that ought to have been imposed on the F&B service provider related to food safety protocols (information on how food was to be handled, stored, prepared and served to maintain food safety and hygiene) and sustainable practices (such as efforts to reduce food waste, use of environmentally friendly products, and the sourcing of local ingredients). Furthermore, other aspects of service quality could have been considered, for example, mechanisms that would have provided Malta Enterprise with comfort that service quality was being maintained throughout the term of the agreement.
- 2.5.8 Another aspect of the NAO’s analysis as to whether the obligations that ought to have been placed on the service provider were clearly defined in the RfPs related to the submission of the required licences, certifications and insurance policies. The matter of licences and certifications

was indirectly addressed in this Office’s consideration of the obligation imposed on the service provider in connection with the provision of all permits required for operation, with licences and certifications considered subsidiary in this respect. As regards insurance, the prospective service operator was obligated to provide adequate cover for operations and custom, a copy of which was to be submitted to the MLSP management.

2.5.9 Setting an obligation on the service provider for periodical reporting and performance evaluation would have helped ensure that the F&B service met the standards expected by the contracting organisation. The NAO established that obligations in this respect were not included in the RfPs.

2.5.10 The final aspect considered by the NAO in terms of the obligations set on the service provider through the RfPs concerned whether measures intended to promote compliance with the specific requirements of the tendering organisation were outlined in the call. This Office noted that, according to the RfPs, the service provider had an obligation to offer healthy menu items and to cater to specific dietary requirements. Therefore, this Office deemed this aspect of the criterion to be adequately addressed. However, as indicated, provisions relating to sustainable practices were not specified.

2.6 **Certain obligations to be borne by Malta Enterprise were defined in the request for proposals; however, other requirements were not**

2.6.1 The NAO assessed whether the obligations that ought to have been placed on the contracting authority, in this case Malta Enterprise, were defined in the RfPs.

2.6.2 In its review of the RfPs, the NAO noted that no reference was made to the laws and regulations that guided the call, which information would have facilitated compliance with the relevant legislative and regulatory framework. This point assumes relevance when one considers that reference to the applicable laws and regulations contributes to ensuring that the process is licit, fair and transparent, and in the best interest of all stakeholders.

2.6.3 In contrast, Malta Enterprise specified in detail its expected requirements in terms of the F&B service sought through the RfPs. Information in connection with aspects of the service was disclosed in sufficient detail to afford prospective bidders an understanding of that expected. The specification of requirements also helped to ensure that the service, as sought in the RfPs, met the needs of the contracting authority and contributed to fairness and openness to competition. On the other hand, concerns relating to the imprecise disclosure of information concerning the site from where the F&B service was to be provided have already been noted.

2.6.4 The criteria against which the bids were to be assessed were specified in the RfPs, with relevant marks assigned to each criterion outlined. A general sense of the evaluation process that Malta Enterprise was to follow was also specified in the calls.

- 2.6.5 The lease term was stated in the RfPs, as was the possible renewal of the term. A rental rate was set by Malta Enterprise in the RfPs issued. Subsequent revisions made, particularly the removal of a minimum rental rate for the internal areas and the rendering of the external area as free of charge, were clearly outlined.
- 2.6.6 Several aspects relating to the obligations that ought to have been borne by Malta Enterprise and specified in the RfPs were not addressed. These aspects related to the upkeep of the common areas, the specification of instances of default and their consequence, the commitment by Malta Enterprise that the premises could be enjoyed by the F&B service provider without disturbance or interruption, the resolution of disputes, instances of force majeure and confidentiality provisions.
- 2.6.7 The NAO noted that a sample contract outlining the main elements of the contractual framework that was to eventually be entered into by and regulate the parties, ordinarily considered good practice, was not provided in the RfPs.

2.7 The evaluation process undertaken by Malta Enterprise was in line with that set in the request for proposals; however, shortcomings in governance and fairness were noted

- 2.7.1 The revised RfP issued by Malta Enterprise on 20 November 2015 stipulated 4 December 2015 as the closing date for the submission of bids. Based on records made available by Malta Enterprise, the NAO established that by this date two bids were received, one by a third party and the other by Roots Integrated Services Ltd. A schedule of offers received was drawn up by Malta Enterprise on the closing date. While the process of evaluation falls outside the scope of this audit, the salient developments in this respect are being presented to provide coherence between the RfP and the subsequent contract entered into, deemed essential as context to the issues that would later arise between the parties.
- 2.7.2 An undated evaluation report was provided to the NAO by Malta Enterprise. Highlighted in the evaluation report were the key stages leading to the evaluation of bids, with the date of publication and deadline for submissions noted, as well as reference to the tender opening session held on 11 December 2015, and two meetings of the Evaluation Committee held on 8 January 2016 and 8 February 2016.
- 2.7.3 According to the evaluation report, the Evaluation Committee was composed of a chair, three voting members and a secretary. Acting as Chair was the Chief Officer Corporate Services Malta Enterprise, while the Members were the former CEO MLSP, the Chief Officer Project Evaluation Malta Enterprise and the Manager Major Projects Malta Enterprise. An Executive of Malta Enterprise served as Secretary to the Committee. Requested to provide documentation regarding the appointment of the Evaluation Committee members and declarations of conflict of interest, Malta Enterprise informed the NAO that such documentation could not be retrieved.

2.7.4 Noted in the evaluation report was that the Chair informed the Evaluation Committee of the scope of the proposed contract, referred to the organisation responsible for the drafting of the tender dossier and summarised the key features of the tender procedure. Noted was that two bids had been received, that by a third party and that pertaining to Roots Integrated Services Ltd, which bids were subjected to an administrative compliance check. According to the report, both offers were administratively compliant.

2.7.5 Each evaluator assessed the bids received in terms of the technical requirements established in the RfP and each awarded a score to the bids. Comprehensively, the bid by Roots Integrated Services Ltd obtained a score of 203, while that by the third party was awarded 157, both out of a maximum score of 300. The Evaluation Committee noted that both bidders did not submit visuals for the layout and décor as was requested in the RfP. Acknowledging the cost of preparation of such visuals, the Committee agreed to convene a meeting with Roots Integrated Services Ltd – in view of its submission having obtained the higher score – for clarifications and to present the missing visuals. On the other hand, the third party was requested to submit photographs of food it served. Cited in the evaluation report was that, following the Committee’s review of the replies received, it concluded that both bidders were technically compliant. Following queries by the NAO, the former CEO MLSP confirmed that the meeting with Roots Integrated Services Ltd regarding the visuals for the layout and décor of the premises was held on 14 January 2016. Cook & Co Ltd, which company assumed the bid by Roots Integrated Services Ltd, confirmed that this meeting was held.

2.7.6 The NAO was provided with a copy of the visuals subsequently drawn up by Roots Integrated Services Ltd. The visuals and plans, dated 29 January 2016, presented a modern F&B establishment. According to the plans, the ground floor level comprised a kitchen, restroom facilities, storage space, and an area for the placement of tables and chairs. The patio was also designated as an area for additional covers. A bar and additional covers were to be located at the first-floor level.

2.7.7 The financial offers were then compared. The Evaluation Committee ranked as its first preference the offer submitted by Roots Integrated Services Ltd, which corresponded to a rental fee of €71,565 over the five-year term. The financial offer submitted by the third party over the same term was for €71,199 and hence ranked second. A schedule of the rental fee that was to be paid by Roots Integrated Services Ltd to Malta Enterprise as revised over the five-year term was outlined in the evaluation report (Figure 14 refers).

Figure 14 | Rental fee payable by Roots Integrated Services Ltd to Malta Enterprise

Year	Charge per square metre (€)	Annual charge (excl. VAT) (€)
Year 1	35	10,224
Year 2	40	11,684
Year 3	50	14,605
Year 4	55	16,066
Year 5	65	18,987

- 2.7.8 The Evaluation Committee concluded that Roots Integrated Services Ltd was to be awarded the tender on the basis that it obtained the higher overall mark and tendered the better rental fee.
- 2.7.9 Of note to the NAO was correspondence provided by Cook & Co Ltd dated 20 February 2016. In this exchange between the CEO Roots Integrated Services Ltd and the CEO Malta Enterprise, reference was made by the former to the favourable answer regarding the cafeteria and a meeting was sought with Malta Enterprise to discuss the way forward and other technical aspects of the project. Of interest to this Office was that this submission by Roots Integrated Services Ltd, indicative of its confidence in securing the contract, was made prior to the referral of the Evaluation Committee's report to the Malta Enterprise Board of Directors for its endorsement and the notification of award, which occurred on 12 April 2016 and 17 May 2016, respectively.
- 2.7.10 Queried in this respect, Cook & Co Ltd indicated that after being contacted by the Secretary of the Evaluation Committee, the correspondence dated 20 February 2016 was submitted. On the other hand, Malta Enterprise could neither deny nor confirm this assertion, conceding that the Secretary of the Evaluation Committee might have informed Cook & Co Ltd of the outcome of the evaluation process. Since the email by Roots Integrated Services Ltd to Malta Enterprise, indicative of the favourable outcome, was submitted in February 2016, it is reasonable to presume that some form of communication between the two had occurred.
- 2.7.11 The recommendation of the Evaluation Committee was subsequently referred to the Malta Enterprise Board of Directors by the former CEO MLSP through a memorandum dated 12 April 2016. Outlined in the memorandum was information relating to the RfP that had been issued, the two bids received, and the evaluation process undertaken. Of note to the NAO was that reference was made to the bid submitted by Cook & Co Ltd, described as a company in formation and represented by Roots Integrated Services Ltd. Cited in the memorandum was the Evaluation Committee's recommendation that the lease for the catering establishment be awarded to Cook & Co Ltd, which award was to result in a total rental income of €71,565 for the MLSP, while the prospective tenant was to invest at least €65,000 in equipment and general improvements.
- 2.7.12 Also noted in the memorandum were details of the site that was to be leased for the provision of F&B services, including dimensions thereof and the benchmarked rate of €65 per square metre per year as determined by the MLSP or the best offer received. In addition, highlighted in the memorandum were the conditions specified in the RfP regulating diverse aspects of the F&B service sought. Included in this respect was reference to the minimum opening hours, the lease term and several operational requirements.
- 2.7.13 In view of the memorandum submitted by the former CEO MLSP and the conclusions arrived at by the Evaluation Committee tasked with the adjudication of the RfP, the approval of the Board of Directors of Malta Enterprise was sought by the MLSP for the allocation of 413 square metres at the LS3 to Cook & Co Ltd to provide the F&B activity as outlined in its submission at

an annual rate of €25 per square metre for the first year, rising to €40 per square metre in the second year, €55 per square metre during the third and fourth years, and €65 per square metre thereafter.

- 2.7.14 The approval was subject to certain conditions, namely, that Cook & Co Ltd was to:
- a. undertake a minimum investment of €65,000 to acquire the necessary equipment and to effect other related improvements required to set up the F&B facility;
 - b. render the facility complete and operational within two months from handing over of the assigned space;
 - c. adhere to and abide by all commitments undertaken in terms of the lease agreement; and
 - d. ensure that the facility was insured.

2.7.15 The NAO's attention was drawn to discrepancies in the rent payable by Cook & Co Ltd when comparing rates cited in the report drawn up by the Evaluation Committee and those referred to the Board of Directors of Malta Enterprise. The discrepancy over the five-year term was adverse to Malta Enterprise by €1,461. In submissions to the NAO, the former CEO MLSP indicated that the discrepancy arose from an error when referring the matter to the Board of Directors. This Office noted that the difference in rates was rectified in the lease agreement, wherein the rates quoted reflected those bid and presented in the evaluation report.

2.7.16 Documentation indicative of the endorsement of the recommendation by the Evaluation Committee by the Malta Enterprise Board of Directors was sought by the NAO. Although Malta Enterprise provided this Office with a copy of the evaluation report duly signed by the Executive Chair Malta Enterprise, no information allowing for the determination of the date of approval was submitted.

2.7.17 On 17 May 2016, Roots Integrated Services Ltd was officially informed by the Secretary of the Evaluation Committee that the MLSP had accepted its offer for the provision of F&B services at the MLSP for a total price of €71,565 (excluding VAT). However, in submissions to the NAO, Cook & Co Ltd indicated that, in February 2016, it was informed by the Secretary of the Evaluation Committee that its bid was that selected in respect of the RfP. The NAO deemed this disclosure as irregular for it preceded the referral to and endorsement of the evaluation report by the Malta Enterprise Board of Directors.

Chapter 3 | The lease agreement

3.1 While the deliverables and obligations specified in the lease agreement generally reflected those of the request for proposals, concerns emerge regarding the state of the premises and the responsibility to render it suitable for its intended use

3.1.1 Malta Enterprise provided the NAO with the lease agreement entered into on 20 May 2016 between the MDH, as the landlord, and Cook & Co Ltd, as the tenant. The MDH was represented by the former CEO MLSP, while Cook & Co Ltd was represented by a Director. Aside from the aforementioned, another signatory to the agreement was the Chief Operating Officer Malta Enterprise, while a Director of Cook & Co Ltd was a witness.

3.1.2 Through this lease agreement the MDH granted Cook & Co Ltd the use of the premises at the LS3, as defined in a schedule thereto, by title of lease for a period of five years. The term could be extended for a further period of five years if the tenant advised the landlord of this intention not less than three months and not more than a year from the end of the initial term. However, this option could not be exercised, or if exercised not entertained, if the tenant was found to be in default of any of its obligations under the agreement.

3.1.3 The operational start-up date was set as 1 September 2016, while the contractual term was to commence on 20 May 2016 and expire on 19 May 2021. If an extension was requested and granted, this was to cover the period between 20 May 2021 and 19 May 2026. Although the operational start-up date was 1 September 2016, stipulated was that Cook & Co Ltd was allowed access to the allocated premises on signing of the agreement. During the transition period between May 2016 and 31 August 2016, the premises was to be used solely for the purpose of setting up and carrying out the pre-approved works in accordance with the plans and bills of quantity included in the agreement and for no other purpose whatsoever. The gap between entry into the lease agreement and the operational start-up date corresponded to a three-and-a-half-month period. The NAO noted that this differed from the two-month period cited in the RfP.

The works

3.1.4 3.1.4 The procedure that was to be followed when Cook & Co Ltd sought to undertake works at the site was specified in a schedule to the lease agreement. Stipulated in this respect was that any alterations requested by the tenant required the approval of the MDH following the submission of detailed plans of such works and the relative work method statement. On completion of these alterations, Cook & Co Ltd was to submit documented evidence, including an architect's

certificate, detailing the quality of the works carried out. On approval by the MDH, an addendum to the lease agreement was to be made, which addendum was to comprise an updated and revised conditions report of the premises that was to be considered part of the agreement. These alterations were to be removed at the end of the lease, and any works retained on the premises were not to be compensated for by the landlord. No reference to the works that were necessary was made in the RfP, a point of particular relevance in view of the change of use of the premises. In addition, the RfP did not offer the possibility for site visits by interested parties, which would have allowed for the estimation of works required.

The premises

- 3.1.5 According to the lease agreement, the premises was being handed over to Cook & Co Ltd on a tale quale basis, in terms of the condition report attached therewith. The agreement excluded the use of the basement and the roofs. Noted was that, should the tenant require to install any equipment on a roof or in the basement of the MLSP, prior approval was to be sought from the MDH and was subject to the landlord's conditions.
- 3.1.6 The agreement referred to an inventory list and a condition report included as a schedule thereto. The NAO noted that the referred schedule was dated 13 June 2016, that is, after the signing of the agreement. A description and photograph of each item of inventory was included in this schedule. As regards the condition report, several photographs capturing the state of Level 0 and Level 1 of the site were included. Queried as to the discrepancy between the date of signing of the lease agreement and the date of the condition report, the MLSP indicated that this was standard practice. The CEO MLSP explained that the condition report was usually drawn up after an inspection of the premises with the tenant and a date then set for signing. Notwithstanding this, Cook & Co Ltd maintained that, despite the condition report, the latent defects later identified at the site were not captured in this process.
- 3.1.7 Noted in the lease agreement was that the premises was being accepted by Cook & Co Ltd in the state outlined in the inventory list and condition report; however, the agreement was to be updated to reflect the condition of the premises following the completion of the works carried out by the tenant. The updated inventory list and condition report was to be endorsed by both parties and was to form part of the agreement.
- 3.1.8 Notwithstanding that the lease agreement emphasised that the property was being transferred on a tale quale basis, the RfP provided a limited understanding of the condition of the premises, mainly through a brief description of the site and several photos. Furthermore, since no site visits were provided for, prospective bidders could not establish a true understanding of the state of the site and the implications of committing to the lease despite that it was in their interest to request such a visit.

The obligations of Cook & Co Ltd

Pay its dues

- 3.1.9 The tenant was obligated to pay the rental charge as indicated in a schedule to the lease agreement. The charge was established at €35 per square metre for the first year and was to increase to €40 per square metre in the second year, €50 in the third year, €55 in the fourth year and €65 per year thereafter. Notwithstanding this, established in the schedule regulating the payment of rent was that, should the lease be extended to the period 2021 to 2025, the rental rate per square metre per annum was that of €75. Of interest to the NAO was that the rental rates cited in the lease agreement corresponded with those set in the bid and referred to in the RfP evaluation report, but differed from those brought for the approval of the Malta Enterprise Board of Directors.
- 3.1.10 The gross area of the site was established as 292 square metres, resulting in a rental charge of €12,064 (inclusive of VAT) for the first year. The rent was to be paid quarterly in advance via direct debit mandate. The NAO noted that a copy of the direct debit mandate, that ought to have been included as a schedule to the agreement, was not appended therewith.
- 3.1.11 Cook & Co Ltd was granted a moratorium on the rental charge for the first three months of the term, with the charging of rent to commence as from 1 September 2016. Rent due and not paid by the tenant within 30 days of charge was to accrue interest whether formally demanded or not.
- 3.1.12 A deposit equivalent to 50 per cent of the annual rent was to be paid to the MDH by Cook & Co Ltd upfront in cash. For the first year, this amounted to €6,032. The deposit was to be maintained at 50 per cent of the annual rent throughout the lease term. If the deposit was subsequently not maintained, this was to be considered as a material breach of the agreement. The deposit was intended for retention and use by the landlord against any unpaid fees or overdue penalties due by the tenant. If the MDH utilised the deposit to cover amounts deemed due by Cook & Co Ltd, then the latter was to immediately refund the former with a sum sufficient to restore the deposit to its original amount. Failure by the tenant to effect such a payment within 30 days of receipt of the demand by the landlord was to constitute a breach of the lease agreement.
- 3.1.13 Another obligation borne by Cook & Co Ltd related to the payment of utility expenses. The tenant was to make an on-account utility service charge payment of an initial sum of €1,000 per quarter. This payment was to be made in advance as contribution on account of utility charges (water and electricity) and paid through a direct debit facility. Every quarter, the MDH was to take stock of the actual consumption expenditure and the difference was to be settled accordingly within 10 days. If, at the end of the quarter, the aggregate on-account utility service payment for the preceding period exceeded the utility service charge due for that period, a credit note was to be issued to Cook & Co Ltd for the sum paid in excess.

3.1.14 Cook & Co Ltd could opt to avail of one parking space in the basement area of buildings LS1 and LS2, against an annual fee of €920 (inclusive of VAT), payable quarterly in advance by direct debit facility. In addition, the tenant could utilise the open car park area near LS3, at an annual rate of €472 (inclusive of VAT) per car, also payable quarterly in advance. Noted was that the rates and the parking spaces allotted could change according to management needs.

3.1.15 Other services were to be settled on a quarterly basis on presentation of the relative invoice/s as detailed in the MLSP Users' Manual. Cook & Co Ltd was also obligated to indemnify the MDH against all charges, including VAT, that could be imposed on the premises or on the owner or occupier. The tenant was also to pay the landlord for any facility services made use of, the cost of which was to be calculated at the end of every month and charged at the beginning of the next.

3.1.16 Cook & Co Ltd was to pay all suppliers, thereby indemnifying the MDH against all charges for electricity, water, gas, telecommunications and other services consumed or used within the premises. When the service was supplied by the landlord, invoices were to be settled within 30 days through a direct debit set-up. Failure would result in the tenant being liable to suspension of services leading to an automatic revocation of the lease agreement.

3.1.17 If Cook & Co Ltd failed to adhere to any of the terms, covenants or conditions of the lease, then the MDH could suspend utility services and access to the premises, provided that a 15-day notice was given in advance to the tenant of such intention. On the other hand, should the tenant fully and promptly comply with all its obligations under the lease, the landlord was obligated to return the full deposit to the tenant at the end of the term.

Provide data on its activity

3.1.18 Another obligation borne by Cook & Co Ltd related to the provision of data regarding its activity. In this context, the tenant was obligated to provide the MDH with reports on the operations, finances, investment, revenue and employment in connection with the site, to be used by the landlord for publication purposes in terms of its performance. This obligation was further delved into in the MLSP Users' Manual, which specified that tenants were to submit annual audited data on their operations.

3.1.19 Also specified in the lease agreement was that Cook & Co Ltd was to immediately advise the MDH of any change in ownership or structure in its legal entity as defined in the lease agreement, such as changes in the registered shareholding.

Operations and upkeep of the premises

3.1.20 Cook & Co Ltd was to use the premises to carry out operations related to the preparation of food and beverages as outlined in its bid. On the other hand, the tenant could not use the

premises for retailing goods, or as accommodation, or to house clients of the tenant overnight, or for residential purposes, unless written permission was obtained from the MDH. Storage and warehousing were only allowed in relation to the permitted use.

- 3.1.21 The MLSP Users' Manual placed an obligation on the users of the premises to conduct a risk assessment of their unit every six months. A confidential summary of the outcome, signed by the assessor, was to be referred to the MLSP. Required actions were to be included in this summary and were then to be addressed by the user. Such documented evidence was to be filed along with the risk assessment summary in the confidential user file held by the MLSP. The MLSP was to share the confidential file with its own risk assessor, tasked with carrying out a bi-annual risk assessment of the common areas and visiting several premises to ensure a safe operational status within the facility.
- 3.1.22 Further stipulated in the MLSP Users' Manual was that tenants were to ensure that the premises was maintained in good condition through their own maintenance personnel. Major maintenance, repair or alteration works were to be pre-approved by the MSLP if these included dusty activities. Tenants could make use of the MLSP handyman service for minor works by completing a procurement requisition form.
- 3.1.23 Cited in the lease agreement was that Cook & Co Ltd bore an obligation to maintain the premises in good condition throughout the term, effecting any required repair works. The tenant was to also repair and/or replace any of the MDH's fixtures and fittings in the premises that were beyond repair at any time during or at the end of the lease. An inventory of these fixtures and fittings was included in the conditions report attached to the agreement. Cook & Co Ltd was to immediately carry out any repair works when notified. Moreover, the tenant was to allow the landlord access to the premises to view its state of repair and condition. The tenant was expected to complete any repair works required within three months of notification, failing which, the landlord was to undertake the repairs and charge the tenant all expenses incurred and an administrative fee equivalent to 10 per cent of the cost of the repair works. Moreover, Cook & Co Ltd would be liable to pay an additional 10 per cent of the rent per square metre per annum, calculated daily for the duration of the breach, for any continuing failure to remedy the default/s.
- 3.1.24 Cook & Co Ltd was to retain full responsibility for all supplies, products, services and waste. The tenant was to ensure that the handling and transfer of the supplies and waste was carried out by authorised personnel and was not left unattended in the common parts of the premises. The MDH was to facilitate the waste disposal process by allowing approved service providers to access the premises. It was also the responsibility of the tenant to ensure that the premises was kept clean, tidy and clear of all rubbish.
- 3.1.25 The tenant was to redecorate the internal area of the premises as often as necessary in the reasonable opinion of the MDH, as well as in the last year of the term, to maintain a high standard of decorative finish and attractiveness. However, Cook & Co Ltd was not to make any

additions to the premises or unite the premises with an adjoining area or make any alteration thereto save as permitted. Also stated in the agreement was that no poles or masts were to be erected on the premises unless approved by the landlord.

3.1.26 To be able to effect any alterations, Cook & Co Ltd was to first apply to the MDH for consent. It was only with the landlord's consent that the alterations could be carried out. Any application was to be supported by drawings and, where applicable, a specification in duplicate prepared by an architect or a member of some other appropriate profession who was to supervise the work until completion. It was the tenant's responsibility to obtain and comply with the necessary approvals from the competent authorities and pay their charges. The tenant was to pay the fees of the landlord's professional advisors at rates that were to be disclosed to the tenant prior to their engagement. On agreement, the tenant was to enter into any covenants the landlord required as to the execution and reinstatement of the alterations. If the works required were deemed to be of a substantial nature, the MDH could require Cook & Co Ltd to provide adequate security in the form of a deposit of money or the provision of a banker's guarantee prior to commencement of the works, as assurance that the works would be completed. The costs of the alterations were to be borne by Cook & Co Ltd, irrespective of any agreement reached between the tenant and the contractor relative to the works. The cost of such works was not to create any liability on the MDH for the contribution of any sums.

3.1.27 Cook & Co Ltd was to be responsible for the carrying out of alterations approved by the MDH. The alterations undertaken with the landlord's written consent were to immediately on completion become the property of the landlord, without giving any right to the tenant for compensation. This condition could be waived if otherwise agreed between the parties at the time approval was granted for the said alterations. Cook & Co Ltd was to use materials of the highest quality possible with due regard to their use, and appropriate certificates of completion and compliance were to be submitted to the MDH.

3.1.28 On termination of the lease agreement, if so requested by the MDH, Cook & Co Ltd was to, at its own expense, remove any additional buildings, additions, alterations or improvements made to the premises and was to make good any damages to the premises. The alterations that the landlord required to be removed at the end of the term were to be agreed in writing a priori at the time when consent to effect such alterations was granted by the landlord.

3.1.29 Should Cook & Co Ltd need to undertake works, it was to pay the MDH all sums due in relation to any damage, alteration or obstruction of any shared facilities, be it pipes, mains, ducts, conduits, gutters, watercourses, wires, cables, channels, flues, conducting media, boundary structures or other things in common to the premises and any adjoining or neighbouring premises that the tenant was responsible for. Cook & Co Ltd was not to make any connection with the conduits except in accordance with plans and specifications approved by the MDH, and on the previous attainment of the consent of the competent authority, undertaking or supplier of the conduit to which the connection is required.

- 3.1.30 Stipulated in the lease agreement was that, during the period 2016 to 2018, Cook & Co Ltd was to employ at least five full-time equivalents and make an annual investment of €150,000. The NAO noted that the annual investment of €150,000 cited in the lease agreement differed from that indicated in the bid by Cook & Co Ltd, wherein reference was made to an investment of €76,000. Queried in this respect, the CEO MLSP stated that since the lease agreement was signed following the submission of the bid, then it was understood that the commitment of Cook & Co Ltd was that cited in the lease agreement. On the other hand, Cook & Co Ltd indicated that they were informed that the €150,000 annual investment stipulated in the lease agreement was not applicable in respect of the catering establishment as this was a standard clause in lease contracts administered by the MLSP. While maintaining that Cook & Co Ltd had in fact invested this amount, there was a limit to the extent of possible investment in such ventures. As for the employment that was to be generated, Cook & Co Ltd confirmed that it engaged the five full-time equivalents required. This was mainly corroborated through information provided to this Office by the CEO MLSP, which indicated that Cook & Co Ltd employed close to five full-time equivalents for substantial stretches of the lease term. The first employee was engaged in February 2017.
- 3.1.31 Noted in the lease agreement was that Cook & Co Ltd was to have full knowledge of and adhere to the MLSP Users' Manual. This provision also applied to the tenant's employees, agents, officers, visitors, suppliers and contractors. Any amendments made to the Manual by the landlord were to be notified to the tenant.

Responsible for health and safety

- 3.1.32 Cited in the lease agreement was Cook & Co Ltd's responsibility to ensure that all health and safety regulations in force were observed at all times. The MLSP Users' Manual stated that users of the premises were individually responsible for the health and safety of their own staff and visitors within their units, as well as in common areas, especially during handling activities. Tenants were also expected to undertake their own health and safety monitoring and inspection, with reports submitted to the MLSP. The tenants were also required to provide any inspection certifications and any documented remedial recommendations and/or requirements corresponding to the internal operations of their leased premises. All accidents and incidents in the premises were to be logged with the MLSP. Tenants were also required to maintain a log of all accidents and incidents.
- 3.1.33 In line with the lease agreement, Cook & Co Ltd was obligated to install and maintain, at its own expense, a professional fire suppression system within its premises, updated details of which were to be submitted to the MDH prior to the operational start date. Also cited therein was that the tenant had the right to install, at its expense, an intruder detection system.

Attain the required licences and permits

3.1.34 Cook & Co Ltd was responsible to apply and obtain the permits and licences required in terms of the regulation of its activity. Specified in the lease agreement was that the tenant was solely responsible to ensure that its activity was authorised by the necessary national permits and/or licences, thereby complying with all the regulations and laws relevant to the tenant’s activities. Cook & Co Ltd was to submit to the MDH copies of all the permits and licences in force throughout the term, as amended, varied or replaced from time to time. Further specified was that the tenant was to ensure compliance with the requirements of any statutes and any other obligations, imposed by or under any law, applicable to the premises. The tenant was also responsible to pay all rates, taxes, assessments, charges, impositions and outgoings that could be charged or imposed on the premises, the owner or occupier in respect thereof. Cook & Co Ltd was also to ensure that the premises adhered to the provisions and requirements of the Environment and Development Planning Act (Chapter 504) affecting the premises’ use. The tenant was to obtain the landlord’s permission before applying for a planning permission.

3.1.35 Cook & Co Ltd was to execute all works and comply with all requirements affecting the premises pursuant to any existing or future law or regulation and/or the requirements of any government department, local authority or other public or competent authority or court. If any structural works were required on the premises to render it compliant with any law or regulation as identified above but were not required due to the tenant’s industrial sector, then these were to be undertaken by the landlord. However, if the structural works were directly related to the particular nature of the operations carried out by the tenant or directly related to the particular industrial sector of the tenant, then such structural works were to be carried out by and at the expense of the tenant. The tenant was not to undertake any works in or near the premises that could result in any loss to the landlord.

3.1.36 Also stipulated in the lease agreement was that Cook & Co Ltd was to notify the MDH of any statutory notice given in relation to the premises by any government department or local, public, regulatory or other authority or court within seven days of receipt. It was then the tenant’s obligation to take all necessary steps to comply with the notice, direction or order and make or join the landlord in making an objection or representation in respect thereof.

Insure the premises

3.1.37 Cook & Co Ltd was to insure the premises in the joint names of the MDH and itself, as well as jointly insure an item covering 12 months’ rent and utility service charge receivable by the landlord that would allow a claim under the material damage insurance policy. The tenant was also obligated to insure against third-party liability, including legal costs and expenses, which cover was to extend to the tenant’s employees. The policy was to also cover the full cost of

re-building and re-instating the premises, together with any costs paid ancillary thereto. The insurance cover was to be obtained from underwriters authorised to operate in Malta. The landlord could demand confirmation from the underwriters that they had agreed to waive all rights against the landlord in respect of loss or damage to the premises. The tenant could not do anything that could put the insurance cover in jeopardy, wholly or in part, and was to accept the underwriters' requirements. A copy of the insurance policy was to be submitted to the landlord, together with the last premium renewal receipt or any other satisfactory evidence that the policy was in force. If Cook & Co Ltd failed to obtain the insurance policies or to give the MDH evidence that such insurance policies were arranged, the landlord, at its sole discretion, could effect such insurance policies and charge the relative expense plus an administrative charge of 10 per cent on costs calculated on a daily pro rata basis.

3.1.38 The cover was to insure against injury, loss, damage or destruction by any of the insured risks to the extent that such insurance could ordinarily be arranged, subject to such excesses, exclusions or limitations as the insurer required. In case re-building was necessary, the tenant was obligated to try and obtain the planning permit or consent that could be required under the Environment and Development Planning Act (Chapter 504) or under any other regulations to enable the rebuilding or reinstatement of the premises. Nonetheless, it was at the landlord's discretion to decide whether, in case of rebuilding or reinstatement, it would just receive the insurance repayment or if this was to be used by the tenant to carry out the said rebuilding or reinstatement. If the funds made available were deemed insufficient, the tenant was to cover the remaining balance.

3.1.39 Cook & Co Ltd's material damage insurance cover was to contain all applicable memoranda clauses, including but not limited to 85 per cent reinstatement, public authorities, professional fees, cost of demolition, propping, shoring and debris clearance, tenant's improvements and alterations, tenant's liability, rent, designation, definitions, capital additions, watchman, public utilities, concealed pipes trace/access/repair, drains, workmen, non-invalidation, breach of warranty, automatic reinstatement of sums insured, electrical, time and salvage disposal.

3.1.40 In addition, a Public Liability Insurance was to cover a minimum of €1,165,000 in respect of death of, or bodily injury (including disease), to any person, or loss of or damage to third party's (including the tenant's employees') property, per occurrence (with a minimum aggregate limit in any period of insurance of €2,350,000). The policy was also to provide a minimum of €2,350,000 for Employers' Liability Insurance in respect of death, bodily injury, disease, illness or any other physical or mental impairment or disorder to any employee of the tenant, per occurrence (with a minimum aggregate limit in any period of insurance of €4,700,000).

Not to alienate the property

3.1.41 The tenant could not part with the possession of the premises and could not hold it on trust for others. Only with prior consent in writing of the landlord could the tenant

assign or make over the lease, whether in whole or in part, or sublet all or any part of the premises.

Pay penalties

3.1.42 Several penalties were established in the lease agreement in respect of breach of obligations by the tenant. If Cook & Co Ltd failed to submit data or copies of permits, licences or insurance policies, the tenant was liable to pay a penalty amounting to 10 per cent of the rent for each day in breach. Furthermore, if the tenant caused any damage or nuisance to the premises or to the common areas or to adjoining properties, then the tenant was liable to pay the full rent for each day of default. Another circumstance where the payment of penalties was envisaged was if the tenant did not use the premises for the permitted use or alienated the property. In this case, the full rent was due by Cook & Co Ltd for each day in breach. Once a penalty was due, the MDH was to inform Cook & Co Ltd in writing, specifying the breach and establishing a period within which the breach was to be remedied. If the tenant failed to pay the penalty or rectify the breach, then the landlord was entitled to retain the deposit given by the tenant in full or in part and the tenant had to top up the deposit to make up for what was due. Unpaid penalties due to damage or for unpermitted use and alienation were considered as material breaches and could also lead to termination of the lease.

Vacate the premises on termination

3.1.43 Cook & Co Ltd was to vacate the premises on termination of the lease term and return to the MDH the premises with vacant possession, decorated and repaired in accordance with and in the condition as stipulated in the lease agreement. Two weeks prior to termination, the parties were to enter into a termination agreement, a draft of which was attached to the lease agreement. If the tenant failed to relinquish the premises or enter into the termination agreement, then the tenant was bound to pay five times the daily rate of rent. In these circumstances, the landlord had the right to disconnect all services and disable all access cards to the premises. The tenant could also be served with an eviction order at the end of the term, issued by the landlord as the competent authority in terms of the relevant legislation.

The rights of Cook & Co Ltd

3.1.44 The rights of Cook & Co Ltd were described in the lease agreement as being the right to, at all times, pass and re-pass to and from the premises, with or without vehicles for all purposes connected with the use and enjoyment of the premises. The tenant was also granted the right to the free passage and running of all services through the appropriate adjoining conduits subject to any interruption that might be present due to repairs, alterations or replacements.

The obligations of Malta Digital Hub Ltd

Provide quiet enjoyment

- 3.1.45 The MDH was to allow Cook & Co Ltd to peaceably and quietly hold and enjoy the premises without any interruption or disturbance from or by the landlord or any third party claiming under the landlord. However, the MDH did not warrant that the premises could be lawfully used for the permitted use, nor did it guarantee the issuance of the required permits or licences, including planning permits. In addition, stipulated in the agreement was that the MDH was excluded from the obligation to maintain the premises in a fit condition for the use intended by Cook & Co Ltd and the obligation to effect all repairs that could become necessary.

Facilities maintenance and upkeep

- 3.1.46 Another obligation of the MDH related to the maintenance of the general plant and equipment of the MLSP. Regular inspection and repair, if necessary, was to be undertaken to ensure that a safe working environment was maintained for all users. A list of items to be maintained as well as the frequency of inspection and testing was cited in the MLSP Users' Manual.

- 3.1.47 The landlord was also obligated to provide the following services:

- a. general access and security;
- b. passenger and goods lifts;
- c. restrooms;
- d. fire detection and firefighting equipment in the common areas, including water sprinklers, hoses and cylinders;
- e. general signage; and
- f. other amenities.

Ensure health and safety in the common areas

- 3.1.48 Specified in the MLSP Users' Manual was that the MLSP was committed to a high standard of health and safety management, including compliance with all relevant legislation, and was responsible for the health and safety of all shared and common areas. The MLSP was to ensure that shared equipment was in safe working order. In addition, the MLSP was responsible for executing directives and ascertaining that all users within the Park followed the applicable legislation.

3.1.49 Fire extinguishers and fire blankets were to be made available throughout the Park by the MLSP. Fire extinguishers were to be serviced annually. Users of the premises were to provide the names of their regulatory first aider to the MLSP, thereby ensuring that any injuries on site were treated efficiently and effectively. First aid boxes were to be made available by the MLSP, while treatment could be given in the common treatment room located in the Park.

Provide general signage

3.1.50 It was the MDH's responsibility to provide general signage for tenants and the public, including visitors. The landlord was also to offer a service to tenants who opted to use a dedicated advertising space on the premises. Advertising space rental rates were to be against payment and negotiated on a case-by-case basis.

Provide kitchenette facilities

3.1.51 All users within the MLSP were to be provided with kitchenette facilities. The facilities were to have drinking water, cutlery and cleaning materials, together with food heating appliances and refrigerators.

The rights of Malta Digital Hub Ltd

3.1.52 The rights of the MDH were defined as being the right to the free and uninterrupted passage and running of all services through the appropriate conduits and all other structures of similar use that could, at any time, be constructed. The right to construct and maintain any pipes, sewers, drains, mains, ducts, conduits and gutters as well as wires, cables or other channels that were necessary for the provision of services or supplies to any adjoining property of the landlord was also retained by the MDH. However, the MDH was to make good for any damage caused when exercising this right.

3.1.53 Noted in the lease agreement was that, at any time during the term, the MDH had the right to access and break in, in case of an emergency, the leased premises at its expense. The right to access was to be in connection with an inspection required to see the condition and state of repair of the premises, or to carry out any works in connection with the conduits mentioned in the previous paragraph or an adjacent building which could only be accessed through the leased premises. The MDH was also allowed entry to the premises to take schedule or inventory of the fixtures or other items to be yielded at the end of the term and to exercise any other right granted to the landlord through the lease. Entry to the premises could also be required to give notice to repair to Cook & Co Ltd on the works that were to be undertaken in line with the tenant's obligations. The MDH could also enter the premises to open floors and other parts of the premises where this was necessary.

- 3.1.54 According to the lease agreement, the MDH had the right to redesignate the common areas of the buildings. Therefore, the landlord had the right to determine that an area previously designated as a common part be set aside for the exclusive use of the landlord or of a third party and the tenant had no right to challenge the re-designation of a common part, provided that this did not negatively impact the premises or the tenant's enjoyment thereof or, in any material manner, any services provided to the tenant in terms of the lease.
- 3.1.55 The access control system to the main buildings was to be retained as supplied by the MDH and no other lock system could be installed on the doors of the premises, other than that as authorised by the landlord.

Termination

- 3.1.56 The lease agreement provided a list of breaches that would lead to termination. The major breaches stipulated were the:
- a. non-payment of rent and/or the utility service charge for a period of more than 45 days from when becoming due, including any balances and VAT;
 - b. invalidation in any manner of the debit mandate form;
 - c. tenant's failure to satisfy its obligations under any insurance clause;
 - d. tenant's failure to fulfil its maintenance obligations in terms of the lease;
 - e. tenant's alteration of the use of the premises through use other than that for which it was given or failure to make use of the premises;
 - f. tenant's failure to employ the number of personnel envisaged;
 - g. tenant's subletting or assignment of the premises;
 - h. tenant's failure to abide by any laws or regulations including the MLSP's manuals;
 - i. tenant's breach of any term or condition of the lease;
 - j. tenant's entry into liquidation proceedings unless these are entered into for the purposes of amalgamation or reconstruction of a solvent company; and
 - k. tenant's entry into or making of a proposal to enter into an arrangement for the benefit of its creditors.

3.1.57 In addition to the above breaches, another cause of termination was if the tenant failed to utilise substantially, to the satisfaction of the landlord, the whole of the premises. However, the landlord could, at its discretion, allow a reduction in premises size where the unutilised part could be yielded to the landlord in accordance with the relevant provisions in the lease agreement.

3.1.58 Prior to termination, the landlord was to serve the tenant with a judicial letter, which letter was to specify the breach and establish a period within which the breach could be remedied by the tenant. Should the tenant fail to remedy the situation, the landlord had the right to terminate the lease. In case of termination by the landlord, the landlord was to notify the tenant in writing listing the breach and the term within which the tenant was to vacate the premises. Following termination, the landlord was to access the premises and prohibit the tenant from such access. In such circumstances, the tenant was to acknowledge that it no longer had any title to the premises.

3.1.59 In case the tenant wished to terminate the lease, this could be done by giving written notice to the landlord six months prior to termination. If the tenant failed to vacate the premises at the end of the six months, then the tenant was to pay for each day it remained in default pre-liquidated damages equivalent to five times the rent. The payment was to be payable as from the first day of expiry of the notice period.

3.1.60 On termination, the tenant was to remove any property that belonged to it. Failure to do so within 14 days from a written request submitted by the landlord, or if no such request was submitted within 28 days from the landlord's first attempt to make such a request, would allow the landlord to sell the property. If the property sold belonged to a third party, then the landlord was to be indemnified from any liability. The proceeds of sale would then be passed on to the tenant unless the landlord failed to locate the tenant and the tenant did not make a claim with the landlord within six months from vacating the premises. In such cases, the landlord could retain the proceeds of sale. The landlord was to be indemnified for any damage caused with the removal of the said property.

Notices, disputes, confidentiality, force majeure and data protection

3.1.61 Any notice submitted in terms of the lease agreement was to be in writing and, unless the receiving party acknowledged receipt, was only valid if given by hand, sent by registered post or recorded delivery, or sent by email to a specific email address, or sent by fax, provided that a confirmatory copy was given by hand or sent by registered post or recorded delivery on the same day. On the other hand, if the receiving party was a company, a notice was to be delivered to the company's registered address. Where the receiving party was the tenant, this could be delivered at the premises, unless it was a company or a corporate body. A notification was to be deemed as delivered three days following posting by registered post or recorded delivery.

- 3.1.62 The tenant could not benefit or prevent the release or modification of any covenant agreement or condition entered into by any other tenant of the landlord in respect of any adjoining property. If any dispute arose between the tenant and any adjoining party, the landlord was to decide on the issue. On the other hand, disputes between the tenant and the landlord were to be directed to an arbitrator for arbitration unless any party referred the matter to court.
- 3.1.63 Both parties were bound by confidentiality in relation to any confidential information acquired with respect to the clients, business or affairs of the other party to the lease. Consent from either party was required for disclosure unless the information was in the public domain and not because of any breach by one of the parties. Disclosure could be permitted if required in connection with any legal proceedings or if the landlord needed to disclose certain information to the MLSP related to the lease. All data was to be processed as per the Data Protection Act (Chapter 586).
- 3.1.64 There was no liability on either party if the obligations could not be carried out due to force majeure. Force majeure was defined as being either acts of God, fire, flood, storm, explosion, sabotage, accident, embargo, riot, civil commotion, strikes and war, terrorist or criminal acts. However, if the damage sustained through force majeure could be avoided by any of the parties, then the obligation to amend the situation prevailed. If, on the other hand, one of the parties could not carry out its obligations due to force majeure, then it had the obligation to notify the other party about it in writing.

Overview of the comparison between the request for proposals and the lease agreement

- 3.1.65 The NAO compared the deliverables and obligations of the MDH and Cook & Co Ltd as specified in the lease agreement and whether these were consistent with the provisions of the RfP.
- 3.1.66 The term of the lease, as specified in the agreement, reflected that set in the RfP, that is, five years extendable by another five years. An element of divergence noted by the NAO related to the period within which Cook & Co Ltd was to initiate operations. While the RfP indicated a two-month timeframe from notification of award till commencement, the agreement specified a three-and-a-half-month period. The lease agreement also provided further information on how the landlord and the tenant were to be regulated in circumstances where the latter failed to vacate the premises on expiry of the term.
- 3.1.67 As regards the state of the premises that was to be leased and the undertaking of works in relation thereto, the lease agreement emphasised that the property was being transferred on a tale quale basis and outlined the procedure that was to apply for works that Cook & Co Ltd sought to carry out. In contrast, the RfP provided a limited understanding of the condition of the premises, mainly through a brief description of the site and several photos. The RfP was silent about the works that were necessary, particularly in view of the change of use of the premises, and did not offer the possibility for site visits by interested parties, which would have allowed for the estimation of works required.

3.1.68 Several other points of consistency between the lease agreement and the RfP were noted by the NAO, with provisions relating to the rent and utility charges payable and the area to be leased as cases in point. Also captured in both documents were requirements relating to the investment to be made, the resources to be deployed and the upkeep of the site, as were matters concerning insurance cover. As is the norm, the agreement delved into more detail on each of these aspects of the lease. Similarly congruent were provisions relating to the securing of the necessary permits and licences to operate the site. However, the NAO noted that the RfP omitted any reference to the fact that the MDH was not guaranteeing that the premises in its existent state was suitable for the intended use. In view of the change of use, it would have been beneficial had this provision been included in the RfP.

3.1.69 Of note is that that the operations-related obligations imposed on Cook & Co Ltd were not specifically captured in the lease agreement but incorporated as part of the contractual framework through reference to the bid.

3.1.70 In terms of the obligations imposed on the tenant, omissions in the RfP on provisions subsequently specified in the lease agreement related to breaches leading to the payment of penalties or the termination of the lease agreement, and reporting requirements regarding performance. Also noted were omissions relating to the obligation to assume responsibility for health and safety requirements at the leased site, to carry out regular risk assessments and to redecorate the premises as often as necessary during the lease.

3.1.71 As regards the obligations imposed on the landlord, no reference was made in the RfP to the responsibility to provide tenants with the quiet enjoyment of the leased premises, to maintain and upkeep the shared facilities, and ensure health and safety in the common areas.

3.2 The deliverables specified in the lease agreement reflected those of the bid

3.2.1 The bid submitted by Roots Integrated Services Ltd in respect of the RfP issued by Malta Enterprise was dated 4 December 2015. The bid comprised a brief profile of Roots Integrated Services Ltd, information relating to the offer, submissions relating to the operations and financing of the F&B service provision, and the requisite standard forms appended to the RfP. Indicated in the bid was that Roots Integrated Services Ltd had branched out from a private hospital group, with commercial interests in several sectors. The Company was registered in May 2014, with its objectives relating to the provision of corporate services, particularly in respect of support and supply of ICT services, including business analysis, ICT managed services, project management, cloud computing and remote services. In addition, Roots Integrated Services Ltd also offered professional cleaning services, general trade, catering services, biomedical engineering services, the operation of fashion retail outlets and financial services. An organogram capturing the subsidiary companies to Roots Integrated Services Ltd responsible for the provision of these services was included in the bid. Specific reference was made to the Company's involvement in catering services. Indicated in the bid was that, in the previous five years, the Company

transformed the canteen facility of one of the major private hospitals in Malta and opened a café in Sliema.

3.2.2 In its bid, Roots Integrated Services Ltd proposed that the cafeteria within the MLSP was to initially open from Monday to Saturday and would operate as a café-bistro, serving freshly prepared food and offering a variety of options with a menu that was regularly changed. The Company noted that the facility would not be fully operational at the outset and envisaged that a loss would be registered in the initial years of operation, particularly due to the limited tenants of the park and the fact that the industrial zone was not yet complete. Therefore, Roots Integrated Services Ltd proposed that it would undertake the entire investment required, including the kitchen, furniture and furnishings of the facility provided that a scalar rent payment be introduced for the internal areas (Figure 15 refers). No rent was to be charged for the patio area.

Figure 15 | Rental rate proposed by Roots Integrated Services Ltd

Term	Calendar year	Rent per square metre (€)	Rent for the year (€)
Year 1	2016	35	10,224
Year 2	2017	40	11,684
Year 3	2018	50	14,605
Year 4	2019	55	16,066
Year 5	2020	65	18,987

3.2.3 Roots Integrated Services Ltd noted that a substantial investment in marketing the cafeteria was required to attract external clients thereby ensuring sufficient sales to generate an appropriate return on investment over time. A take-away and delivery service to MLSP offices was also to be provided. The Company stated that it would engage five employees, that is, an F&B manager, two cooks and two waiters. A list of the kitchen equipment necessary to operate the facility was also provided. Included in the bid was a summary of how the kitchen was to be managed and a sample menu.

3.2.4 Roots Integrated Services Ltd presented five-year financial projections in line with the RfP. The Company projected sales of €237,966 during the first year based on an average 180 daily covers, from Monday to Saturday, with an average spend of €4.50. However, after deducting the relevant expenses, this resulted in a projected loss for the first year of €7,795. Roots Integrated Services Ltd anticipated that the situation would improve over time, with the Company projecting sales of €508,983 in the fifth year and a profit of €61,701. This revenue was projected based on an average 300 daily covers at an average spend of €5.50 each. The projected cash and cash equivalents at the end of the fifth year of operation was €187,122. Roots Integrated Services Ltd planned an investment of €76,000 in fixed assets, including catering equipment, improvements to premises, furniture and fittings, electronic equipment and motor vehicles. The NAO noted that the planned investment as cited in the bid differed to that stipulated in the lease agreement, wherein the amount to be invested was set at €150,000.

3.2.5 Appended to the RfP and duly completed by the CEO Roots Integrated Services Ltd was the obligatory documentation required from bidders. In this respect, the Company submitted a completed tender form and a ‘Declaration by Interested Providers’ duly signed by its CEO. Specified in the RfP was a checklist of documents and information that bidders were to submit. The NAO noted that the bid by Roots Integrated Services Ltd fulfilled all the requirements bar that relating to the submission of visuals for the layout and décor of the catering facility. As noted earlier, Cook & Co Ltd provided the relevant visuals at a later stage.

3.2.6 The NAO considered whether the deliverables specified in the lease agreement entered into by the MDH and Cook & Co Ltd reflected that proposed by Roots Integrated Services Ltd in its bid to the RfP for the provision of F&B services issued by Malta Enterprise. Two points of analysis emerge.

3.2.7 First, the bid submitted by Roots Integrated Services Ltd provided the information sought through the RfP, except for the visuals relating to the layout and décor of the facility. This aspect was addressed by the RfP Evaluation Committee. Nevertheless, the NAO noted that information relating to the F&B services was not directly captured in the lease agreement subsequently entered into by the parties. Instead, the agreement focused on the relationship between the MDH as landlord and Cook & Co Ltd as tenant, highlighting in detail the rights and obligations of both parties. However, the obligations relating to the provision of F&B services at the site were cross-referenced through a clause in the lease agreement whereby Cook & Co Ltd was bound to “use the premises to carry out operations related to the preparation of food and beverages as outlined in its proposal ... submitted on 04.12.2015.” The CEO MLSP and the Chief Operating Officer (COO) Malta Enterprise asserted that no concerns arose in this respect, maintaining that the inclusion of the bid as part of the lease agreement ensured the assimilation of all terms and conditions. The NAO deemed the link between the bid and the lease agreement as captured in the above clause as sufficient in regulating the use of the site and the level of F&B service that was to be provided by Cook & Co Ltd to the MDH.

3.2.8 Second, this Office noted that the rental rates stipulated in the lease agreement matched those proposed in the bid by Roots Integrated Services Ltd. Therefore, no concerns emerge in this respect.

3.3 Malta Enterprise did not provide for and Cook & Co Ltd did not request to inspect the premises prior to entering into the lease agreement

3.3.1 Good practice would dictate that a prospective tenant conducts an inspection of the premises being leased to ascertain the condition of the property and identify any issues or defects. Anomalies that emerge during inspection could be taken into consideration during the tenant’s negotiations of the lease agreement with the landlord, thereby ensuring clarity in terms of responsibility for any repairs deemed necessary. Furthermore, a site visit would have provided the tenant with an added safeguard in terms of the obligation of the landlord to disclose any

relevant information relating to the condition of the site, more so when the property was being leased on a tale quale basis and was intended for a specific use, thereby necessitating possible adaptation.

- 3.3.2 Having established that no site visits were contemplated in the RfPs issued by Malta Enterprise, the NAO sought to determine whether it was possible for the selected bidder, that is, Cook & Co Ltd, to inspect the site following award but prior to entry into the lease agreement. Queries to this effect were made by this Office to Malta Enterprise and Cook & Co Ltd.
- 3.3.3 The NAO established that no site visits were held in the period immediately preceding the signing of the lease agreement. In submissions to this Office, Malta Enterprise again referred to the meeting held with Cook & Co Ltd on 14 January 2016. Citing information provided by the former CEO MLSP, Malta Enterprise noted that, during this meeting, a representative of Cook & Co Ltd was shown the site and provided with information relating to the envisaged use of the soon-to-be leased premises.
- 3.3.4 On the other hand, Cook & Co Ltd declared that it was not given access to the site and was only able to view the premises following the signing of the lease agreement. The Company emphasised that it first visited the site on 21 May 2016, that is, a day after entry to the lease agreement. When reference was made to the 14 January 2016 meeting, Cook & Co Ltd confirmed attending such a meeting; however, indicated that the leased premises was only seen from the outside. While the former CEO MLSP confirmed that a meeting was held with Cook & Co Ltd on the indicated date, the assertion that the premises was only seen from the outside was not confirmed by Malta Enterprise.
- 3.3.5 When queried by the NAO as to whether it requested to access the premises to be leased, Cook & Co Ltd indicated that it had not made any request; however, contended that it was the responsibility of Malta Enterprise, as landlord, to ensure that the prospective tenant had visibility over the premises that was to be leased.
- 3.3.6 The NAO is of the opinion that the fact that Malta Enterprise did not offer proper access to the premises at any time prior to entry into the lease agreement impinged on the right of a prospective tenant to inspect the property being leased, which right is considered a basic and legitimate expectation. Further complicating matters was the fact that prospective bidders were not provided with access to the site during the tendering period. This limitation in visibility could have been somewhat mitigated had access to the site been granted to the selected bidder prior to entry into the lease agreement. There existed a window during which it was possible for Cook & Co Ltd to understand the state of the premises to be leased prior to committing to take over the site. Nonetheless, Cook & Co Ltd cannot put this shortcoming squarely on Malta Enterprise, for its interest to inspect the site prior to entering to any commitment too was obvious. This Office remains unconvinced with that stated by Malta Enterprise and Cook & Co Ltd.

3.4 The rights and obligations of Malta Digital Hub Ltd, as landlord, were stipulated in the lease agreement

3.4.1 A lease agreement should clearly specify the rights and obligations of the landlord and the tenant emanating from the contractual relationship between the two. It is important that both parties are aware of and understand the rights and obligations borne by each. Good practice would dictate that the rights and obligations of the landlord are specified in terms of the site that is to be leased and, where applicable, for common areas. Also essential is clarity on these aspects during the different phases of the lease term, that is, on assignment of the property, during tenancy, and on return thereof. The NAO's analysis of the lease agreement between the MDH and Cook & Co Ltd was undertaken against this frame of reference.

Rights and obligations of Malta Digital Hub Ltd in respect of the common areas

3.4.2 Cited in the lease agreement were several rights retained by the MDH, as landlord, in connection with the common areas. These comprised the right to:

- a. the free and uninterrupted passage and running of all services through the appropriate conduits and all other structures of similar use;
- b. redesignate common areas; and
- c. retain the installed access-control system.

3.4.3 On the other hand, the obligations borne by the MDH centred on its responsibility for the cleaning, upkeep and maintenance of the common areas and the adherence to health and safety standards. According to the MLSP Users' Manual, cleaning was to be undertaken daily. As regards the obligation for upkeep and maintenance, the lease agreement stipulated that the MDH was to maintain the general plant and equipment of the MLSP. This obligation comprised regular inspection and repair, with a list of items to be maintained included in the MLSP Users' Manual. The frequency of the inspections and tests that were to be carried out was specified.

3.4.4 In terms of adherence to health and safety standards, the MDH was to comply with the MLSP Users' Manual and all relevant legislation. The MDH was responsible for the health and safety of all shared and common areas within the MLSP, and was tasked with ensuring that shared equipment was in safe working order, issuing directives in relation thereto, and ensuring that all users within the MLSP abided by the legislation in force. Also specified was the fire safety equipment to be made available and serviced and the first aid arrangements in place.

Rights and obligations of Malta Digital Hub Ltd in respect of the leased premises

3.4.5 Aside from the rights and obligations borne by the MDH, as landlord, over the common areas were those corresponding to the premises leased to Cook & Co Ltd. The NAO categorised these rights and obligations according to the phase of the lease term, that is, prior to entry, during, and on expiry.

Prior to the lease term

3.4.6 The lease agreement specified that the MDH was to hand over the premises to Cook & Co Ltd on a tale quale basis and in terms of the condition report and inventory list attached as a schedule thereto. The schedule, dated 13 June 2016, comprised a description and photograph of each item of inventory, thereby providing details of the fixtures and fittings in the leased premises. The condition and general layout of the premises was captured through a series of photographs. Noted in the lease agreement was that the premises was being accepted by Cook & Co Ltd in the condition described. Further stipulated was that the agreement was to be updated to reflect any approved and executed alteration works on the premises. Such works were to be documented through an updated schedule, which was to be endorsed by both parties and was to form part of the agreement.

3.4.7 Apart from the provisions regarding the handing over of the premises on a tale quale basis, the lease agreement specified the MDH's waiver of any warranty that the premises could be lawfully used for the intended use. Furthermore, the MDH did not provide any guarantee that the premises was fit for the permitted use in terms of relevant planning legislation and any other regulations regarding the permits or licences required to operate. Also waived in the lease agreement was the MDH's obligation to maintain the premises in a condition fit for the use intended by Cook & Co Ltd and the obligation to effect repairs which could become necessary.

During the lease term

3.4.8 Several rights in respect of the leased premises were retained by the MDH during the lease term. These comprised the right to:

- a. access at any time, and break in in case of emergency, to ascertain the condition of the premises;
- b. carry out works in connection with the conduits or on an adjacent building that could only be accessed through the leased premises;
- c. give notice to Cook & Co Ltd to carry out works in line with its obligations as tenant;

- d. prohibit Cook & Co Ltd from installing any other lock system on the leased premises;
- e. request Cook & Co Ltd to carry out repairs; and
- f. rescind the lease in case of default by the tenant.

3.4.9 On the other hand, the MDH bore an obligation to allow Cook & Co Ltd the peaceful and quiet enjoyment of the leased premises without any interruption or disturbance from, by or any person under the claim of the landlord.

At the end of the lease term

3.4.10 The only reference to any rights or obligations of the MDH at the end of the lease term was that of its right to take schedule or inventory of the fixtures and items that were to be yielded by Cook & Co Ltd.

Overall consideration of the rights and obligations of Malta Digital Hub Ltd in respect of the common areas and the leased premises

3.4.11 The NAO noted that the lease agreement was clear as regards the pertinent aspects associated with the MDH’s role as landlord in respect of the common areas. The agreement provided well-defined terms relating to access and use, as well as cleaning, upkeep, maintenance and health and safety.

3.4.12 Similarly clear were the provisions of the lease agreement relating to the rights and obligations of the MDH in connection with the leased premises. Fundamental in this respect was that the MDH was leasing the site on a tale quale basis. The term ‘tale quale’ implied that the property was being leased as is, without any warranties or guarantees regarding its existing condition. The NAO is of the understanding that since the lease agreement stipulated that the MDH was handing over the premises to Cook & Co Ltd on a tale quale basis, this indicated that the former was generally not responsible for repairs or improvements required to the property following entry into the agreement. Also implied was that Cook & Co Ltd was accepting the property in its current condition and was to assume the works, repairs and maintenance needed during the tenancy.

3.4.13 The lease agreement also exonerated the MDH from providing any guarantee that the premises was fit for the use it was intended for. This was deemed somewhat anomalous by the NAO since the MDH was leasing the premises specifically for the operation of a catering establishment, for which planning and other regulatory permits were required.

3.4.14 Whether the lease agreement was equitable in terms of the rights and obligations that it imposed on the MDH and Cook & Co Ltd is discussed elsewhere in the report. Nonetheless,

the NAO acknowledges that the lease agreement was a private writing that allowed the parties to set the terms and conditions to the contract. More crucial was that both parties agreed on the terms of the lease.

3.5 The rights and obligations of Cook & Co Ltd, as tenant, were stipulated in the lease agreement; however, the agreement was silent should the permits or licences required to operate not be secured

3.5.1 In the context of a lease agreement for immovable property, it is imperative that the contractual ties between the tenant and the landlord are stipulated. This ensures that, as is the case for the landlord, the rights and obligations of the tenant are clearly specified. Aspects of the contractual relationship that are generally included are the permitted use, the payment of rent, the upkeep of the property, and adherence to any building or community rules. The inclusion of clear rights and obligations in the lease agreement can help to address the expectations of the landlord and the tenant and can serve as a reference in the event of any disputes or misunderstandings.

3.5.2 From the perspective of the tenant, the importance of clarity on the rights and obligations in terms of the site that is to be leased is central. Also of relevance is that clear terms are set in connection with the use of the common areas. The rights and obligations of the tenant may vary during the different phases of the lease term, that is, on assignment of the property, during tenancy, and on return thereof. It is therefore essential for the lease agreement to adequately address these stages of the contractual relationship. The NAO's analysis of the lease agreement between the MDH and Cook & Co Ltd was undertaken against this frame of reference.

Rights and obligations of Cook & Co Ltd in respect of the leased premises

3.5.3 The NAO categorised the rights and obligations of Cook & Co Ltd in relation to the leased premises based on the phase of the lease term, that is, prior to the commencement of operations, during the lease term, and on expiry.

Prior to the commencement of operations

3.5.4 Cook & Co Ltd was responsible to individually apply and obtain the permits and licences required in terms of its catering activity. Stipulated in the lease agreement was that Cook & Co Ltd was to ensure that the activity was authorised by the necessary permits and/or licences, thereby complying with all the regulations and laws relevant to the tenant's activities. While this provision helped to ensure that Cook & Co Ltd was compliant with all relevant laws and regulations, it also safeguarded the MDH in terms of liability in the event that the tenant was found to be operating without the necessary permits and licences.

3.5.5 Cook & Co Ltd bore an obligation to submit to the MDH true copies of all the permits and licences in force throughout the term, as amended, varied or replaced from time to time. It was also

- the tenant’s responsibility to ensure compliance with the requirements of any statutes and any other obligations imposed by or under any law, applicable to the leased premises or the trade or business being carried out. In addition, Cook & Co Ltd was to ensure that the premises adhered to the provisions and requirements regulating its use in terms of planning legislation. Noted in this respect was that Cook & Co Ltd was to obtain the MDH’s consent before applying for planning permission. Also noted in the lease agreement was that Cook & Co Ltd was obligated to pay all rates, taxes, assessments, charges, impositions and outgoings that could be charged or imposed on the premises or the owner or occupier in respect thereof.
- 3.5.6 Cited in the lease agreement was that Cook & Co Ltd accepted the premises being leased to it by the MDH on a tale quale basis, as described in the condition report and inventory list appended to the agreement as a schedule. The schedule, dated 13 June 2016, comprised a description and photograph of each item of inventory, thereby providing details of the fixtures and fittings in the leased premises. The condition and general layout of the premises was captured through a series of photographs. Also specified in the lease agreement was that the schedule was to be updated to account for any approved alteration works undertaken on the premises. The updated schedule was to be endorsed by both parties and was to form part of the agreement. The implication of Cook & Co Ltd entering into the lease agreement with the MDH for premises transferred on a tale quale basis was that the tenant accepted the leased premises ‘as is’ and did not hold the landlord liable for pre-existing damages or issues with the property.
- 3.5.7 Adaptation works could be required to render a premises adequate for the use intended, particularly when the new use represented a departure from that previously planned or utilised. Two considerations emerge as relevant in this respect. First, that provisions allowing the tenant to effect the required adaptations to the premises are specified in the lease agreement. Second, that the landlord has visibility and the right to sanction, or otherwise, any proposed alterations. The NAO assessed whether these considerations were addressed in the lease agreement entered into by the MDH and Cook & Co Ltd.
- 3.5.8 Stipulated in the lease agreement was that any alterations requested by Cook & Co Ltd required the approval of the MDH. To effect any alterations, Cook & Co Ltd was to first submit an application to the MDH. This was to be supported by detailed plans and the relative work method statement prepared by an architect, or a member of an appropriate profession, who was to supervise the works until completion. Also specified was that Cook & Co Ltd was to obtain and comply with the necessary approvals from the competent authorities and pay relative charges.
- 3.5.9 Cook & Co Ltd was to be responsible for carrying out and funding alterations approved by the MDH. In addition, the tenant was to pay the fees of the landlord’s professional advisors. For works of a substantial nature, the MDH could request Cook & Co Ltd to provide a deposit as security for the completion of the works. The tenant was to use materials of the highest quality possible and appropriate certificates of completion and compliance were to be submitted to the landlord. The alterations undertaken with the MDH’s written consent were to, on completion,

become the property of the landlord without giving any right to Cook & Co Ltd for compensation. This condition could be waived if otherwise agreed between the parties at the time approval was granted for the said alterations. On completion of any alterations undertaken, the tenant was to submit documented evidence, including an architect's certificate, detailing the quality of the works undertaken. Once approved by the MDH, an addendum was to be made to the lease agreement through which the conditions report of the premises was to be updated to reflect the alterations made and was to be considered part of the agreement.

- 3.5.10 The lease agreement further provided that any contracts entered into between Cook & Co Ltd and the contractor of any works to be carried out at the tenant's cost were not in any way to create any liability on the MDH either for the contribution of any sums due or in any manner whatsoever.
- 3.5.11 Further elaborated on in the lease agreement were provisions relating to structural works required to comply with any existing or future laws or regulations and/or the requirements of any government department, local or competent authority, or those emanating from a court of competent jurisdiction. In general, structural works arising from any of these circumstances were to be carried out at the sole expense of the MDH. However, if the structural works were directly related to the nature of the processes and/or operations carried out by Cook & Co Ltd, or were directly related to catering, then such structural works were to be carried out by and at the expense of the tenant.
- 3.5.12 On termination of the lease agreement, if requested by the MDH, Cook & Co Ltd was to, at its expense, remove any additional buildings, additions, alterations or improvements made to the site and make good any damages made to the premises. Nonetheless, any alterations that were to be removed at the end of the term were to be agreed to in writing a priori at the time when consent to effect such alterations was granted by the MDH. Also specified in the lease agreement was that any alteration works retained on the premises at the end of the term were not to be compensated for by the landlord. Moreover, the cost of removing the alterations and restoring the premises to its original condition was to be borne by Cook & Co Ltd.
- 3.5.13 In relation to health and safety matters, Cook & Co Ltd was to install and maintain, at its own expense, a professional fire suppression system within the premises, updated details of which were to be submitted to the MDH prior to the operational start-up date. Cook & Co Ltd could install, at its expense, an intruder detection system to alert the tenant when the premises was accessed outside normal working hours.

During the lease term

- 3.5.14 Several obligations that Cook & Co Ltd bore during the lease term were specified in the lease agreement entered into with the MDH. Notable in this respect were provisions relating to the payment of rent and utilities, the use of the site, reporting requirements, upkeep and

maintenance, health and safety protocols, the employment of personnel, alteration works, insurance and the assignment of the premises.

- 3.5.15 The lease agreement stipulated the rental charge that Cook & Co Ltd was obligated to pay. Set out in a schedule to the agreement, the annual charge was established as €35 per square metre for the first year of rental. This was to increase to €40, €50, €55 and €65 per square metre in each subsequent year, respectively. If the lease term was to be extended, a rental rate of €75 per square metre per year was to be charged by the MDH. Cited in the agreement was that the gross area of the premises was 292 square metres. Therefore, the charge for the first year was of €12,064, inclusive of VAT. The rent was to be paid quarterly in advance via direct debit.
- 3.5.16 In addition to the payment of rent, Cook & Co Ltd was to pay an upfront deposit equivalent to 50 per cent of the annual rent. For the first year, this amounted to €6,032. This deposit was to be maintained at 50 per cent of the annual rent throughout the lease term.
- 3.5.17 Another obligation of Cook & Co Ltd related to the payment of utility charges. The tenant was required to pay an initial sum of €1,000 per quarter as an on-account utility service charge payment, which was to be paid in advance through a direct debit facility. The MDH would review the actual consumption expenditure every quarter, and any difference was to be settled by Cook & Co Ltd within 10 days. In case the on-account utility service payment for the previous quarter was higher than the utility service charge due for that period, a credit note was to be issued to Cook & Co Ltd for the excess amount paid.
- 3.5.18 Other charges cited in the lease agreement related to the use of facility services, which fee was to be calculated at the end of every month and charged at the beginning of the next. All charges in relation to rent and other sums payable by Cook & Co Ltd were to be inclusive of VAT.
- 3.5.19 Suppliers were to be at the charge of Cook & Co Ltd and the MDH was to be indemnified against all charges for electricity, water, gas, telecommunications and other services consumed or used at or in relation to the premises emanating from the said suppliers. In the case where such services were provided by the MDH, Cook & Co Ltd was to pay the itemised invoices within 30 days through a direct debit set-up or be liable to the suspension of services leading to an automatic revocation of the lease agreement.
- 3.5.20 Cook & Co Ltd bore an obligation to use the premises for operations relating to the preparation of food and beverages as outlined in its bid to the RfP. Noted in this respect was that the tenant could not use the premises for retailing goods, as accommodation, to house its clients overnight, or for residential purposes, unless written permission was obtained from the MDH. Moreover, Cook & Co Ltd could not part with the possession of the premises and could not hold it on trust for others. Noted was that the tenant could assign or make over the lease, whether in whole or in part, or sublet all or any part of the premises only if the prior consent in writing of the landlord was obtained.

- 3.5.21 Aside from provisions relating to the use and assignment of the premises were other matters concerning the level of activity and investment expected of the tenant. Stipulated in the lease agreement was that, during the period 2016 to 2018, Cook & Co Ltd was to employ at least five full-time equivalents and make an annual investment of €150,000.
- 3.5.22 Other obligations imposed on Cook & Co Ltd related to its reporting requirements. In this context, the lease agreement stipulated that Cook & Co Ltd was to provide the MDH with reports on its operations, finances, investment, revenue and employment details, which information could be used by the landlord for publication purposes of its performance figures. The tenant was also required to immediately advise the landlord of any change in ownership or its structure as a legal entity – as specified in the lease agreement – such as through changes in its shareholding.
- 3.5.23 Also specified in the lease agreement was that Cook & Co Ltd was responsible for all its supplies, products, services and waste, and was to indemnify the MDH of any such responsibility. The tenant was also responsible for cleaning the premises and for keeping the surrounding area tidy.
- 3.5.24 Another responsibility borne by Cook & Co Ltd was that of ensuring that the leased premises was maintained in good condition and repair through its own maintenance personnel. Of note was that the lease agreement specifically excluded the MDH from the statutory obligation to make repairs when they became necessary. Stipulated in the agreement was that Cook & Co Ltd was to provide the MDH with access to the premises for the landlord to view its state of repair and condition. Major maintenance, repair or alteration works undertaken by the tenant were subject to the prior approval of the landlord. On completion, the works would become the property of the landlord without giving any right to the tenant for compensation. This condition could be waived if otherwise agreed between the parties. Furthermore, the tenant was to repair and/or replace any of the landlord's fixtures and fittings in the premises that were beyond repair at any time during or at the end of the term. An inventory of these fixtures and fittings was included in the conditions report attached to the lease agreement.
- 3.5.25 Related to maintenance was Cook & Co Ltd's obligation to redecorate the internal areas of the premises, as often as necessary in the reasonable opinion of the MDH and in the last year of the term, to retain a high standard of decorative finish. However, the tenant was not to make any addition to the site, unite the premises with an adjoining property, or make any alteration to the premises save when so permitted.
- 3.5.26 It was also the responsibility of Cook & Co Ltd to ensure that all health and safety regulations in force, and as amended from time to time, were observed. Further stipulated in the MLSP Users' Manual was that users of the premises were individually responsible for the health and safety of their own personnel and visitors, within their units as well as in common areas. In addition, the

tenant was required to carry out its own health and safety monitoring and inspection, and provide relevant certificates and documentation corresponding to any remedial recommendations or actions necessary in relation to the internal operations of the leased premises to the MDH. All accidents and incidents were to be logged with the MDH, while Cook & Co Ltd was required to maintain its own log of all accidents and incidents.

3.5.27 An integral part of health and safety management at the MLSP was the obligation on the tenants to conduct a risk assessment of their unit every six months. A confidential summary of the outcome, signed by the assessor, was to be referred to the MDH. Required actions were to be included in this summary and were then to be addressed by the tenants.

3.5.28 Cook & Co Ltd was to insure the premises in the joint names of the landlord and the tenant. Insurance in the same joint names was also to cover 12 months' rent and the utility service charge receivable by the MDH, which cover would allow a claim under the material damage insurance policy. The tenant was also to insure against third-party liability, including its employees, legal costs and expenses. The insurance cover was to be obtained in Malta and the policy was to cover the full cost of rebuilding and reinstating the premises as well as any related ancillary costs.

3.5.29 Aside from the obligations cited prior, the lease agreement granted Cook & Co Ltd the right to, at all times, access the premises for all purposes connected with the use and enjoyment of the premises. The tenant was also granted the right to the free passage and running of all services through the appropriate adjoining conduits subject to any interruption that might be present due to repairs, alterations or replacements.

At the end of the lease term

3.5.30 On termination of the lease term, Cook & Co Ltd was to vacate and return the premises to the MDH with vacant possession, decorated and repaired in accordance with and in the condition as stipulated in the lease agreement. If so requested by the landlord, the tenant was to, at its own expense, remove any additional buildings, additions, alterations or improvements made to the premises and had to make good any damages made to the premises. Two weeks prior to the end of the lease, the parties were to enter into a termination agreement, a draft of which was attached to the lease agreement. The lease agreement provided for circumstances when the tenant failed to relinquish the premises or enter into the termination agreement. Under such circumstances, the tenant was to pay the landlord five times the daily rate of rent. Furthermore, in such an event, the landlord retained the right to disconnect all services and disable all access cards to the premises. The MDH could serve Cook & Co Ltd with an eviction order at the end of the term, since the former was recognised as the competent authority in terms of the relevant legislation.

Rights and obligations of Cook & Co Ltd in respect of the common areas

- 3.5.31 In addition to the rights and obligations borne by Cook & Co Ltd with respect to the leased premises were other provisions regulating its role as a tenant within the broader context of the MLSP. These provisions generally regulated the access to and use of the common areas and facilities.
- 3.5.32 In the lease agreement, reference was made to Cook & Co Ltd's obligation not to carry out any activities or use its premises in a manner deemed of nuisance to the other tenants of the MLSP or to neighbouring properties. Cook & Co Ltd was not to obstruct any common parts of the building.
- 3.5.33 Cook & Co Ltd was to pay the MDH for any damage, alteration or obstruction made to any of the shared facilities or of any adjoining or neighbouring premises through works undertaken. The tenant was also to refrain from making any connection with any conduits except in accordance with plans and specifications approved by the landlord, and on the prior attainment of the consent of the competent authority, undertaking or supplier of the conduit to which the connection was required.

Overall consideration of the rights and obligations of Cook & Co Ltd in respect of the leased premises and the common areas

- 3.5.34 The NAO sought to establish whether the rights and obligations of Cook & Co Ltd were stipulated in the lease agreement. This Office is of the opinion that the agreement clearly specified the responsibilities that were to be borne by Cook & Co Ltd, contributing to the clarity in roles and duties that ought to have been assumed by it as tenant. Nevertheless, several points of note arise in this respect.
- 3.5.35 Pertinent were provisions in the agreement that specified that the premises was transferred by the MDH to Cook & Co Ltd on a tale quale basis. This term implied that the property was being leased 'as is', without any warranties or guarantees regarding its existing condition. Nonetheless, evidence of the condition of the premises at handing over was included in the lease agreement. Although it could be argued that more information relating to the premises would have better captured the state of the site, ultimately, Cook & Co Ltd accepted the premises 'as is' irrespective of its suitability as a catering establishment.
- 3.5.36 The assignment of the premises for catering purposes and the fact that this considerably differed from the use originally planned created the need to adapt the premises prior to the commencement of operations. The NAO is of the understanding that Cook & Co Ltd was accepting the property in its current condition and thereby assume responsibility for the works required. The lease agreement specified the right of Cook & Co Ltd to undertake alteration works, outlined

- the process that the tenant was to follow in seeking the MDH’s sanctioning of such work, stipulated procedural requirements to ensure quality, indicated that the tenant was to pay for the alterations required and that, on termination of the lease term, these improvements would become the property of the MDH at no expense unless otherwise agreed.
- 3.5.37 Also noted in the lease agreement was that any structural works arising from the obligation to comply with industry-specific requirements were the responsibility of Cook & Co Ltd, at its expense. In turn, the MDH was to undertake structural works that arose from requirements of a general nature required in terms of existing or future laws, regulations or court judgements.
- 3.5.38 Further specified in the lease agreement was that Cook & Co Ltd assumed responsibility for the securing of any permits and/or licences required to operate the catering facility, and to pay any expenses incurred in relation thereto. However, the lease agreement was silent in the event that the necessary permits and licences for the operation of the site as a catering facility were not issued by the relevant authorities or delayed. This scenario assumes importance when one considers that the premises was not covered by a planning permit to operate as a catering establishment and in view of the obligation imposed on Cook & Co Ltd to commence operations within three and a half months of signing the lease agreement.
- 3.5.39 As regards the rights and obligations of Cook & Co Ltd during the lease term, the NAO noted that the lease agreement was unambiguous in its establishment of terms, stipulating the responsibilities of the tenant with clarity. Specified in this respect were provisions outlining the obligations of Cook & Co Ltd to pay rent, provide a deposit in relation thereto, settle utility charges in a systematic manner, and compensate the landlord for the facility services availed of. Other obligations imposed on Cook & Co Ltd through the lease agreement related to limitations on the possible use of the premises, restricted to that defined in its bid, and constraints on its assignment or sub-letting. Furthermore, the lease agreement established provisions regulating the level of activity and investment expected of Cook & Co Ltd, as well as its reporting requirements to the MDH on matters of performance and ownership.
- 3.5.40 Also noted by the NAO was the emphasis in the lease agreement on the responsibility assumed by Cook & Co Ltd to ensure that the leased premises was maintained in good condition and repair, at its own expense, and the commitment that any alteration works that were to be undertaken during the term were to be approved by the MDH, paid for by Cook & Co Ltd, and unless otherwise agreed, become the property of the landlord on completion.
- 3.5.41 In addition, Cook & Co Ltd was to ensure that all health and safety regulations in force were adhered to at the leased premises, that adequate risk management practices specified in the MLSP Users’ Manual were complied with, and that insurance cover was provided. Aside from setting these obligations, the lease agreement granted Cook & Co Ltd the right to access and use the premises at all times for the purposes for which it was granted.

3.5.42 Provisions relating to the end of the lease term were also reviewed by this Office and deemed to afford the parties to the lease agreement with clarity on how this phase of the contractual relationship was to be managed. Specified were matters concerning the vacation of the premises by Cook & Co Ltd, how the tenant's exit was to be documented and the state in which the premises was to be left. Also captured in the lease agreement was a scenario where Cook & Co Ltd failed to relinquish the premises, with the provisions that were to come into effect should such a situation materialise specified.

Chapter 4 | Adherence to contractual obligations

4.1 Access to the leased premises was possible on the transfer of the site; however, delays were noted in the handing over of the keys

4.1.1 The timely handing over of a leased site from a landlord to a tenant at the beginning of a lease term could be a crucially important milestone, for it allows the tenant to commence undertaking the necessary alterations and/or repairs to render the property suitable for its intended use. Good practice would dictate that the timeframe within which such a handing over ought to take place is specified within the agreement and consequently adhered to.

4.1.2 The lease agreement, entered into by the MDH and Cook & Co Ltd on 20 May 2016, included several provisions regarding the transfer of control over the site in terms of the lease and in relation to access granted thereto. Central in this respect was a provision cited in Schedule 4 of the agreement, wherein it was specified that the tenant was granted access to the premises on signature of the lease agreement. Acknowledged in the agreement was that the MDH was granting Cook & Co Ltd access in advance of the operational start date, which was set as 1 September 2016. During the period between signing of the agreement and the operational start date (20 May 2016 till 31 August 2016), Cook & Co Ltd was to use the premises solely for the purpose of setting up and undertaking the works approved by the MDH. Further specified in the lease agreement was that Cook & Co Ltd was granted the right to, at all times, access the premises for all purposes connected with its use and enjoyment.

4.1.3 These provisions assume relevance when one considers that Cook & Co Ltd was responsible for effecting the alteration works necessary to render the premises suitable to carry out operations related to the preparation of food and beverages as outlined in its bid. Early access to the premises was essential for the tenant to have sufficient time to undertake the required works, for the agreement effectively provided a three-and-a-half-month window of time within which relevant adaptations were to be carried out.

4.1.4 The NAO sought to establish whether access to the premises was granted by the MDH to Cook & Co Ltd in a timely manner, in accordance with the provisions established in the lease agreement. In submissions made to this Office, Cook & Co Ltd indicated that the keys to the premises were provided several weeks after signing the agreement, that is, on 1 July 2016. In support of this assertion was correspondence exchanged between Cook & Co Ltd and Malta Enterprise on 1 July 2016, made available to this Office by the latter. Noted in this correspondence was confirmation that the keys to the leased premises had been handed over. In further clarifications, the CEO MLSP indicated that the keys to the external doors of the premises were signed for by Cook & Co Ltd on 20 June 2016.

- 4.1.5 The NAO enquired with Malta Enterprise and Cook & Co Ltd regarding the delay in the handing over of the keys. Both parties were unable to provide an explanation as to this delay. Cook & Co Ltd were uncertain about the procedure for the handing over of the keys to the premises and noted that copies of all keys corresponding to the several tenancies at the Park were retained by the MLSP. In clarifications provided, the CEO MLSP noted that it was standard practice for the MLSP to hand over keys to leased premises following the signing of the relevant condition report. In this case the condition report was finalised on 13 June 2016, with the keys to the leased premises subsequently collected by Cook & Co Ltd shortly thereafter, that is, on 20 June 2016.
- 4.1.6 Notwithstanding this delay, the CEO MLSP stated that tenants are granted permission to freely access the allocated space on signing of the lease agreement. He noted that incoming tenants could still view the premises being allocated by making a request to the MDH. Further elaborating on this point, the CEO MLSP noted that Cook & Co Ltd had free access to the premises from the point of entry into the lease agreement onwards, for the keys to the allocated site could be retrieved at any time from the Park's security office.
- 4.1.7 Cook & Co Ltd conceded that they accessed the premises for the first time on 21 May 2016, that is, a day after entry to the lease agreement. Elaborating on developments occurring during this period, Cook & Co Ltd noted that the premises was not yet finished at the time of contract signing, which assertion was substantiated by the fact that the condition report was concluded on 13 June 2016. According to Cook & Co Ltd, access to the premises prior to 1 July 2016 was restricted in that it was only possible through the MLSP security staff. Cook & Co Ltd maintained that it was at this stage that it noted that most of the representations made by the MDH regarding the state of the property were non-existent or not in compliance with acceptable statutory or health and safety laws, thereby necessitating the undertaking of works to render the site operational. These claims were rebutted by Malta Enterprise, with the CEO MLSP maintaining that the assertions by Cook & Co Ltd were inconsistent with its action to accept the property and sign off the condition report as a finished premises. According to Malta Enterprise, at that point in time, Cook & Co Ltd could have withdrawn from the lease.
- 4.1.8 In conclusion, the NAO noted that the premises was transferred from the MDH to Cook & Co Ltd through the signing of the lease agreement on 20 May 2016. Both parties agreed that the keys to the premises were not handed over on signing, as works at the site were still ongoing; however, these were provided several weeks later. Nevertheless, Cook & Co Ltd and the MDH confirmed that, following entry into the lease agreement, access to the premises was possible through the MLSP security section, despite that this arrangement created an element of inconvenience to Cook & Co Ltd.

4.2 Cook & Co Ltd commenced operations several months after the stipulated timeframe, pending planning permission, the undertaking of works and operating clearance

4.2.1 The lease agreement stipulated that Cook & Co Ltd was to commence operations by 1 September 2016, that is, three-and-a-half months from entry to the agreement. The NAO established that the premises was not rendered operational within the set timeframe. Cook & Co Ltd indicated that the operational start date was 1 January 2017; however, this was in respect of the ground floor. In submissions to the NAO, Cook & Co Ltd stated that the first floor was completed around May to June 2017. On the other hand, the MDH referred to a post on the social media page of the restaurant dated September 2016, which led it to the understanding that the commencement of operations occurred around this time. The NAO reviewed the post indicated by the MDH and noted that this was of a generic nature, not indicative of the commencement of operations. Later posts, dated January 2017, provided clearer evidence of activity.

4.2.2 In submissions to the NAO, Cook & Co Ltd contended that several issues ultimately constrained it from adhering to the timeframe within which operations were to commence. Notwithstanding this, Cook & Co Ltd maintained that it made multiple attempts to reduce delays to the start of operations.

4.2.3 After the closing date for the submission of proposals yet during the period of evaluation, Roots Integrated Services Ltd enquired with Malta Enterprise whether the relevant planning permit was already in hand. In correspondence dated 20 January 2016, Roots Integrated Services Ltd expressed concern on the time required to obtain the permit and the corresponding trading licence necessary for the commencement of operations.

4.2.4 Additional correspondence referred to the NAO by Cook & Co Ltd, dated 20 February 2016, captured a submission made by the CEO Roots Integrated Services Ltd to the CEO Malta Enterprise. Cited was that, in view of the favourable answer regarding the cafeteria, an appointment was sought with Malta Enterprise to discuss the way forward and other technical aspects of the project. Roots Integrated Services Ltd highlighted its concern about delays in the delivery of items from its overseas suppliers, indicating that the delivery of such items would require between six to eight weeks. In addition, Roots Integrated Services Ltd noted that the proposed meeting with Malta Enterprise would aid in its preparation of the promotional material intended to boost publicity of the catering premises. Also stated was that Roots Integrated Services Ltd would endeavour to open the premises by no later than two months from the date of assignment.

4.2.5 In correspondence dated 25 May 2016, five days after entry to the lease agreement, Roots Integrated Services Ltd highlighted several issues that were raised during a meeting held on site with a Malta Enterprise architect and a representative. In essence, Roots Integrated Services Ltd requested the assistance of Malta Enterprise to address the problems identified, which

would render it difficult for the tenant to operate the premises. The issues identified by Roots Integrated Services Ltd are reproduced hereunder.

- a. The sanitary facilities required restructuring since no storage or washing area was allocated. Moreover, it was imperative that the washing area be separate from the food preparation area.
- b. The access of all supplies was to be from the service area and not through the front entrance. Two reasons were cited, namely, the possible damage to the flooring during the delivery of supplies and practical matters.
- c. The roofing of the first floor's opening, with Roots Integrated Services Ltd proposing iron beams and flooring rather than concrete.
- d. In view of the objection by Malta Enterprise for Roots Integrated Services Ltd to make use of the common area staircase, the latter sought information on what type of staircase the former was to install and how this would be integrated in the leased premises.
- e. The kitchen extraction vent required widening.
- f. The installation of a gas cistern was required. To this end, Malta Enterprise was requested to indicate where this was to be sited, preferably hidden from view.
- g. The electrical supply installed at the leased premises was deemed inadequate for the planned kitchen. Noted in this respect was that the kitchen was to be in accordance with that stipulated in the RfP.

4.2.6 Correspondence on the matters raised by Roots Integrated Services Ltd was exchanged internally by Malta Enterprise on 31 May 2016. While the former CEO MLSP sought to reach some form of compromise, he noted that the proposed structural changes would be financed by the tenant, that some of the works arose from the requirements of the RfP, and that the tenant would be responsible to reverse alterations on the expiry of the lease term. Although the former CEO MLSP was inclined to favourably consider that sought by Roots Integrated Services Ltd, the Architect Malta Enterprise raised several concerns. Of note to the NAO was that the Architect contended that the structural changes requested were extensive and were never considered as part of the RfP. The Architect asserted that the extent of alterations ought to have been raised during the bidding process and that the original concept was for a cafeteria and not a restaurant. Nevertheless, the Architect indicated that certain requests by Roots Integrated Services Ltd could be accommodated, namely, the creation of storage space through the re-siting of the stairs, the opening of an internal doorway, the splitting of the double height and the installation of an underground gas tank. Of note was that the Architect referred to a meeting held with Roots Integrated Services Ltd on site where it was agreed that the tenant would revise the proposal

submitted to address the feedback given by Malta Enterprise; however, the Architect observed that no such revisions were made, with the tenant reiterating that originally requested. These exchanges constitute the point at which the divergences in the understanding of the function of the premises emerge, with Malta Enterprise maintaining that the site was to serve as a cafeteria and Roots Integrated Services Ltd understanding that this was to have broader use as a restaurant. In later submissions to the NAO on whether the premises was to serve as a cafeteria or restaurant, Malta Enterprise asserted that no limitation on the nature of the catering service was imposed, other than the minimum hours stipulated in the RfP. Justifying the function of the site as a restaurant, Cook & Co Ltd referred to the planning application submitted by Malta Enterprise whereby reference was made to the use of the premises as a Class 4D establishment, which permits on-site cooking.

4.2.7 The NAO has no visibility over developments that occurred following the exchanges of end May 2016. However, on 19 August 2016, Cook & Co Ltd submitted to Malta Enterprise a list of difficulties it was facing in efforts to open the premises, the most salient of which are reproduced hereunder.

- a. The planning permit was still pending due to delays in the application process, despite efforts by Cook & Co Ltd to hasten the process through its own architect. Nonetheless, Cook & Co Ltd maintained that the intervention of the Architect MLSP was still required since the permit was to be issued in the name of the landlord.
- b. An inspection carried out by the Health Inspectorate highlighted several shortcomings in relation to the structure of the premises. These shortcomings necessitated the relocation of the bathrooms away from the kitchen, a separate entrance for the delivery of supplies, the resizing of the bathrooms to ensure accessibility for persons with a disability, the reducting of the extraction fans in the kitchen and the installation of mechanical ventilation required in non-naturally ventilated environments. In addition, the inspection indicated that the premises lacked air circulation, especially in the upper levels, and therefore new openings were recommended.
- c. The electrical distribution board and all other electrical and air-conditioning controls were to be relocated away from the kitchen. Other points raised related to the fact that only one circuit breaker was installed for the entire building, which was deemed non-compliant with health and safety regulations, and that no electrical points were available in the kitchen, with the relevant rectification works to be undertaken by Cook & Co Ltd.
- d. Cook & Co Ltd also referred to the low-quality soffit that was to be replaced.
- e. According to Cook & Co Ltd, several issues related to the inadequate or missing drainage system at the premises. The works undertaken by the tenant to rectify these problems necessitated the reflooring of the premises.

- 4.2.8 In conclusion, Cook & Co Ltd maintained that it was not aware of the above issues at the outset and that its budget was adversely affected in its efforts to address matters. Emphasising its commitment to commence operations, Cook & Co Ltd noted that the initial delays experienced were mainly as a result of the permits not being applied for or tardiness in application, and therefore not attributable to it. In this context, the tenant requested that Malta Enterprise extend the moratorium on the payment of rent. In submissions to the NAO, Cook & Co Ltd noted that whenever informed of the issues being faced, Malta Enterprise would advise it to continue with the works necessary to commence operations and that relevant expenses would be settled later.
- 4.2.9 Malta Enterprise informed the NAO that the correspondence submitted by Cook & Co Ltd on 19 August 2016 was discussed internally. In email correspondence by the former CEO MLSP to the former CEO Malta Enterprise, dated 22 August 2016, reference was made to the need to engage an engineer to verify that claimed by Cook & Co Ltd. The former CEO MLSP reiterated the concerns raised by Cook & Co Ltd, highlighted the risks arising therefrom and recommended that the request for an extension of the moratorium be acceded to. In reply to this email, a Malta Enterprise official referred to a site visit held with Cook & Co Ltd a few days earlier, during which it became evident that the failings raised by the tenant were the result of poor workmanship that could not have been anticipated prior to the commencement of works. The Malta Enterprise official noted that extra works were necessary to address such deficiencies, resulting in delays in the commencement of operation. Furthermore, while the Malta Enterprise official objected to any call for compensation, given the circumstances, he recommended the extension of the moratorium by one month. The former CEO Malta Enterprise agreed with that proposed. Notwithstanding this consensus, the NAO established that the request for an extension to the moratorium on the payment of rent, beyond September 2016, was not acceded to by Malta Enterprise. However, no further information was provided to this Office on the outcome of this internal discussion, with the former CEO MLSP contending that he was not involved in the matter since technical issues were handled by Malta Enterprise.
- 4.2.10 Given the reference to the inspection by the Health Inspectorate in the email by Cook & Co Ltd, the NAO sought further clarification from the Environmental Health Directorate on the matter. In a visit held on 16 August 2016, the Directorate noted several issues that warranted address. These included the provision of a restroom with an anteroom for patrons and the proper ventilation of the premises. In submissions to this Office, the Directorate clarified that no objection was raised regarding the siting of the restrooms adjacent to the food preparation areas, as long as the restrooms included an appropriately ventilated anteroom, as mandated by law. With respect to the lack of ventilation in general, the Directorate noted that although the matter regarding ventilation of the upper floor level was raised, the creation of new openings was not specifically required and that this shortcoming could be addressed through mechanical means. As regards the separate entry for the delivery of supplies, the Directorate indicated that, at the time of the visit, another access point for this purpose was already in place. No

specific recommendations were made by the Directorate in relation to the extraction fans to be installed in the kitchen since this was a technical issue that was to be guided by the engineer's report submitted and approved at the planning stage. Similarly, the Directorate noted that no comments were raised regarding restroom facilities for persons with a disability as this matter did not fall under its remit but that of the Commission for Persons with Disability.

4.2.11 The condition of the premises at the point of handing over by the MDH to Cook & Co Ltd was brought up in the judicial proceedings instituted by the parties in 2020. Of note was the judicial protest lodged by Cook & Co Ltd against the MDH on 9 January 2020, wherein the tenant referred to concerns relating to the leased premises raised in earlier legal proceedings and requested redress by the landlord in line with the lease agreement. Cited in the protest was that Cook & Co Ltd had invested €1,500,000 in the leased premises, which investment included works relating to infrastructure, plumbing, electricity, drainage, air-conditioning, and the purchase of kitchen equipment. In subsequent testimony given by Cook & Co Ltd during these proceedings, the deficiencies highlighted in paragraph 4.2.7 were reiterated, with the tenant claiming that it became aware of these issues only when it accessed the premises.

4.2.12 Elaborating on shortcomings noted at the premises, during court testimony Cook & Co Ltd stated that the electrical infrastructure installed was not to standard. Citing the wiring that was to feed the kitchen, Cook & Co Ltd argued that this was of inappropriate specifications and posed a fire hazard if not replaced. According to Cook & Co Ltd, following discussions with the MDH on the deficiencies noted, the latter indicated that should it undertake the required works a call for tenders would have to be issued. Given the circumstances, the tenant could more expeditiously carry out the required works to upgrade the electrical system. Cook & Co Ltd contended that it was in this context that the MDH agreed to reimburse the expenses incurred.

4.2.13 In subsequent submissions to the NAO, Cook & Co Ltd maintained that, in view of the works required, it had to store the equipment purchased for the premises until this could be installed. According to Cook & Co Ltd, the equipment was kept at the MLSP storage area for several months, with no charge levied in this respect. Cook & Co Ltd interpreted this as acknowledgement by Malta Enterprise that certain issues at the leased premises could not be addressed within the allocated timeframe to render the site operational. The CEO MLSP informed this Office that no record was traced relating to the temporary use of the MLSP's storage facilities by Cook & Co Ltd and noted that no payments were received in this respect.

4.2.14 In turn, in submissions to the NAO, Malta Enterprise contended that the premises was allocated to Cook & Co Ltd fully functional, with finishes including soffit, flooring and tiling, restrooms, internal walls and paintwork, an air-conditioning system, fire detection, hydrants and a fire extinguishing system, as well as internal and external doors. According to Malta Enterprise, problems arose when Cook & Co Ltd decided to effect structural alterations to create two distinct facilities at ground and first floor levels. That at ground floor was the Zenzero restaurant, while that at the first-floor level was the Tribute Lounge. Malta Enterprise noted that this layout was

not indicated in the bid submitted by Roots Integrated Services Ltd, for the visuals provided showed a restaurant with a double height ceiling and tables at both levels. The two levels were to be serviced with an internal staircase which, according to Malta Enterprise, was removed by Cook & Co Ltd to create two distinct facilities with different ambience and purpose. Nevertheless, the NAO noted that the plans and visuals submitted by Roots Integrated Services Ltd were indicative of the intent to alter the layout of the premises, with the introduction of a bar and a seating area at the upper floor level, and the siting of the kitchen at the ground floor level.

4.2.15 During court proceedings, the Architect Malta Enterprise referred to the substantial alterations to the leased premises made by Cook & Co Ltd, citing the relocation of the staircase and the layout of the restrooms as cases in point. He contended that these changes were the source of the problems with the drainage system at the premises.

4.2.16 In disclosures to the NAO, Cook & Co Ltd referred to the two-month deadline for commencement of operations set in the RfP and argued that this limited timeframe resulted in an impression that the site had already been prepared for the tenant to acquire the relevant licences necessary to operate the catering establishment. Cook & Co Ltd further contended that the MLSP had made certain omissions and representations that constituted a fraudulent inducement and gained an unfair advantage over the company when it was induced to enter into the lease agreement when the statutory mandates were not in place. Moreover, Cook & Co Ltd understood the RfP as affirmation that the premises was in line with the PA requirements.

4.2.17 The NAO noted that the planning application submitted by Malta Enterprise on 27 August 2015 – to regularise the change of use of the site indicated in the RfP from a childcare centre to a food and drink establishment – was not approved by the PA at the point of entry by the MDH and Cook & Co Ltd into the lease agreement, that is, on 20 May 2016. The planning permit was eventually issued on 24 August 2016.

4.2.18 For the premises to operate as a catering establishment, it required a licence from the MTA, which licence was to be issued in terms of the Malta Travel and Tourism Act (Chapter 409). Several conditions were to be met for the licence to be issued. These comprised that:

- a. the premises was covered by a planning permit;
- b. a Public Sewer Discharge Permit from the Water Services Corporation was at hand;
- c. clearance from the Superintendent of Public Health was obtained; and
- d. the following documents were submitted:
 - i. a detailed curriculum vitae of the chef or the operator;
 - ii. a copy of the proposed menu; and
 - iii. a certificate confirming installation of an alarm and fire extinguishers.

4.2.19 The NAO sought to verify whether and when each of these conditions were met. As indicated in a preceding paragraph, this Office confirmed that the relevant planning permit was issued on 24 August 2016. Noted was that, during the consultation process held with respect to the planning application, certain public authorities highlighted issues or conditions that the tenant was to adhere to or comply with to proceed with the project. In this regard, in correspondence dated 16 June 2016, the Environment and Resources Authority (ERA) requested the provision of plans and section drawings in relation to the exhaust and effluent from the kitchen/food preparation area and in connection with waste disposal. In addition, in a letter dated 23 June 2016, the Environmental Health Directorate listed several conditions subject to its non-objection, which related to adequate ventilation and sewage management.

4.2.20 Additional comments were also put forward by the Water Services Corporation, with the Corporation indicating that Cook & Co Ltd was to install a suitably sized grease trap to control effluent. In its consultation feedback, the Corporation remarked that prior to commencement of the activity, the tenant was to acquire a public sewer discharge permit as required by law and by the MTA. This permit was issued on 16 November 2016.

4.2.21 The clearance required by the Superintendent of Public Health was also subject to several conditions. Captured in the report submitted to the NAO by the Superintendence of Public Health – and as outlined by Cook & Co Ltd in its correspondence with Malta Enterprise – were deficiencies that warranted address before the clearance to operate was provided. Noted in the health inspection report was that another inspection was held on 1 November 2016 wherein it was ascertained that most of the requirements highlighted by the Superintendence were pending. Following the final inspection carried out on 24 November 2016, which served to confirm that the required works were concluded, approval by the Principal Health Officer was granted, with clearance subsequently issued on 25 November 2016.

4.2.22 Having satisfied all conditions, a temporary licence was issued by the MTA on 12 December 2016, following an inspection by an Executive Enforcement Officer, wherein all requirements were found to be met.

4.2.23 When queried as to whether Cook & Co Ltd had informed the MDH of the delay in commencement of operations, which delay would exceed the date stipulated in the lease agreement, that is, 1 September 2016, Cook & Co Ltd noted that the MDH was being continuously updated and it was in this context that the request for an extension of the moratorium on the payment of rent was made. Furthermore, Cook & Co Ltd contended that Malta Enterprise’s granting of storage facilities at no charge was an acknowledgement of the problems at the premises and tacit agreement that an extension to the moratorium was granted. In addition, Cook & Co Ltd maintained that the moratorium extended until end December 2016, that is, the point at which the equipment was removed from storage. This understanding by Cook & Co Ltd conflicted with the fact that an invoice for rent due was issued by the MDH for September 2016. Malta Enterprise insisted that the premises was ready for use at this point and that the problems

that arose were attributable to Cook & Co Ltd's decision to effect substantial alterations to the property.

4.2.24 Following the review of pertinent information, the NAO established that Cook & Co Ltd did not adhere to the requirement established in the lease agreement to commence operations by 1 September 2016. Nevertheless, this Office is of the opinion that the delay could not be solely attributed to Cook & Co Ltd for several defects were noted when assuming ownership of the premises, with necessary repairs extending beyond the term stipulated in the lease agreement. While Malta Enterprise initially acknowledged certain deficiencies, this stance was eventually revisited, with the current administration negating the claims by Cook & Co Ltd in this respect.

4.2.25 It is to be noted that the PA permit issued to Malta Enterprise for the change of use of the site from a childcare centre to a catering facility, was granted on 24 August 2016, that is, a week prior to the indicated date of commencement of operations. Furthermore, the planning permit was contingent on several conditions, resulting in the undertaking of works necessary to adapt the premises to its new use. The extent of works required to render the premises in line with the planning permit remained a contentious issue between Cook & Co Ltd and Malta Enterprise, with the former maintaining that some of the works arose from the poor workmanship originally undertaken, while the latter contending that the works resulted from decisions taken by the tenant relating to the level of use of the premises. Irrespective of that maintained by the parties, the NAO is of the understanding that it was unlikely for the works required to render the premises in line with the permit to be undertaken in the week that remained between the date of issuance of planning authorisation and the date of commencement of operations.

4.2.26 The prolonged process leading to the issuance of the planning permit inevitably delayed the securing of an operating licence from the MTA, with a temporary licence obtained on 12 December 2016, several months after the originally designated commencement date of 1 September 2016. This Office established that Cook & Co Ltd started operating the Zenzero restaurant in January 2017.

4.3 In some respects, Malta Digital Hub Ltd honoured its obligations as landlord; however, in some instances, it failed to abide by the provisions of the lease agreement, while in others the agreement was ambiguous rendering the assignment of responsibility complex

4.3.1 The leased premises was housed within the LS3, which block comprised two floors and an underground facility. A recreation/canteen facility, a kitchenette and restrooms were located on each floor, while a passenger lift serviced the two levels. The lease agreement listed several obligations that the MDH, as landlord, was to honour, be it in terms of the common areas and in respect of the leased premises. Regarding the common areas, the obligations borne by the MDH comprised its responsibility for the cleaning, upkeep and maintenance of these areas and ensuring compliance with health and safety standards. As to the MDH's obligations in

- respect of the leased premises, the landlord was to capture the condition of the premises at initial handing over to the tenant, approve any alteration works required, endorse such works on completion through an updated schedule to the agreement, and allow Cook & Co Ltd the peaceful and quiet enjoyment of the leased premises during the lease term.
- 4.3.2 The cleaning of the common areas was regulated through the MLSP Users' Manual, which specified that cleaning was to be undertaken daily. No concerns emerged in this respect.
- 4.3.3 In terms of the upkeep and maintenance of the common areas, the lease agreement specified that the MDH was to maintain the general plant and equipment of the MLSP and was obligated to provide the following services:
- a. general access and security;
 - b. passenger and goods lifts;
 - c. restrooms;
 - d. fire detection and firefighting equipment in the common areas, including water sprinklers, hoses and cylinders;
 - e. general signage; and
 - f. other amenities.
- 4.3.4 Further elaboration on the items that were to be maintained and the frequency of the inspections and tests that were to be carried out was noted in the MLSP Users' Manual. Regular inspection and repair, if necessary, was to be undertaken by the MDH to ensure that a safe working environment was maintained for all the users. In submissions to the NAO, Malta Enterprise indicated that the maintenance and upkeep of the MLSP was undertaken by an inhouse unit or through subcontractors.
- 4.3.5 In testimony given by Malta Enterprise in court proceedings, it was declared that the MDH undertook all necessary repairs with respect to the common areas. Notwithstanding this, Malta Enterprise indicated that Cook & Co Ltd often raised complaints in relation to the frequent faults that the lift registered. The lift formed part of the common area and was meant to serve all tenants within the LS3; however, it was used by the tenant's customers to access the upper level of the restaurant. Malta Enterprise contended that the lift was inappropriately used by patrons of the tenant when exceeding its carrying capacity. In submissions to the NAO, Malta Enterprise referred to the fact that, as part of the adaptation works undertaken, Cook & Co Ltd altered the layout of the leased premises resulting in the elimination of the planned internal staircase, which modification resulted in the heavier use of the lift and the emergency exit staircase to

access the first floor. Moreover, according to Malta Enterprise, Cook & Co Ltd did not install a goods lift or dumbwaiter, resulting in the use of the passenger lift to transport goods.

- 4.3.6 Malta Enterprise maintained that this inappropriate use explained the frequent breakdown of the lift, which was confirmed in a report drawn up by the third party responsible for its service. To address this issue, Malta Enterprise redirected the cameras in the common area towards the lift to verify the source of the faults and noted that the complaints by the tenant ceased shortly thereafter. Malta Enterprise highlighted that it bore the costs for the maintenance of the lift, even though Cook & Co Ltd had agreed to cover the cost of preventive maintenance after the lapse of the warranty period.
- 4.3.7 The matter concerning access to the first-floor level of the leased premises was also a contentious point to Cook & Co Ltd. Noted was that the RfP annexed to the lease agreement included plans that presented a staircase within the confines of the leased premises granting access to the first floor. Cook & Co Ltd affirmed that this internal staircase was never constructed by Malta Enterprise despite its inclusion in the plans. Moreover, the plans presented the passenger lift as accessed from within the leased premises, whereas in effect, access to this lift was through the common areas. According to Cook & Co Ltd, these factors necessitated the use of common area facilities to access its leased premises at the first-floor level.
- 4.3.8 Another maintenance-related concern raised by Malta Enterprise was the frequent blockage of the drainage system reported by Cook & Co Ltd. In disclosures to the NAO, Malta Enterprise argued that other tenants did not report similar problems despite heavier use of such facilities. In addition, Malta Enterprise contended that Cook & Co Ltd were responsible for causing such blockages through the failure to install a grease trap and macerator.
- 4.3.9 The granting of access to utilities to tenants was another obligation borne by Malta Enterprise. Correspondence exchanged between Cook & Co Ltd and Malta Enterprise reviewed by the NAO highlighted the concerns raised by the former in terms of the supply of water. In essence, Cook & Co Ltd sought a direct supply of water from the mains, while Malta Enterprise indicated that the water provided through the MLSP's reservoir was of adequate quality and consumption could be quantified through an inhouse meter. Nevertheless, Cook & Co Ltd provided the NAO with correspondence wherein Malta Enterprise informed the tenant that water levels at its reservoirs were low, noted that resort to mains supply was envisaged, and recommended that additional water tanks be installed by Cook & Co Ltd to ensure no disruption to the catering establishment. In addition to the points raised regarding supply, Cook & Co Ltd highlighted concerns with respect to the quality of water sourced from the MLSP reservoirs, maintaining that this was inadequate for a catering establishment, resulting in their request for direct supply from the water mains.
- 4.3.10 According to the MDH, in court submissions, the matter concerning the supply of water was addressed when the leased premises was connected directly to the main supply. The works

undertaken were at the expense of Malta Enterprise. Another utility-related matter raised by Cook & Co Ltd concerned the supply of electricity. Malta Enterprise maintained that the structural changes carried out by Cook & Co Ltd when creating two separate facilities resulted in a higher electrical demand. Correspondence reviewed by the NAO indicated that, when taking over the leased premises, Cook & Co Ltd were of the understanding that the electrical supply was sufficient to meet its requirements; however, the tenant subsequently revised this position, requesting a higher load. To address this issue, Cook & Co Ltd purchased the cable required for the upgrade of electrical supply, while its installation was undertaken by Malta Enterprise.

4.3.11 The MDH, as landlord, was responsible for the maintenance and upkeep of the general plant and equipment of the MLSP and the common areas. The NAO sought to establish whether any complaints were made by Cook & Co Ltd to the MDH in this respect. No concerns were brought to the attention of this Office by Cook & Co Ltd.

4.3.12 Also specified in the lease agreement was the MDH's responsibility to provide general signage. The specific obligations arising from the commitment to provide general signage remained unclear to the NAO. In submissions to this Office, Malta Enterprise indicated that its understanding of this obligation was that of displaying a list of tenants of the MLSP in its reception area, as well as on its website.

4.3.13 The NAO noted that the lease agreement prohibited Cook & Co Ltd from displaying advertisements anywhere on the premises and/or in the common areas. Nonetheless, the MDH could provide all tenants with a dedicated advertising space against payment. Following enquiries by this Office, Malta Enterprise indicated that no information regarding whether Cook & Co Ltd had sought such advertising was retrieved. However, Malta Enterprise noted that no payments were made in this respect. Nonetheless, Cook & Co Ltd had signage advertising the catering establishment at the leased premises and on the MLSP footprint, which was visible from the main road.

4.3.14 That stated by Malta Enterprise was confirmed in court testimony given by Cook & Co Ltd. Reference was made to three signs promoting its catering establishment – one on a main road in San Gwann, another at a nearby parking area, and one outside the restaurant – although the tenant contended that it was not allowed to otherwise advertise its restaurant within the MLSP. Cook & Co Ltd claimed that the MLSP had refused to provide it with appropriate public access to any sign promoting its business. Also noted by Cook & Co Ltd was that the restaurant was excluded from the list of tenants advertised within LS1, that is, the main block of the MLSP, notwithstanding that Cook & Co Ltd bore an obligation to provide F&B services to the other tenants within the Park.

4.3.15 In submissions to the NAO, Cook & Co Ltd asserted that it was prohibited from placing promotional material or menus at the MLSP reception area. Queried in this respect, the CEO MLSP informed the NAO that it was the Park's policy not to have any advertising material in its reception area. Nevertheless, he maintained that the MLSP had continuously encouraged tenants and other

event organisers at the Park to utilise the services of Cook & Co Ltd, and the MLSP itself had regularly utilised the services of this tenant when organising in-house events.

- 4.3.16 Another obligation that the MDH bore was that for health and safety in all common areas within the MLSP and to ensure that all shared equipment was in safe working order. These obligations were stipulated in the MLSP Users' Manual, which prescribed the responsibilities and duties of the landlord with respect to health and safety management. A Health and Safety Guide was also appended to the lease agreement, which document referred to all buildings within the MLSP. According to the MLSP Users' Manual, the MDH was committed to a high standard of health and safety management, including compliance with all the relevant legislation. The MDH was also responsible for executing directives and ensuring that all users within the MLSP followed applicable legislation.
- 4.3.17 Specified in this respect was the requirement to make available fire extinguishers, fire blankets and first aid boxes, and allocate a common treatment room. In correspondence submitted by Malta Enterprise to the MTA, as part of the documentation required by Cook & Co Ltd to obtain a licence for its catering establishment, Malta Enterprise confirmed that the LS3 was furnished with annually certified fire extinguishers, a sprinkler and a fire hydrant system. Noted was that the fire hydrant pumps ran on an essential generator and were located away from the main buildings in a designated pump area. The documentation submitted by Malta Enterprise in this respect comprised a handing-over certificate issued by a contractor on completing the installation of the fire detection, access control and security systems, thereby indicating that these obligations were fulfilled by the MDH.
- 4.3.18 In other correspondence submitted by Malta Enterprise to the MTA, it was confirmed that the catering establishment had a fire detection system, fire extinguishers and a fire hose reel installed. Noted was that the fire hose reel was connected to the main fire-fighting pumps situated at the LS4. In submissions to the NAO, Cook & Co Ltd expressed concern regarding the proper functioning of the fire hydrant located in the kitchen.
- 4.3.19 In its address of queries raised by the NAO, Malta Enterprise explained that health and safety was ensured through risk assessments of the MLSP facilities. In addition, maintenance work orders were issued when specific observations were noted during routine walk-arounds within the common areas.
- 4.3.20 In terms of the leased premises, the MDH was to document the state of the premises at handing over. This aspect was already addressed, with the NAO concluding that the condition of the premises was adequately captured in the lease agreement and its corresponding condition report. Regarding the subsequent works undertaken by Cook & Co Ltd, the MDH bore responsibility to approve the proposed works and ensure that these alterations to the site were reflected in schedules to the lease agreement. In submissions to the NAO following queries raised in this regard, the former CEO MLSP stated that he frequently visited the tenants within the Park and

discussed their requirements and progress in refurbishing the leased units. The former CEO MLSP further noted that an element of visibility over the works undertaken by tenants was captured through visits by the MLSP technical team. He also indicated that there were instances when the MLSP technical team directed the tenants on matters concerning changes to their leased units without him being consulted. Nevertheless, the former CEO MLSP contended that it was the tenants' responsibility to produce evidence of approval and to ensure that such documents were filed with their lease contracts. Elaborating in this respect, the former CEO MLSP stated that lease agreements entered into by the MLSP necessitated that unapproved works be reversed at the expense of the tenant at the end of the term. Regarding the requests for authorisation that ought to have been submitted by Cook & Co Ltd, the former CEO MLSP indicated that he had no access to relevant documents and could not advise as to what had been submitted.

4.3.21 In light of that stated by the former CEO MLSP, the NAO redirected queries to the CEO MLSP. In turn, the CEO MLSP informed this Office that no records were traced in the tenant's file regarding requests for approval submitted by Cook & Co Ltd for the works undertaken at the leased premises, or authorisations granted by the MDH, as landlord, as was specified in the lease agreement. Nevertheless, the CEO MLSP did not exclude the possibility that such requests were made directly to the former CEO MLSP. In support of this assertion, the CEO MLSP provided the NAO with correspondence dated 18 June 2016 wherein Cook & Co Ltd informed the former CEO MLSP that, following a meeting with Malta Enterprise's maintenance and technical personnel, the alteration works that were to be undertaken were agreed on. Cited in this respect was the opening of three doors, including a service door, the construction of two restrooms, the replacement of the internal staircase with another restroom designated for persons with a disability, the construction of a ceiling in the central area of the site, and the opening of a dumbwaiter in the anteroom of one of the restrooms. The former CEO MLSP approved these alteration works on 20 June 2016. On its part, Cook & Co Ltd informed the NAO that the former CEO MLSP was aware of the difficulties being faced by the tenant and that the approach adopted was that of solving the problems that arose and to later discuss possible compensation. While the approval by the former CEO MLSP of most of the works undertaken was acknowledged, the NAO noted that the procedure stipulated in the lease agreement for the sanctioning of alterations to the leased premises was more onerous and not adhered to in this regard.

4.3.22 Further commenting on the alteration works undertaken by Cook & Co Ltd, Malta Enterprise argued that deviations from the original plans as submitted in its bid could not be undertaken as these were tantamount to a change in specifications which would have necessitated a fresh call for tenders. The NAO deemed this argument invalid, for the lease agreement allowed for alterations to be made to the premises subject to prior approval and adherence to established procedures.

4.3.23 Aside from the works undertaken by Cook & Co Ltd, certain works that could arise remained the responsibility of the MDH. The lease agreement stipulated that any structural works necessary to render the premises compliant with any existing or future law or regulation, or any requirement

of any government department, local authority, or other public or competent authority or court of competent jurisdiction not emanating from the tenant's industrial sector were to be undertaken by the landlord. However, if the structural works required were directly related to the nature of the operations carried out or directly related to the particular industrial sector of the tenant, such works were to be executed by and at the expense of the tenant.

- 4.3.24 Therefore, the lease agreement made a clear distinction between the tenant's responsibilities to ensure that the premises was in line with the regulations governing the specific use of the premises, and those of the landlord, which were limited to the obligations emanating from the general regulations governing premises imposed by legislation and relevant authorities. Notwithstanding this, the lease agreement did not define that understood by works "of a structural nature". Common definitions put forward in this respect refer to works of a structural nature as relating to the maintenance, repair and replacement of building components and systems that provide support for the building or structure, including foundations, columns, walls, beams and roof systems.
- 4.3.25 Cook & Co Ltd maintained that there were several defects in the leased premises, mainly relating to its general structure and utility services that breached applicable regulations. The tenant contended that certain defects, such as those relating to the electricity and the drainage systems, were latent and could not have been reasonably identified. Since these defects affected the structure of the building, Cook & Co Ltd asserted that the rectification required was the responsibility of the MDH. Cook & Co Ltd informed the NAO that it had presented a report of its findings and concerns regarding the premises to Hon. Chris Cardona, then Minister for the Economy, Investment and Small Business. Although Cook & Co Ltd indicated that action was subsequently taken, it did not elaborate on the matter and later developments indicate that problems between the landlord and the tenant persisted.
- 4.3.26 Regarding drainage, Cook & Co Ltd stated that the restroom drains were of inadequate bore, which inevitably led to blockages. This claim was refuted by the CEO MLSP. In support of this stance, the CEO MLSP provided the NAO with a survey report undertaken in February 2019 by a third party which indicated that the diameter of the bore was larger than attested by Cook & Co Ltd and therefore adequate. In addition, the CEO MLSP contended that the cause of the constant blockages was attributable to the inappropriate disposal of cooking oil and wastepaper. The CEO MLSP supported this argument through the submission of photographic evidence sourced by Malta Enterprise in November 2018.
- 4.3.27 Other associated problems identified by Cook & Co Ltd were damaged pipes and pipes that were incorrectly patched or glued or blocked with cement and debris. Moreover, the tenant noted that there were no drainpipes laid in the kitchen. Furthermore, Cook & Co Ltd claimed that no water tanks were provided and no stopcocks were installed apart from one above the soffit. In addition, the water that was supplied from the reservoir to the leased premises required filtration as this was not potable.

4.3.28 Another issue identified by Cook & Co Ltd related to the electricity system installed. The tenant argued that this was defective since the distribution board did not have a mains circuit breaker for the different areas of the premises. Moreover, Cook & Co Ltd noted that the distribution board was located next to the kitchen's water supply, in breach of health and safety regulations. In addition, no electrical points were available in the kitchen.

4.3.29 Cook & Co Ltd also contended that mould was found in parts of the premises and asserted that this constituted a health hazard. A report by a third party engaged by Cook & Co Ltd referred to an onsite inspection wherein the extent of this problem was stated. In the report dated 26 February 2018 it was noted that the premises, particularly the back of house storage, kitchen and sanitary areas, were affected by rising damp, which was in turn causing damage to the walls and skirting. Also noted was that the problem did not appear to be localised to a particular wall but spread over a large part of the back of house of the premises. Impeding the assessment of this problem by visual inspection was the fact that several walls in this area were tiled over or covered by the kitchen. The report recommended that, in view of the nature of the activities carried out, the problem was to be urgently addressed to ensure food safety and prevent sanitary issues. In submissions to the NAO, Cook & Co Ltd indicated that the matter was raised with the former CEO MLSP, who noted that the problem with mould at the leased premises was due to the waterproofing layer being located one floor below ground level, thereby resulting in rising damp.

4.3.30 Another matter highlighted by the third-party report was a settlement crack identified on one of the external walls to the back of house, which defect caused the cracking of the tiling on the corresponding internal wall. Nevertheless, acknowledged in the report was that a detailed structural assessment was not carried out and that this crack was not of particular structural or safety concern and appeared to be localised to that area.

4.3.31 The NAO sought the views of the MDH in relation to that stated by Cook & Co Ltd regarding the landlord's obligation to undertake the necessary works. The incumbent management of Malta Enterprise dismissed all claims raised by Cook & Co Ltd in respect of the defects identified at the premises, citing that the lease agreement specified the handing over of the property on a tale quale basis. As justification for this stance, Malta Enterprise noted that the condition report appended to the lease agreement captured the state of the premises as leased to Cook & Co Ltd. Furthermore, Malta Enterprise argued that the claims raised by Cook & Co Ltd were never backed by any professional report or opinion, with the onus of proof unreasonably shifted onto Malta Enterprise. The NAO maintains an element of reservation in that correspondence exchanged internally within Malta Enterprise in August 2016 lent credence to the claims of poor workmanship and latent defects raised by Cook & Co Ltd, which resulted in the former CEO Malta Enterprise agreeing to extend the moratorium on the payment of rent by one month.

4.3.32 Cook & Co Ltd rebutted the argument made by Malta Enterprise, maintaining that in an agreement made under the tale quale provision, it is implied that the agreement is being entered into in good faith, and that dealings between the parties are fair and in accordance with the law.

- 4.3.33 Another obligation cited in the lease agreement related to the disposal of waste. Although Cook & Co Ltd was responsible for all its supplies, products, services and waste, and was to indemnify the MDH of such responsibility, the latter was obligated to facilitate waste disposal by allowing approved service providers access to the leased premises within the MLSP. Despite that information provided in this respect was scant, the NAO noted a declaration by a waste collector confirming that the waste generated by the restaurant was to be collected on a daily basis. This declaration was submitted to the MTA as part of the catering facility's licensing process. While Malta Enterprise highlighted some initial difficulties in relation to the disposal of waste by Cook & Co Ltd, it noted that these were subsequently resolved through the measures taken by the tenant.
- 4.3.34 According to the lease agreement, the MDH was to ensure the peaceful and quiet enjoyment of the leased premises by Cook & Co Ltd during the lease term. A concern raised by Malta Enterprise in respect of its broader responsibility to all tenants at the MLSP in ensuring the peaceful and quiet use of their premises related to the inappropriate use of the leased premises by Cook & Co Ltd. Malta Enterprise contended that Cook & Co Ltd infringed the permitted use of the premises as a catering establishment intended to serve the MLSP. The CEO MLSP indicated that this arose following events organised by Cook & Co Ltd at the Zenzero restaurant and the Tribute Lounge outside office hours. According to Malta Enterprise, Cook & Co Ltd were not allowed to use the first-floor level as a training venue, for this use required certification. When this matter was brought to the attention of the MLSP Board, as a possible breach of the lease agreement on grounds that such use was not permitted, the Board resolved to seek legal advice, the outcome of which was not referred to the NAO's attention. This concern of the MLSP contrasted with that stated by Cook & Co Ltd, in that the Park was aware of and indirectly consented to the use of the leased premises as a training venue when conceding parking spaces, at a charge, for participants. While the invoices raised in this regard did not specify the reason for which parking was required, Cook & Co Ltd maintained that it had always requested the approval of the MLSP prior to the hosting of such events at the leased premises and provided a list of attendees.
- 4.3.35 In court testimony given by the former CEO MLSP, he stated that he was aware that the first floor of the premises was open in the evening, and indicated that in the instances when he was present, it catered for private functions such as dinners or social functions. Apart from a few minor incidents, the NAO was not provided with documentation that the attention of Cook & Co Ltd was drawn to the inappropriate use of the premises. Nevertheless, the use of the leased premises as a nightclub or venue to host parties remained a point of contention to the incumbent management of Malta Enterprise, who argued that this was inconsistent with the use stipulated in the bid originally submitted by Roots Integrated Services Ltd and incorporated as part of the lease agreement. By way of background, the bid by Roots Integrated Services Ltd referred to the use of the first-floor level as a private lounge. Furthermore, Malta Enterprise argued that use as a nightclub caused damage to common areas adjacent to the leased premises and did not fit within the broader character of the Park.

- 4.3.36 In conclusion, the MDH, as landlord, bore obligations relating to the common areas of the MLSP. Certain obligations were met without concern, with cleaning, waste disposal and health and safety-related requirements as cases in point. Nonetheless, other aspects concerning the repair and maintenance of the site, the provision of utilities, and signage remained contended between the parties.
- 4.3.37 As regards repairs and maintenance, the MDH's concerns centred around the inappropriate use of common facilities by Cook & Co Ltd and the latter's inadequate adaptation of the leased premises to cope with its revised use. In turn, Cook & Co Ltd contended that there existed inconsistencies in the delineation of the common and leased premises, and that certain structural and infrastructural elements of the site were not appropriately planned for in terms of use as a catering facility.
- 4.3.38 The concerns regarding the adequacy of the leased premises to function as a restaurant extended to the supply of utilities. Malta Enterprise contended that the difficulties cited by Cook & Co Ltd in connection with the supply of water and electricity were due to the scale and scope of the operations at the leased premises as undertaken by the latter. On the other hand, Cook & Co Ltd maintained that the supply was inadequate irrespective of the extent of use.
- 4.3.39 One final aspect relating to the MDH's obligations in relation to the common areas was that of providing signage to its tenants. Contentions regarding the obligation borne by the MDH in this respect arose. While Malta Enterprise argued that it had fulfilled this obligation with Cook & Co Ltd as it had done with other tenants, Cook & Co Ltd maintained otherwise.
- 4.3.40 In terms of the obligations of the MDH over the leased premises, these mainly comprised ensuring that the condition of the premises, as leased, was retained. Should any adaptation works be required by the tenant, these were to be approved prior to their undertaking and logged as part of the contractual agreement on completion. The lease agreement stipulated the procedure that was to be followed in this respect. While the NAO was provided with evidence that authorisation for most of the works was sought by Cook & Co Ltd and provided by the MLSP, this Office maintains that these exchanges were not made in terms of the provisions stipulated in the lease agreement regulating the registration of adaptations to the premises. The assertion by the MDH that it was the tenant's responsibility to obtain its authorisation for the works carried out and to ensure that these were reflected in the lease agreement was deemed flawed by the NAO, for the MDH was, by its own admission, aware of the works being undertaken by Cook & Co Ltd. Therefore, the MDH, as landlord, and Cook & Co Ltd, as tenant, failed to adhere to the provisions stipulated in the lease agreement regulating the authorisation of such works.
- 4.3.41 Irrespective of concerns regarding the authorisation and registration of alteration works in terms of the lease agreement, another point of contention in connection therewith was whether these works were the responsibility of the MDH or Cook & Co Ltd. Central to the contention between

the parties was that although the lease agreement indicated that works of a structural nature were to be borne by the MDH, the agreement failed to define what constituted works “of a structural nature”. While certain works fell within this understanding, others were less evident, raising doubt as to which party was responsible. Other works could less clearly be defined as structural, but more infrastructural in nature, such as those undertaken in connection with the drainage and electrical system. The argument can then be made that the rectification of these infrastructural deficiencies gave rise to works of a structural nature and therefore responsibility was to be borne by the landlord. The latent nature of these deficiencies compounded matters even further.

- 4.3.42 Another complication was whether the change in use of the premises gave rise to additional works. Cook & Co Ltd argued that the deficiencies prevalent at the leased premises were not attributable to its use as a catering facility but would have arisen in case of any use, such as their basic nature. On the other hand, Malta Enterprise maintained that these deficiencies manifested because of other alterations made to the premises by Cook & Co Ltd and the extent of use thereof, and were therefore not the fault of Malta Enterprise.
- 4.3.43 The tale quale provision in the lease agreement and that no warranty was provided as to the adequacy of the premises in terms of its intended use served as further complications to this contractual relationship. The NAO is of the opinion that these conditions should have served as a further prompt to Malta Enterprise to disclose all information regarding the premises prior to entry into the lease agreement. In addition, this Office maintains that it was the responsibility of Cook & Co Ltd to ascertain the condition of the premises that was to be leased prior to contractual commitment, more so given this tale quale conditionality and the lack of warranty.
- 4.3.44 Finally, as regards the obligation of the MDH to ensure the peaceful and quiet enjoyment of the leased premises, no concerns were raised by Cook & Co Ltd. However, in respect of its broader responsibility to all tenants at the MLSP in ensuring the peaceful and quiet use of their premises, Malta Enterprise raised concern in relation to the inappropriate use of part of the premises leased to Cook & Co Ltd. Nevertheless, no documentation capturing the communication of this concern to this tenant was provided. Furthermore, the NAO noted that the lease agreement was silent in terms of the permitted use of the premises, other than that specified by Cook & Co Ltd in its bid.

4.4 Cook & Co Ltd did not honour several obligations set in the lease agreement, key among which were the undertaking of works without planning authorisation and in breach of procedures established in the agreement, operating without a licence, and the failure to settle rent and other dues

4.4.1 The lease agreement entered into by the MDH and Cook & Co Ltd on 20 May 2016 stipulated several obligations that the tenant was to adhere to. These obligations were varied in nature and related to different aspects of tenancy, such as the timely payment of rent, the maintenance of the leased premises in good condition, and compliance with relevant laws and regulations.

Permits and licences

4.4.2 Prior to commencing operations, Cook & Co Ltd was bound to obtain the permits and licences required to operate. With respect to its proposed activity as a catering establishment, permits and licences were to be sourced from two entities, that is, from the PA and the MTA, respectively. Both required clearance from other stakeholders prior to issuance.

The permit issued by the Planning Authority for change in use

4.4.3 In the weeks prior to the issuance of the first RfP, that is, on 27 August 2015, Malta Enterprise submitted a planning application under reference PA/2220/16 for a change of use of the site indicated in the RfP from a childcare centre (Class 2C) to a food and drink establishment (Class 4D).³ The location of the site was at the LS3, a building forming part of the MLSP. The applicant on behalf of Malta Enterprise was its Chief Financial Officer. The application indicated that the childcare centre occupied an area of 405 square metres.

4.4.4 A screening letter dated 5 October 2015 was submitted by MEPA to the Malta Enterprise project architect requesting several submissions required for a complete assessment of the proposed development. These included:

- a. a fire safety, ventilation and noise-mitigation report by a qualified and warranted engineer dealing with fire detection and fire safety measures, extraction system for cooking fumes and smells, and mitigation measures against nuisance to neighbours from noise emissions;
- b. a Tourism Policy Compliance Certificate from the MTA;
- c. a breakdown of parking provisions for the existing development to establish whether adequate parking was provided for in the proposed change of use;

³ The PA categories for commercial properties in Malta, issued in February 2014, define the activities and operations that are permitted under each class. Class 2C relates to education, with one particular use noted as 'kindergarten, creche, day nursery or day centre'. Class 4D corresponds to food and drink establishments where cooking is allowed.

- d. the original signed application form;
- e. a completed National Statistics Office Development Form; and
- f. the payment of fees due.

4.4.5 In submissions made to the NAO regarding the required planning permit, Cook & Co Ltd referred to the meeting held with Malta Enterprise on 14 January 2016, during which the site was seen. Cook & Co Ltd contended that, following enquiries made as to whether the premises was covered by the necessary permit, it was informed that all was in order in this respect. The NAO understood that this confirmation was provided to Cook & Co Ltd by the former CEO MLSP.

4.4.6 On 22 January 2016, Malta Enterprise was informed that the Tourism Policy Compliance Certificate and details of the parking provisions had not been submitted. MEPA granted Malta Enterprise a further four weeks to submit the information required and informed the applicant that failure to comply within the stipulated timeframe would result in the application being deemed withdrawn.

4.4.7 Further enquiries were made by the PA on 13 May 2016, with the Authority enquiring with Malta Enterprise's architect on whether it intended to proceed with the application. The pending information was to be submitted by 13 July 2016, as otherwise, the application would be considered as withdrawn by the applicant. On 15 May 2016, the Malta Enterprise architect informed the PA that the applicant was proceeding with the application; however, referred to the clearances from the MTA that were still pending.

4.4.8 Consultation letters were sent by the PA to the relevant authorities on 3 June 2016, with comments and/or recommendations solicited within 30 days. The authorities contacted were the Environmental Health Directorate, ERA, the National Commission for Persons with Disability, Enemalta, Transport Malta, the Water Services Corporation, the MTA, the Superintendence of Cultural Heritage, the Occupational Health and Safety Authority and the Civil Protection Department.

4.4.9 The MTA replied on 8 June 2016 and indicated that the Authority had no objections to the proposed change in use and had issued a Tourism Policy Compliance Certificate on 27 May 2016. This Certificate was issued in the name of the CEO MDH, who had submitted the application on behalf of the MDH, and allowed for the operation of a third-class restaurant named Zenzero.

4.4.10 In correspondence dated 16 June 2016, ERA requested plans and sections of several items, namely in relation to exhausts and effluents from the kitchen and the food preparation area, and to waste disposal. Specifically, the PA was requested to clarify:

- a. how exhaust and effluent from the kitchen and food preparation area were to be filtered, and the number and location of grease traps on site. This was to include details on how:
 - fumes from frying were to be filtered for the removal of oils and fats;
 - minor kitchen exhausts were to be treated and/or vented in such a way as to prevent odour nuisance and indicated that discharge from low level vents, such as wall grills, was to be above head height and directed upwards;
 - oils and fats from cooking were to pass through a grease trap prior to being discharged to the sewers; and
 - b. the location of a waste storage area, showing how waste with a high potential for odour generation was to be stored in a confined area to minimise odour.
- 4.4.11 The Environmental Health Directorate, in a reply dated 23 June 2016, indicated its non-objection subject to adherence to several conditions. These related to adequate ventilation and sewer management, namely:
- a. that the proposed restrooms leading to the food storage and preparation areas were to be provided with adequate ventilation and with an ante room. If natural ventilation was not possible, adequate mechanical extract ventilation was to be provided;
 - b. prior to use, the premises was to be connected to the main grid sewerage system, and provided with a supply of electricity and wholesome water from an approved source;
 - c. the height of the proposed food storage and preparation areas was not to be less than 2.29 metres;
 - d. the proposed grease or gully traps were to be located in the open air;
 - e. all food storage and preparation areas were to be adequately ventilated; and
 - f. adequate measures were to be provided for the hygienic disposal of refuse.
- 4.4.12 Related comments were put forward by the Water Services Corporation, whereby the Corporation necessitated the installation of suitably sized grease traps to control effluent. At any one time, the effluent could not exceed the 200 mg/l as per Legal Notice 139 of 2002, Limit of Fats and Greases. Moreover, a sampling point was to be provided for at the outlet of the grease trap. Receipts of cleaning and maintenance of the grease traps were to be retained and forwarded to the Discharge Permit Unit (a unit within the Water Services Corporation) as part of the application for the renewal of the Discharge Permit. Waste cooking oils were to be discarded through approved waste collectors. Likewise, receipts corresponding to waste transfer were to be kept and again presented to the Discharge Permit Unit when renewing the Discharge Permit.

Prior to commencement of operations, the operators were to acquire a Public Sewer Discharge Permit as required by law and the MTA. The permit for the discharge of effluent in the public sewer required for licensing purposes was issued on the 16 November 2016.

- 4.4.13 Following the conclusion of the consultation process, the PA submitted its assessment of the application. The case officer report indicated that the proposed change of use from a Class 2C childcare centre to a Class 4D food and drink establishment was in conformity with the North Harbour Local Plan, which designated the site as an industrial estate where Class 4D use was permitted without any floor space restrictions. Also stated in the report was that the proposed Class 4D food and drink establishment at ground and first floor levels occupied a total area of approximately 50 square metres (including the kitchen and the sanitary facilities). The proposed internal modifications were also deemed to be in line with the North Harbour Local Plan, in that the proposed use was to serve the employees of the operating building, and therefore considered ancillary to the existing facility. The report also noted that the proposed ventilation system as described in the ventilation report was favourably considered, as were the measures with respect to noise emissions. In view of this, the case officer recommended the application for approval. The NAO noted that the 50 square metres cited in the case officer's report differed from the dimensions of the site stated in the RfP (413 square metres) and that indicated in the planning application (405 square metres).
- 4.4.14 The PA approved the application on 24 August 2016. A full development permission for the site's change of use from a childcare centre (Class 2C) to a food and drink establishment (Class 4D) was issued on 25 August 2016, subject to several conditions, namely:
- a. the permit was valid for five years and the development was to be as specifically indicated on the approved drawings;
 - b. the premises was to be used as a catering establishment for the preparation and sale of hot or cold food and drinks, or consumption on the premises where cooking is allowed;
 - c. a Final Compliance (Completion) Certification, verifying that the development was carried out in full accordance with the approved drawings, documents and conditions imposed in the permit was to be submitted;
 - d. the conditions imposed by the Environmental Health Directorate, as listed in correspondence dated 23 June 2016, were to be adhered to by the applicant; and
 - e. the conditions imposed by the Water Services Corporation, which mainly required the installation of suitably sized grease traps to control effluent, and the securing of a Public Sewer Discharge Permit as required by law and by the MTA prior to the commencement of activities were to be addressed.

4.4.15 In conclusion, the lease agreement stipulated a three-and-a-half-month period between entry into the lease agreement and the operational start-up date. The NAO noted that the permit relating to the change in use of the leased premises was obtained by Malta Enterprise within this period, hence regularising the use of the premises as a catering establishment.

The permit issued by the Planning Authority for structural alterations

4.4.16 On 29 November 2016, Cook & Co Ltd submitted a request to the PA to carry out minor amendments to the internal layout of the premises. This request for minor amendments was made in terms of the planning application that catered for the change of use of the premises and that was approved by the PA a few months prior. The NAO's review of the plans available online indicated that the amendments mainly comprised the shifting of the kitchen from the first floor to the ground floor, the inclusion of additional tables, the relocation of the restrooms at both levels, and the installation of a bar at the first floor.

4.4.17 Providing an element of context to the submission for the sanctioning of minor amendments made in November 2016, Cook & Co Ltd maintained that delays were hindering progress while the process of seeking planning clearance remained under the control of the MLSP. To this end, Cook & Co Ltd requested the release of the MLSP architect to engage its own architect to see this process of sanctioning through. The architect engaged by Cook & Co Ltd confirmed that responsibility for the required sanctioning was delegated to him by the architect acting on behalf of Malta Enterprise.

4.4.18 The architect acting on behalf of Cook & Co Ltd in its application for the sanction of minor amendments indicated that the plans and visuals provided by Cook & Co Ltd in the bid did not feature a ceiling between the ground and first floor area of the part of the premises characterised by double height. The architect noted that this was later requested by Cook & Co Ltd to increase the space available and accommodate additional tables. The architect considered this a minor amendment to the permit issued by the PA covering the change of use.

4.4.19 The NAO had limited visibility over the events that ensued following the request for alterations to the premises submitted by Cook & Co Ltd to the PA on 29 November 2016. However, glimpses into the developments that occurred pursuant to this submission emerged in court testimony and through meetings held by this Office with the involved parties.

4.4.20 Relevant to this process was documentation presented during court proceedings by the architect engaged by Cook & Co Ltd. In correspondence submitted by the architect to the PA on 4 December 2017, he provided further details on the amendments being requested. This correspondence was triggered following a request raised by the PA case officer on 1 December 2017 to discuss the proposal. The architect representing Cook & Co Ltd contended that the changes proposed to the internal configuration of the premises were not to have any effect on the scale and scope of the operation already approved in the original application under

reference PA/2220/16. Moreover, the architect informed the PA that the changes for which approval was sought had been approved by the landlord given that they did not impinge on the external appearance of the building.

- 4.4.21 On 5 December 2017, the architect informed Cook & Co Ltd about the feedback received from the PA regarding the application for the sanctioning of minor amendments. This correspondence was presented in court proceedings. In essence, the architect indicated that during the process for the change in use of the property, from a childcare centre to an F&B establishment, consultation with external bodies was waived on the premise that the outlet (indicated as measuring 50 square metres) fell below a certain area threshold (clarified as 75 square metres during court testimony). Moreover, referring to discussions held with the PA team responsible for assessing the original application, the architect noted that “certain aspects such as parking provision were glossed over, through some inventiveness.” According to the architect, the PA was interpreting the request for minor amendment, which included the roofing of the double height area to increase the floor space at the first-floor level, as an extension of the retail area. The PA indicated that this would result in an area that exceeded the threshold and that consultations could not be waived again. Since the minor amendment process did not allow for consultations, the PA proposed the withdrawal of the request made and the submission of a full development application instead so that what was not assessed in the original change of use application be assessed at this juncture.
- 4.4.22 The matter was followed up by the architect in correspondence to Cook & Co Ltd dated 12 December 2017 and 14 December 2017, also submitted as part of the court proceedings underway, wherein he requested direction on the way forward. In court testimony, the architect maintained that no reply was received from Cook & Co Ltd and that the application remained pending.
- 4.4.23 Of note to the NAO was that stated by Cook & Co Ltd during court testimony in that following the submission of this application for minor amendment, the tenant’s architect was informed by the PA’s case officer that he did not wish to work on this case anymore “because there is a lot of inventiveness in this case”. Based on that stated in the testimonies provided by Cook & Co Ltd and the architect acting on its behalf, the NAO understood that the concern expressed by the PA case officer related to the substantial difference between that originally applied for and that approved. Another complication that emerged in this respect was that the increase in floor area by an additional 40 square metres, was not being considered in terms of the true extent of the leased premises, that is, around 400 square metres, but was being considered in terms of a far reduced approved area of 50 square metres and therefore could not be considered as a minor amendment. Furthermore, the discrepancy in terms of the site area as originally approved exempted certain consultations with third parties and the imposition of requirements that scaled with the extent of the operation, such as parking.

4.4.24 The planning permit for the change of use cited an area of 50 square metres, which was incongruent with the actual size of the premises, that was over 400 square metres. In court testimony, a representative of the PA explained that, in applications submitted with respect to restaurants, only the customer floor space was considered by the Authority. In this case, the PA representative asserted that the total customer floor space was 43 square metres and noted that since the application was for a canteen, no additional parking spaces were required.

4.4.25 Exacerbating matters was that part of this discrepancy emerged as a result of the fact that Cook & Co Ltd, by its own admission during court proceedings, affirmed that the works sought through their 29 November 2016 application had already been carried out, despite that no permit for such works had been issued.

4.4.26 In submissions to the NAO, Cook & Co Ltd argued that they were misled by the MDH's admissions and representations in several respects, particularly when citing a premises measuring 413 square metres in the RfP, that the permit for a catering establishment was not issued at the time of award and that it only covered an area of 50 square metres. Furthermore, during court proceedings, Cook & Co Ltd maintained that it became aware of the discrepancy in site area during a meeting held on 6 June 2018 at the MLSP. According to Cook & Co Ltd, during this meeting, the landlord was represented by the CEO MLSP and other officials of Malta Enterprise and the MLSP.

4.4.27 This discrepancy in area prompted Cook & Co Ltd to seek another meeting with Malta Enterprise; however, despite attempts, these proved to no avail. Consequently, Cook & Co Ltd lodged a judicial protest on 4 July 2018, highlighting issues relating to the lack of a planning permit and licence for the premises and identified several structural and utility-related deficiencies. Following the submission of this judicial protest, a meeting was held between Malta Enterprise and Cook & Co Ltd. According to subsequent testimony provided by Cook & Co Ltd, during this meeting, Malta Enterprise acknowledged that the indicated 50 square metres was erroneous and that corrective action was to be taken. Present for this meeting were the former CEO Malta Enterprise and the COO MLSP as well as representatives of Cook & Co Ltd and its legal counsel. Cook & Co Ltd maintained that, during this meeting, the parties agreed that an architect was to be engaged to regularise the situation, with the relevant professional fees borne by Malta Enterprise or the MDH. In view of the lack of developments, on 3 December 2018, Cook & Co Ltd submitted an official letter through which it sought that the MDH obtain a planning permit for the leased premises, grant direct access to the passenger lift, ensure a reliable supply of potable water, install a goods lift and undertake the required drainage works. In further submissions made during judicial proceedings, Cook & Co Ltd acknowledged that the architect engaged had passed away and that his son subsequently stepped in to undertake this assignment around March/April 2019. Of note to the NAO was the testimony by Cook & Co Ltd regarding the feedback provided by the newly engaged architect, who allegedly claimed that "this is all a hoax". Pressed to clarify that intended, Cook & Co Ltd indicated that the architect insisted that an application for a restaurant was necessary, otherwise he was unwilling to proceed. Cook

& Co Ltd further testified that it was not informed of subsequent developments; however, a planning notice was affixed to the premises in June 2019. An element of corroboration was provided by the CEO MLSP, who provided the NAO with an excerpt of the minutes of the MLSP Board meeting held on 16 April 2019. During this meeting, the Board resolved that the MLSP was to obtain a planning permit sanctioning the use of the premises leased by Cook & Co Ltd as a restaurant.

4.4.28 Based on the review of the source documents (the RfP, the planning application originally submitted by Malta Enterprise and the PA case officer report), the NAO ascertained that the error regarding the gross discrepancy in terms of the area of the site was not attributable to Malta Enterprise. In the application originally submitted by Malta Enterprise to the PA, for the change of use of the premises, the area earmarked was of 405 square metres. This effectively tallied with the 413 square metres cited in the RfP. However, in the PA case officer report dated 15 June 2016, the following was cited, “The proposed Class 4D food and drink establishment at the ground and first floor levels, occupies a total area of approx. 50sqm (including the kitchen and the sanitary facilities) (drwgs. 1G-H).” In the NAO’s understanding, it is at this point that the discrepancy regarding the area of the site emerged. Requested to confirm this understanding and elaborate on the source of the discrepancy, the PA informed this Office that the drawings submitted as part of PA/2220/16, referred to above, indicated a total area of 221 square metres. The PA also referred to a subsequent planning application for the regularisation of structural changes, bearing reference PA/3688/19. This application included an extension to the premises with additional floor space of 41 square metres and an outdoor area of 138 square metres. The PA noted that, in total, the area of the premises was approximately 400 square metres and acknowledged that this was in line with the original planning application. In sum, the PA conceded that the area of the premises originally approved was erroneous; however, maintained that despite the misquoted scale of the proposal, the assessment in terms of land use planning remained valid. While the origin of the error was traced to the PA, the NAO is of the opinion that Malta Enterprise, in its role as the applicant for planning permission, had visibility over the outcome of the process, and could have exercised greater diligence in ensuring that the permit granted reflected that applied for and that advertised in the RfP.

4.4.29 The NAO established that the process relating to the regularisation of structural alterations carried out by Cook & Co Ltd at the leased premises proceeded on a different course when, on 18 January 2019, Malta Enterprise submitted a development planning application to the PA, assigned reference PA/3688/19. The application was for the sanctioning of internal alterations and an extension at first floor level. The area of the site was 233 square metres. Details of the works for which planning permission was being sought were the following, the:

- a. replacement of the internal stairs at ground floor level with a restroom;
- b. redesignation of another restroom as a store;

- c. relocation of the kitchen from the first floor to the ground floor;
 - d. relocation of the counter area to the front of the premises;
 - e. replacement of the stairwell on the first floor with restrooms;
 - f. setting up of a bar area;
 - g. utilisation of the area originally planned as a kitchen as a seating area; and
 - h. creation of another floor through the splitting of a double-height area to expand the seating area.
- 4.4.30 An amended fire safety, light, noise mitigation and ventilation report was also submitted to the PA. The report, dated 23 April 2019, provided an assessment of the premises in respect of possible risks and hazards. It is to be noted that although at the time of the report the catering establishment was in full operation, it identified several shortcomings that warranted address, such as the need for a self-closing fire rated door between the kitchen and the rest of the premises and an automatic fire alarm system installed throughout the premises. Possible other locations for the installation of fire extinguishers were also identified. With respect to air ventilation, noted in the report was that the first-floor level lacked adequate aeration and the installation of an active system to achieve the required air changes was recommended. The PA deemed the submission of all documentation as complete on 24 May 2019, following which, on 27 May 2019, the Authority sought the clearance of several stakeholders.
- 4.4.31 The Environmental Health Directorate lodged an objection regarding Malta Enterprise's failure to provide the required documents, sketch plans and information pertaining to the premises. Nevertheless, this objection was taken over by events as, on 11 July 2019, the PA requested Malta Enterprise to clarify several matters. One matter related to the outside catering area, with the PA enquiring whether this was covered by a permit. In reply, on 14 August 2019, Malta Enterprise revised its application to include the sanctioning of the outdoor catering area, in addition to the internal alterations and extension at first-floor level. The inclusion of the outdoor area was deemed a material change by the PA on 20 August 2019, hence necessitating a fresh round of review and consultation with stakeholders. A charge was raised by the PA in relation to the planning process, with an invoice submitted to Malta Enterprise on 16 August 2019 for the amount of €1,987 in connection with development and environment fees, including the street and sewer contribution. This amount was settled on 10 September 2019.
- 4.4.32 Following the second round of consultation with stakeholders, an objection was raised by the Commission for the Rights of Persons with Disability due to several shortcomings. However, this objection was withdrawn following revisions to the plans. The Environmental Health Directorate's

failure to comment on the new plans was considered a non-objection on its part. Transport Malta also did not object; however, imposed a number of conditions in terms of the placing of tables and chairs in the outside area.

- 4.4.33 In the PA case officer's report dated 29 November 2019, reference was made to the fact that since this application entailed the sanctioning of a development, a fine of €2,633 was payable prior to the issuing of a permit. According to the case officer, although the description of the proposal included the 'installation of shading structures (umbrella and canopy)', these were not indicated in the layout plans submitted. The case officer also noted that no objections were received from the statutory consultees, although the Water Services Corporation imposed several conditions to be adhered to. With respect to zoning issues, noted in the report was that the sanctioning did not infringe the zoning of the area and the North Harbour Local Plan. Furthermore, the outdoor catering area proposed for sanctioning was in line with the relevant standards and policies. Moreover, the report noted that the MTA and Transport Malta had not objected to this proposal. In view of the above, the case officer recommended the application for approval; however, the placing of the canopies, umbrellas and ancillary structure was not permitted unless expressly indicated in the approved drawings.
- 4.4.34 According to the minutes of a PA Planning Commission meeting held on 16 December 2019, Malta Enterprise was to submit details of the shading devices as proposed in the plan and elevation within 15 days. Minutes of a subsequent meeting held on 9 January 2020 indicated that Malta Enterprise had revised the drawings; however, further information was to be provided in terms of the materials to be used. A revised project description was also to be included. These additional submissions resulted in revisions being made to the PA case officer report, with revised plans referred to the PA Planning Commission and the Environmental Health Directorate for clearance on 10 January 2020. The PA Planning Commission met again on 23 January 2020 wherein the project was approved and an updated report by the case officer dated 20 January 2020 was endorsed. Following approval, Malta Enterprise paid the fine of €2,633 imposed by the PA on 31 January 2020.
- 4.4.35 A non-objection was issued by the Environmental Health Directorate on 2 March 2020. The non-objection was subject to several conditions, mainly that the volume of the food preparation on site was to be commensurate with the size of the kitchen, a suitable patrons' restroom was to be provided, restrooms leading to food rooms as well as food rooms and food stores were to have adequate ventilation, while ante rooms were not to be used as a passage way for foodstuffs. The height of the proposed food rooms was not to be less than 2.4 metres. The proposed grease traps were to be located in the open air, while adequate measures were to be provided for the hygienic disposal of refuse. Following this submission by the Environmental Health Directorate, the executable full development planning permit was issued by the PA on 13 March 2020. Clearance was subsequently obtained from the Water Services Corporation and Transport Malta on 20 March 2020 and 24 June 2020, respectively.

4.4.36 In submissions to the NAO, Malta Enterprise contended that the delays experienced in relation to the sanctioning of the structural alterations made by Cook & Co Ltd were attributable to the tenant. The CEO Malta Enterprise referred to the testimony of the architect engaged by Cook & Co Ltd, wherein the latter had indicated that his inquiries with the tenant on whether to withdraw the minor amendment application and proceed with the submission for a new full development permit remained unaddressed. According to Malta Enterprise, Cook & Co Ltd also failed to pay the architect engaged to submit the new design plans required by the PA. Consequently, Malta Enterprise settled these dues to facilitate matters. The CEO Malta Enterprise indicated that, in view of the inaction of Cook & Co Ltd, Malta Enterprise assumed responsibility for the sanctioning of the premises. Following the settlement of the relevant professional fees, the architect originally engaged by Cook & Co Ltd forwarded the relevant plans enabling Malta Enterprise to submit a planning application through its own architect. This was confirmed by the architect originally engaged by Cook & Co Ltd during court testimony.

4.4.37 When queried by the NAO as to the reasons why Malta Enterprise took ownership of the planning application for the sanctioning of the internal alterations, the extension of the first-floor level and the outside catering area, despite Cook & Co Ltd being the tenant and having already undertaken these works, the CEO MLSP informed this Office that during the Board meeting of 16 April 2019, the MLSP decided to initiate legal proceedings against Cook & Co Ltd and assume responsibility for the permit application process. According to the CEO Malta Enterprise, the Board's primary concern motivating this decision was to rectify the fact that the restaurant was not covered by a planning permit. Queried by the NAO as to whether Malta Enterprise raised requests for reimbursement with Cook & Co Ltd for expenses incurred in securing the planning permits, Malta Enterprise confirmed that no charges were levied in this respect.

4.4.38 On the other hand, Cook & Co Ltd informed the NAO that when notified by its architect of the problems in its application for the sanctioning of minor amendments and the recommendation to seek a full development permit, it indicated to the architect that the matter would be discussed by Malta Enterprise. According to Cook & Co Ltd, following the exchange of correspondence, the parties agreed that the planning process would be taken over by Malta Enterprise. In court testimony, Cook & Co Ltd contended that Malta Enterprise agreed to cover the cost of the architect engaged to sanction the irregularities in terms of the planning permit covering the premises. The irregularities related to discrepancies in the dimensions of the premises and the structural works already undertaken. Moreover, Cook & Co Ltd maintained that in its understanding and in accordance with the RfP, its responsibility was solely as the operator of the premises and that it was not responsible to obtain the necessary permits, which responsibility rested on the MLSP as landlord. In disclosures to the NAO, Cook & Co Ltd reiterated that it became aware of problems with respect to the planning permits for the site towards the end of 2017. Moreover, Cook & Co Ltd claimed that it was previously informed by the MDH that the relevant permit was in order.

- 4.4.39 By way of conclusion, multiple concerns emerge in the NAO's review of the sanctioning of the works undertaken at the leased premises. The origin of the matter can be traced back to the initial attempt by Cook & Co Ltd to regularise the 'minor amendments' to the internal layout of the premises. This attempt drew attention to the discrepancy in terms of the area of the site, which was not in conformity with the planning permit in hand that covered the change in use of the premises from a childcare centre to a catering establishment, as well as the extent of the structural alterations carried out. As regards the discrepancy in the area of the leased premises, the NAO established that this incongruence was not attributable to Malta Enterprise or Cook & Co Ltd, but erroneously arose during the planning application screening process undertaken by the PA. Based on the documentation reviewed, this Office understood that Malta Enterprise and Cook & Co Ltd initially appeared unaware of this error.
- 4.4.40 The NAO is less tolerant of the structural alterations to the leased premises carried out by Cook & Co Ltd without the prior sanctioning of the PA. The lease agreement stipulated a mechanism that was to be followed when the tenant sought to effect changes to the premises, a process that required the landlord's authorisation and that ought to have resulted in the documentation of any works undertaken. While this Office reviewed correspondence whereby the authorisation of the MDH was sought and secured, this exchange did not cover all the works undertaken by Cook & Co Ltd. Even in the case of works that were authorised, the procedure outlined in the lease agreement for sanctioning and registration was not followed.
- 4.4.41 Aggravating matters was that, despite the partial endorsement of Malta Enterprise, Cook & Co Ltd failed to obtain the planning permit required from the PA prior to undertaking the works. The argument put forward by Cook & Co Ltd, that its role as specified in the RfP was merely that of an operator and did not include the responsibility to obtain the necessary permits, was deemed incorrect by the NAO. The RfP as bid for by Cook & Co Ltd stipulated that the tenant was to "Provide all necessary permits to operate the facility/ies". Cook & Co Ltd's stance when arguing that its role was merely that of an operator was rendered incongruent by the fact that it had carried out all the works to the leased premises knowing that these required sanctioning.

Licences from the Malta Tourism Authority

- 4.4.42 For a premises to operate as a catering establishment, its operator is required to obtain a licence from the MTA in accordance with the Malta Travel and Tourism Services Act (Chapter 409). This Act defines a 'catering establishment' as "any building, premises or other establishment, including kiosks, howsoever described, purveying for reward food and, or, beverages including wines and spirits, for consumption."
- 4.4.43 Documentation obtained by the NAO from the MTA indicated that an application for a catering establishment licence dated 6 May 2016 was filed with the Licensing Administration Section on 18 May 2016. Although the section corresponding to the operator's details was not completed,

specified in the signature sheet of the form was that the application was being made by the CEO MDH on behalf of Cook & Co Ltd. A receipt for the application fee of €47 was issued by the MTA on 6 July 2016. Of note is that the application submitted by the MDH to the MTA was dated 6 May 2016, that is, post referral of the award of tender to the Malta Enterprise Board of Directors (12 April 2016), yet prior to the notification to Cook & Co Ltd (17 May 2016).

4.4.44 According to the Catering Establishments Regulations (Subsidiary Legislation 409.15), catering establishments are classified into five designations, namely, restaurants, snack bars, bars, nightclubs and discotheques, and kiosks. Restaurants are further classified into three classes – first, second or third. Schedule 2 of the Regulations provides details of the standards that a restaurant is to comply with to adhere to its classification.

4.4.45 For an operating licence to be issued, the MTA was to carry out an inspection to verify that the premises respected the class standard for which the licence was applied for. Irrespective of classification, catering establishments were required to have adequate space for the storage of waste, which could not be placed outside catering establishments. Furthermore, licensees of catering establishments were to be in possession of a fire safety certificate issued by a competent authority confirming compliance with fire safety standards. A separate permit was required if loud music or musical instruments were to be played on the premises. Following queries by the NAO, the MTA informed this Office that no such permit was sought.

4.4.46 In respect of the application submitted by the MDH, dated 6 May 2016, the operating licence sought was for a third-class restaurant. The requirements that were to be met for the issuance of a third-class restaurant licence included that the premises had a façade in good condition and that was adequately maintained, displaying the name and menu of the establishment. Deliveries were to be made in a way not to disrupt or interfere with clients and if an open space was to be provided, sun shading was required during the day in summer. In addition, the establishment was to have a non-slip kitchen floor, and a worktop and shelving made of anticorrosive and innocuous materials. The kitchen was to have separate sinks for the washing of food and equipment with hot- and cold-water supply, as well as a wash-hand basin. In addition, the premises was to have natural and/or mechanical ventilation. However, since the licence applied for was that of a third-class restaurant, the premises did not require a lift (given that it was less than three storeys), the provision of a credit card payment service, and the availability of cloakroom facilities or a lounge area. Furthermore, the premises bore no obligation to have air conditioning or heating systems, a bar counter or separate restroom facilities. Nevertheless, the application form stipulated the submission of supporting documentation, which included a recent police conduct and a copy of the identification card of the applicant, a site and layout plan of the premises certified by an architect, photos of the façade, the pertinent Lands Authority permit, a copy of the memorandum and articles of association if the applicant was a company and a document indicating the rental value of the bar area of the premises (which document was to be in the form of a lease agreement or a declaration by an architect).

- 4.4.47 Submitted by the MDH with its application for an MTA licence was a declaration dated 16 May 2016 that specified the rental value of the establishment. This declaration, compiled by an architect engaged by Cook & Co Ltd, indicated that the area of the proposed cafeteria was approximately 290 square metres and was to be rented at €25 per square metre per annum. Of note to the NAO was that this rate differed from that specified in the contract, which rate was established at €35 per square metre.
- 4.4.48 On 27 May 2016, the MTA informed the MDH that its application for a licence to operate the catering establishment Zenzero restaurant was accepted and was to be processed in accordance with the relevant procedures. The MTA appended a Tourism Policy Compliance Certificate, dated 25 May 2016, in its correspondence to the MDH, required by the latter to proceed with the application when applying for clearance from other departments and authorities. Nonetheless, the MDH was informed that the Compliance Certificate was not tantamount to an operating licence, which could only be issued following the submission of the required documentation and inspection of the premises by the MTA's officials to ensure conformity with the established standards. The required documentation cited in the letter, comprised:
- a. a copy of the planning permit, including the approved plans;
 - b. clearance from the Superintendent of Public Health;
 - c. a public sewer discharge permit from the Water Services Corporation;
 - d. a detailed curriculum vitae of the chef or the operator;
 - e. a copy of the proposed menu; and
 - f. a certificate confirming installation of an alarm and fire extinguishers.
- 4.4.49 A copy of the full development permission dated 25 August 2016, corresponding to the change of use of the premises from a childcare centre to a food and drink establishment, was submitted to the MTA by the architect engaged by Cook & Co Ltd on 29 November 2016. The permit was subject to several conditions, one of which was the need for a Final Compliance (Completion) Certification, verifying that the development was carried out in full in accordance with the approved drawings, documents and conditions imposed in the permit. Another condition was that the operator was to adhere to any obligations imposed by the Environmental Health Directorate and the Water Services Corporation.
- 4.4.50 In terms of the requirements set by the Environmental Health Directorate, a non-objection by the Superintendent of Public Health was submitted to the MTA on 28 November 2016, listing several conditions that the catering establishment was to abide by. Aside from conditions related to the storage of food stuffs, specified in the correspondence was that no structural alterations

were to be carried out at the premises unless the competent authorities, including the health authorities, were duly consulted. Of note to the NAO is that, at the point of the submission of this non-objection by the Superintendent of Public Health, the premises was not conformant with the issued planning permit given that structural works were being undertaken at the time, which works were not covered by such permit.

4.4.51 An element of context to the non-objection issued by the Superintendent of Public Health was noted in documentation reviewed by the NAO, mainly in the form of reports submitted by the Office of the Superintendence and in correspondence exchanged between Cook & Co Ltd and Malta Enterprise. Captured in this documentation was that several deficiencies warranted address before Cook & Co Ltd could obtain clearance to operate. These deficiencies came to light through a site inspection carried out by a health inspector on 16 August 2016, whereby reference was made to the need to provide for patrons a restroom with an anteroom and to have the premises properly ventilated. Also noted in the report was that the walls required plastering and painting, missing floor tiles were to be replaced, light fixtures were to be shielded, and insect control measures were to be implemented. In addition, the health inspector's report referred to the need for a wash-hand basin supplied with hot and cold water together with hand washing and drying facilities. Other requirements cited comprised separate sinks for the washing of utensils and food, wall signs to be affixed, the provision of a first aid box and a covered bin, and temperature gauges for all fridges and freezers. As noted in the subsequent health inspector reports drawn up, all these requirements were adhered to by 24 November 2016, following which clearance was issued by the Environmental Health Directorate on 25 November 2016.

4.4.52 Another requirement for the issuance of a licence by the MTA was a permit by the Water Services Corporation for public sewer discharge. This permit was issued by the Water Services Corporation on 16 November 2016 and was valid for a year from this date. The permit was subsequently submitted to the MTA.

4.4.53 Another condition imposed by the MTA was the submission of the proposed menu. On 28 November 2016, Cook & Co Ltd submitted a copy of menu of Zenzero restaurant to the MTA.

4.4.54 On the same day, Malta Enterprise submitted documentation to the MTA in connection with the installation of an alarm and fire extinguishers at the LS3. The documentation included a declaration by officers of the Maintenance and Technical Section of Malta Enterprise, dated 18 November 2016. According to the declaration, the building where the restaurant was sited was furnished with fire extinguishers, a sprinkler system and a fire hydrant system. Attached to the declaration was a handing-over certificate issued by the contractor who installed the fire detection and alarm system, listing all the items that were on site. Of note was that while the certificate was signed by the contractor on 31 May 2016, it was countersigned by Malta Enterprise on 30 November 2016, that is, two days after the submission of the document to the MTA. Furthermore, the MTA was provided with an attestation by Malta Enterprise wherein

it was stated that the restaurant was equipped with a fire detection system, fire extinguishers and a fire hose reel, with the latter connected with the main firefighting pumps situated at the LS4. This attestation was undated.

4.4.55 A fire safety, ventilation and noise mitigation report issued by a building services consultant on 27 October 2015 was also submitted to the MTA on 28 November 2016. The report was intended to identify the fire risks and hazards within the catering premises and address fire safety at its ground and first floor levels. The four main fire safety features were:

- a. fire detection and alarm equipment;
- b. illumination of exits and escape routes;
- c. fire-fighting equipment; and
- d. fire protection equipment.

4.4.56 Noted in the report was that the occupant capacity within the food and drink area was to be less than 60 persons; therefore, the escape route provided in the plans was found to be sufficient. The width of the escape route was also found to be adequate and according to the guidelines. Proposed in the report was that the food and drink establishment be protected with a self-closing fire-rated door and another such door to protect the fire escape stairs. The width of the stairs was found to be adequate in comparison with the number of persons within the establishment area. However, the escape route was to be fitted with adequate emergency lighting and a fire evacuation exit sign. Moreover, an automatic fire alarm system was to be installed within the premises and had to include internal sounders and an external bell box. Also recommended was the installation of smoke and heat detectors, manual call points, and fire extinguishers.

4.4.57 With respect to the ventilation required at the catering establishment, it was recommended that a mechanical ventilation and extraction system be installed. Noted in the report was that a post installation certification by a warranted mechanical engineer was required. It was unclear to the NAO whether this condition was met. To reduce odours, the report proposed the provision of an odour control/extraction system. As for noise emissions, the report recommended that noise from building services installations was not to exceed 40 decibels and therefore all ventilation fans and other building services equipment were to have an acoustic sound that did not exceed this threshold. It was also suggested that air-conditioning units were to be located at roof level on anti-vibration mounts while absorbing materials were to be installed to mitigate reverberation in the premises.

4.4.58 On 29 November 2016, a copy of an insurance policy issued in the names of Cook & Co Ltd for the period 28 July 2016 till 27 July 2017 in relation to the catering establishment within the

MLSP was submitted to the MTA. The limit of the indemnity was set at €1,200,000. Noted was that the type of business indicated in the policy was that of a cafeteria.

4.4.59 A declaration by an architect acting on behalf of Cook & Co Ltd was submitted to the MTA on 29 November 2016. The declaration served to certify that the building was compliant with the approved drawings forming part of PA/2220/16, which comprised the change of use of the premises from a childcare centre to a restaurant. Furthermore, on the same day, the architect informed the MTA that a minor amendment was being made to the plans as approved in PA/2220/16. The minor amendment entailed the internal rearrangement of the space, which had been altered to suit the requirements of Cook & Co Ltd. Attached to the submission to the MTA were the amended plans, with the Authority notified that the plans were also submitted to the PA for its endorsement. The amendments were for the shifting of the kitchen from the first floor to the ground floor, the shifting of the restrooms at both levels and the inclusion of additional tables at ground and a bar at first floor.

4.4.60 On 29 November 2016, an application for the registration of an operator of a tourism establishment was submitted to the MTA by the MDH and Cook & Co Ltd. In the application, details of the establishment, licensee and operator were provided, with Zenzero restaurant, the MDH and Cook & Co Ltd, respectively cited. Also submitted to the MTA on the same day was a declaration by a waste collector confirming the daily collection of the waste generated by the restaurant. A copy of the lease agreement was also submitted.

4.4.61 Following these submissions, on 30 November 2016, a request for an inspection was raised by the MTA and referred with urgency to its Enforcement Unit. The MTA informed Cook & Co Ltd and the MDH of the planned inspection and indicated that if all the standards were met in terms of Subsidiary Legislation 409.15, a temporary licence would be issued given that rectifications were still pending with the PA.

4.4.62 Documentation reviewed by the NAO indicated that an inspection report was drawn up on 12 December 2016 following an inspection undertaken on 5 December 2016. Noted was that Cook & Co Ltd was present during the inspection. According to the report, the premises was inspected in terms of the Catering Establishments Regulations; however, since an application for a minor amendment had been submitted to the PA, a temporary licence of 90 days was recommended.

4.4.63 Correspondence exchanged by the MTA and the PA on 12 December 2016 provided more context to the licensing process. In internal exchanges, the MTA highlighted that PA/2220/16 referred to the catering establishment as a canteen intended to serve the employees of the operating building. In view of this, the MTA sought clarification from the PA on whether the catering establishment would be open to the public and operate after office hours. In response, the PA noted that the establishment was open to the public. This was confirmed by Malta

Enterprise, which entity further asserted that the catering establishment could remain open outside the MLSP's working hours. It was on the basis of this understanding that the MTA favourably considered the issuance of a temporary licence for a third-class restaurant.

- 4.4.64 To this end, on 12 December 2016, the MTA granted the MDH a temporary licence for the operation of Zenzero restaurant within the MLSP. Noted in the letter of approval was that the premises conformed with the required standards for a restaurant in the third class category and was therefore licensed to operate for a period of three months, that is, up to 12 March 2017.⁴ The temporary licence was subject to all the necessary clearances from other Government departments and authorities and the operation was not to commence before all the conditions imposed or recommended by the said departments or authorities were adhered to. Based on information sourced, the NAO established that Zenzero restaurant commenced operations in early 2017. This was confirmed by Cook & Co Ltd.
- 4.4.65 In addition to the MTA-issued licence to operate, the Food Safety Act necessitated that premises used for the preparation of food were to be registered with and licensed by the relevant health authorities. In adherence with this requirement, an application was submitted to the Food Safety Commission by the former CEO MLSP on 9 December 2016. Following registration, four risk assessment inspections were undertaken on the premises to verify compliance with the Act. The first inspection, which was carried out in 2017, resulted in a 'very good' grading. However, this rating subsequently dropped to 'good' following the inspections of 2018, 2019 and 2020, with several deficiencies noted.
- 4.4.66 Following the expiry of the temporary licence in March 2017, no developments were noted by the NAO until 10 November 2017, when the MTA submitted correspondence to Cook & Co Ltd whereby the operator of the catering establishment was informed that the premises was not covered by a valid licence since that temporarily issued in December 2016 for a period of three months had expired. In this correspondence the MTA indicated that, following discussions held with the MDH, it was agreed that the best way forward was for the engagement of an architect to visit the premises and determine which plans and permits matched the present layout. Once the architect provided relevant declarations confirming conformity of the premises with that permitted were made available to the MTA, the Authority would undertake its own verifications necessary for the issuance of a licence to operate a catering establishment.
- 4.4.67 In court testimony later given by officials of the MTA, it was confirmed that no documentation was sourced by the Authority showing that a permanent licence had been issued. The MTA indicated that Cook & Co Ltd had approached the Authority to resolve matters relating to the licence required to operate the premises and that the matter was eventually referred to the CEO MLSP on 18 June 2018. However, correspondence dated 5 July 2018 submitted by the CEO

³ The letter of approval for a temporary licence issued by the MTA on 12 December 2016 indicated that the temporary licence expired on 12 March 2016. The NAO is of the understanding that the date was erroneously stated by the MTA and should have read 12 March 2017.

MLSP to the MTA and Cook & Co Ltd indicated that the matter remained pending feedback from the architect representing the tenant. In this correspondence, the CEO MLSP requested Cook & Co Ltd to contact him once this information was available. Subsequent exchanges by the MLSP and the MTA highlighted the latter's concerns regarding the Authority's exposure on the matter.

4.4.68 In turn, in its testimony, Cook & Co Ltd acknowledged the support provided by the MTA yet maintained that none was forthcoming from the MLSP. Cook & Co Ltd conceded that the delays in respect of the MTA licensing process were due to issues arising in connection with the planning permit. However, Cook & Co Ltd contended that it had previously been informed by the MDH that the permits were in hand. Elaborating in this regard, Cook & Co Ltd claimed that it was only in 2018 that the company became aware that the issues with the MTA were due to the fact that the area in the planning permit was only that of 50 square metres. According to Cook & Co Ltd, when queried on the matter, Malta Enterprise indicated that this issue concerning the area of the site was irrelevant and was to be addressed by the PA.

4.4.69 No further documentation was provided to the NAO in terms of the licence that ought to have been secured by Cook & Co Ltd to operate the Zenzero restaurant. To this end, this Office sought information from the MTA, Cook & Co Ltd and Malta Enterprise regarding whether the catering establishment was licensed to operate from March 2017 onwards. The MTA confirmed that the temporary licence issued to Cook & Co Ltd was valid until 12 March 2017, and therefore, from 13 March 2017 onwards, the premises was not covered by an operating licence. Furthermore, in court testimony by officials of the MTA, it was indicated that no enforcement action was taken in respect of Zenzero restaurant for operating without a licence. Cook & Co Ltd contended that, notwithstanding this, it remained in contact with the MTA on the matter following the expiry of the initial temporary licence granted.

4.4.70 When queried in this respect, the CEO MLSP referred to a clause in the RfP wherein it was specified that it was the responsibility of the operators of the leased premises to apply for and obtain the specific permits and licences required to ensure that the activity was appropriately authorised. Nonetheless, the CEO MLSP maintained that the premises was covered by a planning permit dated 25 August 2016; however, argued that the substantial alterations undertaken by Cook & Co Ltd resulted in complications in securing planning permission which in turn stalled the issue of an operating licence.

4.4.71 The lease agreement indicated that the tenant was automatically liable to pay a penalty for failure to submit copies of permits and licences to the landlord. The penalty payable for each day of default was equivalent to 10 per cent of the applicable rental rate per square metre per annum. Such penalties were also due in relation to other occurrences. Queried as to whether any penalties were levied in this respect, the CEO MLSP informed the NAO that no charges were imposed on Cook & Co Ltd.

- 4.4.72 The Zenzero restaurant ceased to operate in March 2020 as a result of the Government-imposed measure to close all catering establishments as part of its efforts to address the COVID-19 pandemic. Following the easing of measures and the reopening of restaurants, the MTA conducted a series of inspections of all restaurant facilities to grant permission for reopening. In testimony provided by Cook & Co Ltd, it was noted that no inspection was held at the Zenzero restaurant since the premises did not have the necessary licence to operate.
- 4.4.73 Of concern to this Office was that the premises operated by Cook & Co Ltd did not have a licence to operate as a restaurant for most of the period during which the site was under its control. The source of this irregularity can be traced to inconsistencies that emerged in the planning process. The failure to obtain a planning permit resulted in Cook & Co Ltd's inability to secure the licence from the MTA required to operate a restaurant, as a valid permit was one of the requirements set for a licence to be issued. While the initial months of operation were covered by a temporary licence, once this expired in March 2017, Cook & Co Ltd continued to operate the restaurant for several years despite not having a valid licence to do so. While primary responsibility for this failure rests with Cook & Co Ltd, for the lease agreement stipulated that it was the tenant who was to ensure that operations were covered by the relevant licences, an element of concern emerges in that the MTA and Malta Enterprise were aware that the restaurant did not have the required licence yet was allowed to continue to operate for a three-year period regardless. Notwithstanding this, the NAO acknowledges that the misrepresentation of the site in the planning permit for the change in use of the premises gave rise to complications in subsequent efforts to regularise the site and obtain the operating licence.

Rent and other payments

- 4.4.74 The lease agreement established that Cook & Co Ltd was to make rental payments, increasing incrementally over the term of the lease. The rental charge corresponding to the 292 square metres leased was set at €35 per square metre for the first year, which totalled €12,064, inclusive of VAT. The rental rate was to increase to €40 per square metre in the second year of the lease, €50 per square metre for the third year and to €65 per square metre per year thereafter. The lease agreement provided that, if the lease was extended, the rental rate would be revised upwards to €75 per square metre per year for the period 2021 to 2025. The rent was to be paid quarterly in advance via direct debit mandate. However, Cook & Co Ltd was granted a moratorium on the rental fee for the first three months, with the first payment of rent consequently due on 1 September 2016.
- 4.4.75 In addition, Cook & Co Ltd was bound to pay a security deposit, equivalent to six months' rent, on the signing of the lease agreement. This amount was to be increased over the years, in line with revisions to the rental charge. The deposit was to be retained by the MDH to be used against any unpaid fees or penalties payable by Cook & Co Ltd that became overdue. The tenant was to also make an on account utility service charge payment of €1,000 per quarter in advance payable by direct debit, as contribution on account of utility charges due. Every quarter,

the landlord was to take stock of the actual consumption and the difference was to be settled accordingly within 10 days. Provided that, if at the end of the quarter, the aggregate on account utility service payment for the preceding period was in excess of the utility service charge due for that period, a credit note was to be issued to the tenant for the sum paid in excess.

4.4.76 In addition, the tenant was to pay for any access cards provided and for maintenance carried out by the MDH. With respect to suppliers, these were at the charge of Cook & Co Ltd. The tenant was bound to indemnify the landlord for payments made in this respect and for all charges for electricity, water, gas, telecommunications and other services consumed or used in relation to the premises by its suppliers. In cases where the MDH was the supplier of such services, Cook & Co Ltd was to pay the itemised invoices within 30 days through direct debit or be liable to the suspension of services leading to an automatic revocation of the lease agreement.

4.4.77 In a meeting with the NAO, Malta Enterprise declared that Cook & Co Ltd did not make any payments relating to the rent due, utility services and other charges arising in respect of the lease agreement during its tenancy. In addition, the CEO MLSP stated that Cook & Co Ltd did not pay the security deposit, which was equivalent to six months' rent. Consequently, on 22 September 2020, the MDH filed summary proceedings against Cook & Co Ltd for unpaid dues before the Rent Regulation Board. In total, the MDH claimed that Cook & Co Ltd owed €107,022 for charges arising in terms of the lease agreement incurred between September 2016 and July 2020.

4.4.78 A breakdown of this amount was provided by the CEO MLSP, who explained that until July 2020, Cook & Co Ltd owed the MDH approximately €63,000 in rent. The CEO MLSP also indicated that the tenant owed €33,084 and €2,412 for electricity and water consumption, respectively. While the lease agreement stipulated that tenants were to be charged on account for utility services, in the case of Cook & Co Ltd, the MDH charged for actual consumption. In addition, the MDH contended that Cook & Co Ltd had other outstanding dues, that is, an unpaid deposit of €6,031 and €50 for access cards used for parking (Figure 16 refers).

Figure 16 | Amounts claimed by the MDH as payable by Cook & Co Ltd, September 2016 - July 2020

Type of Expense	€
Rent	63,310
Electricity	33,084
Water	2,412
Security deposit	6,031
Access cards	50
Maintenance	2,134
Total	107,022

4.4.79 On the other hand, Cook & Co Ltd contended that it paid the €6,000 security deposit and an undisclosed amount in parking fees. Moreover, Cook & Co Ltd alleged that the invoices issued by Malta Enterprise were incorrect since the rate charged for electricity was higher than that levied

on the landlord and included an 18 per cent VAT that was not due. Cook & Co Ltd maintained that invoices were issued in 2018, when it initiated judicial proceedings against Malta Enterprise. While the NAO was unable to ascertain the amount due for electricity consumed, for not all invoices were provided, an element of inconsistency emerged in this Office's review of those made available. Noted in the invoices reviewed was that a five per cent VAT was charged on electricity and no VAT was levied on water consumption. In addition, despite that stated, invoices raised by the MLSP and presented by Cook & Co Ltd during judicial proceedings bore multiple dates prior to 2018, with the earliest invoice dated 30 June 2016.

4.4.80 The matter of unpaid dues was elaborated on in court testimony provided by the former CEO MLSP. Providing context to his testimony, the former CEO MLSP indicated that he held this post until January 2018. When handing over to his successor in February 2018, the former CEO MLSP referred to the fact that Cook & Co Ltd sought to discuss matters relating to its lease. In further testimony and at the request of the CEO Malta Enterprise, the former CEO MLSP sought to clarify a matter raised in correspondence submitted by Cook & Co Ltd to Malta Enterprise. In essence, in correspondence submitted by the CEO Malta Enterprise to the former CEO MLSP on 19 December 2019, reference was made to the contention by Cook & Co Ltd that the former CEO MLSP had an understanding with the tenant that it was "not to pay rent or any contribution as part of a tacit agreement over the years to which parties acquiesced." The CEO Malta Enterprise sought the feedback of the former CEO MLSP regarding that asserted by Cook & Co Ltd. Queries made by the NAO to obtain a copy of the initial correspondence submitted by Cook & Co Ltd proved to no avail.

4.4.81 In his reply to the CEO Malta Enterprise, also dated 19 December 2019, the former CEO MLSP maintained that he had never advised any tenant, verbally or written, not to settle the rent due. However, the former CEO MLSP noted that in his technical opinion, Cook & Co Ltd had reasonable grounds to request compensation from Malta Enterprise for several latent defects at the leased premises that were valid and not ruled out by the tale-qual reasoning. Moreover, the former CEO MLSP referred to the fact that Malta Enterprise had engaged its own architect and site manager originally responsible for the site for their opinion on the defects. The former CEO MLSP noted that it was in the interest of the architect and site manager to negate the existence of these defects and maintained that Malta Enterprise should have engaged an external expert to ascertain which of the alleged defects were valid, as done by Cook & Co Ltd. In the opinion of the former CEO MLSP, such action would have led to an amicable and reasonable settlement. The former CEO MLSP emphasised that he had advised that once agreement was reached between the parties, compensation could have taken the form of a pro-rata reduction in the lease charge. Nonetheless, the former CEO MLSP indicated that, since he had relinquished the post of CEO MLSP, he was not invited to contribute to any MLSP-related matter and therefore had no involvement in the decision to proceed with judicial action. Providing further clarifications to the NAO, the CEO MLSP noted that, irrespective of any dispute, the lease agreement was clear that amounts due were to be paid.

4.4.82 In turn, in submissions to the NAO, Cook & Co Ltd stated that the former CEO MLSP had invariably provided assurance that the matter concerning the expenses incurred by it as tenant was to be brought to the attention of the MLSP Board for its consideration of possible compensation, be it in terms of direct settlement or through a reduction in rent payable. In support of this claim, Cook & Co Ltd contended that Malta Enterprise was provided with bills of the expenses incurred by it and photographic evidence to justify the works undertaken. Cook & Co Ltd also referred to amounts due to it by the MLSP for services provided. Although these dues were acknowledged by the CEO MLSP, he noted that the amounts in question were minimal, amounting to approximately €500, and were not settled because of a disagreement on that invoiced. Although the outstanding amount could not be verified by the NAO, supporting that stated by the CEO MLSP was correspondence attesting to the MDH's efforts for Cook & Co Ltd to revise the amounts claimed, for quantities invoiced did not always tally with orders made or cancellations taken into consideration.

4.4.83 The NAO is of the understanding that Cook & Co Ltd's failure to pay the rent due and other ancillary charges constituted a breach of the lease agreement. The argument put forward by Cook & Co Ltd, that the premises had several latent defects that resulted in its incurring of costs to rectify, was not considered as sound basis to withhold the payment of contractual dues, particularly when one notes that the tenant was operating from the premises over several years. In respect of the MDH, this Office is of the opinion that there existed scope for the better management of this contractual relationship. Although the landlord had the option to enforce the lease agreement and institute unilateral action to terminate the lease, the characteristics of the parties' relationship ought to have spurred further dialogue that could have enabled settlement. Complicating matters further was the change in management of Malta Enterprise and the MLSP, with the rapport that previously guided the relationship between the landlord and the tenant eroded. Initially, the MDH's views resonated with those of Cook & Co Ltd, particularly in its acknowledgement that certain errors had been made, such as in the MDH's decision to engage the architect originally responsible for the project to verify the defects alleged by Cook & Co Ltd, whose impartiality could readily be challenged. The stance adopted following the change in management at Malta Enterprise and the MLSP was less amenable to seek compromise.

Alterations to the premises

4.4.84 The lease agreement established the provisions that were to regulate alterations made to the premises. In sum, the tenant was to request the permission of the landlord, submit relevant plans and work method statements, obtain the required permits and pay relevant charges. The cost of the alterations were to be covered by the tenant. Once completed and approved by the landlord, details of the works were to be registered as an addendum to the lease agreement. The works were to become property of the landlord, who reserved the right to request the tenant to reverse alterations made at the termination of the lease.

4.4.85 In submissions made by Cook & Co Ltd to the NAO, the tenant contended that the structural works it carried out were necessary to address issues and concerns raised by the Health Inspectorate. According to Cook & Co Ltd, it was informed by the Health Inspectorate that unless these issues were rectified, the necessary operational permits would not be issued. Cook & Co Ltd claimed that it subsequently informed the MLSP of these issues, and verbal authorisation was given, allowing it to carry out the necessary works to fall in line with legal requirements. The cost of these works was to be charged to the MLSP. Moreover, Cook & Co Ltd stated that the MLSP indicated that the process would be expedited if the tenant undertook the works directly.

4.4.86 Cook & Co Ltd maintained that when the works commenced, latent defects in the premises emerged. The defects related to drains and pipework, electricity supply, plumbing, and other structural issues. According to Cook & Co Ltd, the defects that it rectified included the:

- a. opening of a service door, a door in the shaft, one for the food cleaning area and another to the dumbwaiter leading to a storage area;
- b. shifting of a door in the restrooms;
- c. building of two concrete ceilings to create storage and restrooms on the first floor;
- d. opening of a window for ventilation;
- e. digging of new trenches around the kitchen;
- f. retiling of the floor due to drainage flooding under the tiles;
- g. installation of electrical, gas and plumbing supplies; and
- h. removal of defective ducting and widening of wall holes leading to the ducting on the roof.

4.4.87 According to Cook & Co Ltd, on 18 June 2016, that is, prior to the commencement of any works, it submitted correspondence to the MLSP requesting approval for the intended alterations. The MLSP approved the request submitted by Cook & Co Ltd on 20 June 2016.

4.4.88 Other related correspondence referred to by Cook & Co Ltd in submissions made to the NAO was that dated 13 October 2016. In this correspondence submitted by Cook & Co Ltd to the MLSP, reference was made to a meeting held between the parties, wherein the former CEO MLSP requested Cook & Co Ltd to forward a claim for the out-of-pocket expenses incurred by the latter and indicated that this matter was to be escalated by the MLSP. Although Cook & Co Ltd referred to its awareness of the imminent issuance of a planning permit inclusive of the amendments that it had applied for, the NAO could not trace any documentation that backed

this assertion. The only submission for the sanctioning of amendments made to the PA by Cook & Co Ltd was traced to November 2016.

4.4.89 Correspondence presented during court proceedings indicated that a request for payment was submitted by Cook & Co Ltd to the MLSP on 19 January 2017. This request was pursuant to a meeting held between the parties on 17 January 2017. Attached to the correspondence was a document detailing the pending matters relating to the leased premises, the costs incurred in addressing diverse matters in connection therewith and a proposed way forward. Cook & Co Ltd indicated that the cost of the works undertaken was €30,000. Regarding the way forward, Cook & Co Ltd proposed compensation for costs incurred and the possible revision of the contractual clauses relating to the moratorium on the payment of rent and the obligation to return the premises as originally leased.

4.4.90 The request for compensation by Cook & Co Ltd was discussed internally by the MLSP. Correspondence exchanged on 19 January 2017 indicated that the MLSP was to filter the items on which the €30,000 claim was based to identify the works that the MLSP did not agree with. The former CEO MLSP proposed the sharing of the cost between the parties and the possible reduction of the rent payable by Cook & Co Ltd, requesting guidance in this regard from Malta Enterprise. Elaborating on this matter during court proceedings, the former CEO MLSP explained the reasoning behind this correspondence, stating that he was aware that there were certain deficiencies in the premises and was trying to identify a way forward. No further information as to the outcome of these exchanges was provided.

4.4.91 The ensuing development in terms of the authorisation of alteration works was traced to correspondence dated 16 August 2017. In this exchange, the former CEO MLSP sanctioned the installation of an external canopy subject to several conditions, including that Cook & Co Ltd secure the relevant planning permit. Another request for approval was sought by Cook & Co Ltd on 23 November 2017, when the former CEO MLSP was requested to allow for the construction of two storage areas within the common parts of the property adjacent to the leased premises. The former CEO MLSP authorised this request on the same day.

4.4.92 In submissions to the NAO, Cook & Co Ltd maintained that changes to the premises were invariably carried out following the authorisation of the MLSP. In addition, Cook & Co Ltd asserted that the MLSP were aware of the works being undertaken and regularly visited the premises. Although Cook & Co Ltd contended that the obligation to retain records of the works rested with the MLSP, this Office noted that the lease agreement stipulated that both parties bore obligations in this respect. Relevant was that the tenant was obligated to submit documentation of the works, including certification. Notwithstanding this obligation, no documentation was provided to the NAO in this regard.

4.4.93 In terms of the compensation for works undertaken, Cook & Co Ltd maintained that, in discussions held, the former CEO Malta Enterprise had informed the tenant that once the matter of the

permit was addressed, then compensation for the alterations would be considered. An element of corroboration was provided by the former CEO MLSP, who noted that the issues of poor workmanship and the possible granting of a one-month moratorium on the payment of rent were brought up in internal exchanges and consented to by the former CEO Malta Enterprise.

- 4.4.94 Requested to clarify whether the MLSP ultimately consented to compensate Cook & Co Ltd for costs incurred in connection with the works undertaken at the leased premises, the CEO MLSP informed the NAO that based on records reviewed, no compensation was paid. Moreover, the CEO MLSP reiterated that the leased premises was allocated to Cook & Co Ltd in a finished state and on a tale quale basis, and argued that it was the tenant's decision to divide the site into two different outlets. In subsequent submissions to this Office, the CEO MLSP indicated that the claim by Cook & Co Ltd was revised to €1,300,000 as at end June 2019. The claim included costs relating to repairs, labour, utility charges arising from shortcomings attributable to Malta Enterprise, and administration fees; however, excluded legal fees.
- 4.4.95 Evidence brought to the NAO's attention indicated that Cook & Co Ltd requested the MDH's clearance for the alteration works undertaken at the leased premises, with the MDH either consenting or not objecting to the works indicated. Notwithstanding this, the NAO noted that the requests for sanctioning and the authorisations granted in respect of the alteration works were not made in accordance with the lease agreement. In this respect, the lease agreement stipulated that Cook & Co Ltd was to submit duly certified drawings and work method statements relating to the planned alteration works. No evidence of such submissions to the MDH was provided to the NAO.
- 4.4.96 Graver still was the failure of Cook & Co Ltd to adhere to the provision of the lease agreement that required the tenant to obtain and comply with the necessary consents of the competent authorities and pay their charges. Cook & Co Ltd carried out the alteration works at the leased premises without the required PA permit, compounded no less by the fact that this course of action was proposed by Malta Enterprise.
- 4.4.97 An element of attention is warranted in terms of the role of the MDH in this matter. The NAO maintains that the MDH, acting as a responsible landlord, ought to have ensured that the required planning permission was obtained by Cook & Co Ltd prior to it carrying out such works. This responsibility of the MDH assumes further relevance when one considers its visibility over the works. While Malta Enterprise sought to sanction the leased premises by means of a planning application in January 2019, the notable lapse between the execution of the works and their eventual authorisation was considered a matter of note by this Office. Malta Enterprise argued that it was compelled to assume responsibility for obtaining planning permission due to Cook & Co Ltd's failure to pay the relevant professional fees incurred by the tenant's architect in the process of sanctioning alterations already made to the leased premises. Although the NAO acknowledges that the responsibility to secure the required planning permit fell squarely on Cook & Co Ltd, it was the duty of the MDH to ensure that the works undertaken were legal,

particularly in view of the fact that it retained responsibility as landlord and that the property was to return to it following the expiry of the lease term.

Security as a guarantee during works

4.4.98 The lease agreement established that, for any works of a substantial nature, the landlord could require the tenant to provide adequate security in the form of a deposit of money or the provision of a banker's guarantee prior to the commencement of works. This was to serve as assurance to the landlord that any works permitted would be fully completed. Based on documentation reviewed by the NAO, no request for the deposit of a security or guarantee was made by the MDH with respect to the works undertaken at the leased premises.

4.4.99 The purpose of the provisions in the lease agreement relating to the security or guarantee that could be requested by the landlord was to provide assurance and reduce the risk associated with works undertaken by tenants resulting in an adverse effect on the landlord. In this case, the MDH did not exercise its right to request the provision of a security or guarantee by Cook & Co Ltd, thereby increasing its exposure to unforeseen liabilities, evident in the resulting legal proceedings between the parties.

Covenants

4.4.100 Another pre-condition for the execution of alterations stated in the lease agreement related to the entry into covenants by the parties if so required by the landlord. The covenants were intended to regulate the execution and reinstatement of the alterations.

4.4.101 Queried in this respect, the CEO MLSP indicated that no information relating to any covenants entered into was retained in the file corresponding to the tenancy of Cook & Co Ltd. Although the former CEO MLSP referred to exchanges concerning alteration works carried out, these were deemed indirectly relevant to the matter of covenants by the NAO as the lease agreement stipulated provisions regulating the works undertaken.

4.4.102 In conclusion, the NAO noted that no covenants were entered into by the parties as no request to this effect was made by the MDH.

Damage to adjoining properties and shared facilities

4.4.103 Also established in the lease agreement was that if the tenant caused any damage or nuisance to the premises, or to the common areas or to adjoining properties while carrying out alteration works, then it was liable to pay a penalty equivalent to 100 per cent of the applicable rental rate per square metre per annum for each day of default. Such penalties were also due in relation to other occurrences. The CEO MLSP noted that no charges were levied on Cook & Co Ltd for any

damage or nuisance caused to the premises or to the common areas or adjoining properties while undertaking works.

- 4.4.104 The NAO established that no penalties were imposed by the MDH or paid by Cook & Co Ltd for any damage or nuisance to the premises, or to the common areas or to adjoining properties while carrying out alteration works.

Maintenance and cleaning of the premises

- 4.4.105 An obligation cited in the lease agreement was that the tenant was to maintain and repair the leased premises and to keep it in good condition throughout the lease term. In fulfilling this obligation, the tenant was bound to repair or replace any of the landlord's fixtures and fittings at the premises that were beyond repair. An inventory of the fixtures and fittings was included in the conditions report attached to the lease agreement between the MDH and Cook & Co Ltd. Major maintenance or repair works were to be pre-approved by the MDH, particularly if such works included dust-generating activities.
- 4.4.106 Also indicated in the lease agreement was that Cook & Co Ltd was to ensure that the premises was maintained in good condition and repair through the tenant's maintenance personnel. However, specified in the MLSP Users' Manual was that tenants could avail of the maintenance services provided by the MLSP for minor works, which services were to be procured through the submission of the relevant requisition form.
- 4.4.107 An element of visibility over the upkeep of the premises was obtained through the review of the health inspection reports drawn up by the Environmental Health Directorate between 2017 and 2020. During this period, the restaurant was assigned grade A in 2017 and grade B for the years 2018 to 2020.⁵ The NAO deemed this indicative that the premises was being maintained in good condition.
- 4.4.108 In court testimony provided by Malta Enterprise, reference was made to the general maintenance service made available to tenants at the MLSP to undertake certain repairs. The cost of the service was set at €25 an hour, with each job costed based on information provided by the tenant in its requisition. Not all requests for maintenance raised by tenants were charged to the tenant, for Malta Enterprise assessed whether the required works fell within its responsibility as landlord, or related specifically to the leased premises. Malta Enterprise noted that Cook & Co Ltd made use of this service and were billed accordingly; however, these bills remained outstanding. From evidence submitted during judicial proceedings, Malta Enterprise claimed that Cook & Co Ltd owed a total of €2,134 for maintenance works carried out at the tenant's request.

⁵ The grade is assigned by the Environmental Health Directorate following an inspection of the premises. The grades vary from A, which is defined as Very Good, to F, defined as Very Bad.

4.4.109 Substantiating that stated in judicial proceedings, Malta Enterprise provided the NAO with two invoices, one dated 12 July 2017 amounting to €782 and another dated 2 October 2017 for €1,352. The first charge raised related to non-routine electrical works, with relevant maintenance works forms outlining the tasks carried out during the 26.5 hours charged appended therewith. The second invoice corresponded to different requests for works, with 22.75 hours utilised in tasks relating to access to water, lift maintenance and drainage. A separate charge of €681 was included in this invoice in respect of materials used. Further elaborating on the maintenance charge levied in relation to the lift, the CEO MLSP argued that repairs were necessary due to its misuse by Cook & Co Ltd as a goods lift. However, these dues were borne by the MLSP.

4.4.110 Aside from specific issues of contention, the NAO is of the understanding that Cook & Co Ltd maintained the premises in a good state of repair during the lease term. However, this Office notes that the obligation that ought to have been borne by Cook & Co Ltd, to pay for maintenance undertaken by the MDH at the leased premises, was not honoured by the tenant.

4.4.111 The lease agreement also regulated instances when the landlord gave notice to the tenant to undertake repair works, which process was formalised through the issuance of a notice to repair. The tenant was expected to complete the required works within three months. If the tenant failed to execute the necessary works, the landlord was to undertake the repairs directly and charge the tenant the fees incurred and a penalty equivalent to 10 per cent of the annual rental rate per square metre calculated on a daily basis for the duration of the breach. Queried in this respect, Malta Enterprise did not provide documentation indicative of notices given to Cook & Co Ltd to effect repairs. Similarly, Cook & Co Ltd did not provide any records of such notices.

4.4.112 Another aspect of the contractual relationship between the MDH and Cook & Co Ltd related to the latter's obligations in terms of the cleanliness of the leased premises. Stipulated in the lease agreement was that the tenant was responsible for cleaning the premises and keeping the surrounding area tidy. Furthermore, the tenant was to retain full responsibility for all supplies, products, services and waste on its site at all times. In addition, the tenant was to ensure that the handling and transfer of supplies and waste was carried out by authorised personnel and not left unattended in the common parts of the premises. On its part, the landlord was to facilitate the waste disposal process by allowing approved service providers to access the premises.

4.4.113 A declaration submitted to the MTA by Cook & Co Ltd in November 2016 as part of the process of securing an operating licence was noted by the NAO, wherein a service provider confirmed that the waste generated by the restaurant was to be collected daily. The service provider also confirmed that it was capable of handling the waste generated by the restaurant and that it had the necessary machinery and vehicles for the work. Furthermore, this Office reviewed documentation relating to payments made by Cook & Co Ltd to the service provider indicating that waste was collected throughout the operational period.

4.4.114 In submissions to the NAO, the MLSP highlighted certain concerns regarding the collection of waste that emerged during the initial period of operation. However, the MLSP confirmed that these concerns were addressed by Cook & Co Ltd through the engagement of a service provider and other measures relating to the management of waste. Based on that reviewed, no concerns emerged in this respect.

Risk assessment

4.4.115 Noted in the lease agreement was that the tenant was to have full knowledge and adhere to the MLSP Users' Manual. The Manual placed an obligation on the users of the Park to conduct a risk assessment of their unit every six months. A confidential summary of the outcome, signed by the assessor, was to be forwarded to the MDH. Required actions were to be included in this summary and were then to be addressed by the user. Relevant records were to be retained by the MDH, which in turn was to carry out its own risk assessment of the common areas and inspect several leased units to ensure the MLSP's safety every six months.

4.4.116 Queried by the NAO, the CEO MLSP noted that no documentation evidencing risk assessments was provided by Cook & Co Ltd to the MLSP. In turn, queries addressed to Cook & Co Ltd in this respect remained unaddressed.

4.4.117 Although no risk assessments were carried out in line with that specified in the MLSP Users' Manual, the NAO noted that this obligation was partly mitigated through the reports drawn up by the Environmental Health Directorate, which served to identify industry-specific risks. Nevertheless, this Office maintains that the obligations arising from the Manual ought to have been honoured by Cook & Co Ltd and enforced by the MDH.

Health and safety

4.4.118 Another obligation specified in the lease agreement related to the tenant's responsibility to ensure that all health and safety regulations in force, and as may be amended from time to time, were invariably observed. Noted in the MLSP Users' Manual was that users of the premises were individually responsible for the health and safety of their employees and visitors to their units; however, it was the landlord who was responsible for the health and safety of all shared and common areas within the MLSP.

4.4.119 The MLSP Users' Manual placed an obligation on tenants to undertake health and safety monitoring and inspections, with relevant reports to be submitted to the MLSP. Tenants were also required to provide any inspection certifications and any documented remedial recommendations/requirements concerning the operations carried out within their leased units. All accidents and incidents that occurred at the leased units were to be centrally logged with the MLSP. In addition, the tenants were required to maintain their own log of all accidents and incidents. The tenants bore an obligation to install and maintain, at their own expense, a fire

suppression system within their units, updated details of which were to be submitted to the landlord prior to the operational start-up date. The tenants could also install, at their expense, an intruder detection system.

- 4.4.120 Following enquiries by the NAO, the CEO MLSP noted that no health and safety assessments or reports concerning accidents and incidents at the leased premises were registered. Although Cook & Co Ltd referred to an incident concerning the passenger lift in submissions to this Office, no documentation relating to its obligation to log such events or, more broadly, its health and safety responsibilities was provided, despite requests.

Insurance

- 4.4.121 The lease agreement obligated the tenant to procure insurance relating to the premises in the joint names of the landlord and the tenant. Insurance was to cover 12 months' rent and the utility service charge receivable by the landlord, which would allow a claim under the material damage insurance policy. In addition, the tenant was obligated to insure against third-party liability, including the tenant's employees, legal costs and expenses. The insurance was to be procured from reputable underwriters in Malta.

- 4.4.122 The insurance relating to the premises was to cover the full cost of rebuilding and reinstating the premises as well as ancillary costs relating to professional fees and planning applications. Regarding third-party liability, the lease agreement stipulated that the insurance was to cover a minimum value of €1,165,000 for public liability insurance in respect of death of, or bodily injury to, any person, or loss of or damage to third party property, per occurrence, with a minimum aggregate limit in any period of insurance of €2,350,000. The cover was to also provide a minimum of €2,350,000 in respect of employers' liability insurance for death, bodily injury, disease, illness or any other physical or mental impairment or disorder to any employee of the tenant, per occurrence, with a minimum aggregate limit in any period of insurance of €4,700,000.

- 4.4.123 If so requested by the landlord, the tenant was to obtain confirmation from the underwriters of their agreement to waive all rights against the landlord in respect of loss or damage to the premises. The tenant was to comply with all requirements and recommendations of the underwriters and was not to do or omit anything that could cause any insurance policy to become wholly or partly void or voidable. A copy of the insurance policy was to be passed on to the landlord together with the last premium renewal receipt or any other satisfactory evidence that could show that the policy was in force. If the tenant failed to procure insurance cover or to provide the landlord with evidence that such policies were obtained, the landlord could, at its sole discretion, effect the required insurance policies and charge the tenant the relative expenses and an additional administrative charge of 10 per cent on costs calculated on a daily pro rata basis.

- 4.4.124 The NAO sourced documentation relating to the insurance policy procured by Cook & Co Ltd with respect to public liability for the period July 2016 to July 2017. The limit of the indemnity was set at €1,200,000 and was secured from a reputable Maltese underwriter. Despite requests by this Office regarding public liability insurance cover for the period from July 2017 till closure of the premises, no information was provided by Cook & Co Ltd. Queried by the NAO, the CEO MLSP noted that no other documentation corresponding to insurance cover post July 2017 was provided by Cook & Co Ltd.
- 4.4.125 As regards the insurance for the rebuilding and reinstating of the premises and the employers' liability insurance, Cook & Co Ltd did not provide the NAO with any information relating to insurance covers secured in these respects notwithstanding the request made by this Office. In turn, the MLSP merely informed the NAO that no such insurance-related documentation was submitted by the tenant.
- 4.4.126 In conclusion, the NAO is of the understanding that Cook & Co Ltd's adherence to the contractual provisions regulating insurance cover was inadequate, for only one policy of the three established in the agreement was procured, that relating to public liability. Moreover, no evidence of the renewal of this policy was provided to the NAO, casting doubt on whether coverage extended throughout the period of operation. Furthermore, this Office was not provided with any records indicating the attempts made by the MLSP, as landlord, to enforce the provisions stipulated in the lease agreement in this regard.

Final points of note

- 4.4.127 Although this section and that preceding it highlighted several instances of non-adherence to the contractual obligations imposed on the tenant and the landlord, respectively, these shortcomings must be seen in light of the strained relationship that existed between the parties. Cook & Co Ltd maintained that this became pronounced following the change in management of Malta Enterprise and the MLSP, citing the inordinate delays in scheduling meetings and the lack of assistance extended as examples in this respect. In turn, Malta Enterprise and the MLSP contested this understanding.
- 4.4.128 Nevertheless, the NAO noted that there existed several grounds for the termination of the lease agreement during the initial term. The agreement specified various scenarios that would allow the MLSP to terminate the lease. These included unpaid rent or utility service charges, breaches in insurance cover and failure to make use of the premises. Queried by the NAO whether Cook & Co Ltd was served with an eviction order during or at the end of the lease term, the CEO MLSP indicated that the term expired on 19 May 2021. However, prior to the expiry of the term, that is, on 31 August 2020, an application was filed by Cook & Co Ltd with the Rent Regulation Board citing breaches of the lease agreement by the landlord that rendered it impossible for the tenant to operate the catering establishment at the MLSP. The tenant requested its release from obligations arising from the lease agreement, and sought the payment of damages by

the MDH. Immediately thereafter, in a sworn reply filed by the MDH on 22 September 2020, the MDH requested the payment of unpaid rent and utility charges and sought the eviction of Cook & Co Ltd from the premises.

Chapter 5 | Key events and conclusions

5.1 Timeline of key events

5.1.1 This audit focuses on the RfP issued by Malta Enterprise for the provision of F&B services at the MLSP in November 2015. The RfP resulted in the award of a lease agreement to Cook & Co Ltd. During the lease term, several issues arose between the MDH, as landlord, and Cook & Co Ltd, as tenant. The issues mainly related to the suitability of the leased premises for use as a catering establishment, the sanctioning of the property in terms of planning, and the consequent difficulty in securing an operating licence. These difficulties resulted in litigation among the parties, with Cook & Co Ltd seeking redress for the investment made, while the MDH sought the eviction of the tenant and recovery of outstanding dues. Hereunder is a timeline of the key events relating to this matter.

Date	Details of key event
2007	Malta Enterprise, in line with the Government’s strategic vision of establishing high value-added sectors in Malta, commissioned a study regarding the viability of a life sciences park.
July 2008	The commencement of the life sciences park project, which was envisaged to be completed by September 2015. The project cost was estimated at €38,000,000, of which €22,000,000 was to be financed through EU funds.
March 2010	An outline development application in connection with this project was submitted to MEPA and assigned reference PA/1179/10.
July 2010	A full development application for enabling works, that is, demolition and site preparation, was referred to MEPA. This application bore reference PA/3947/10.
30 September 2010	Malta Enterprise submitted a development application to MEPA for the construction of the MLSP. This application was made under reference PA/4523/10. The Park was intended to focus on life sciences and associated technologies and would incorporate pharmaceutical and biotechnological laboratories and research facilities.
30 June 2011	MEPA approved the outline development application bearing reference PA/1179/10 and the full development application for enabling works under reference PA/3947/10.
23 May 2012	A Grant Agreement was approved for part-financing through the European Regional Development Fund.
13 September 2012	MEPA approved the development application bearing reference PA/4523/10 for the construction of the MLSP.
19 September 2012	MEPA informed Malta Enterprise of the development permission granted. Of note was that a childcare facility was to be situated on the east end of the LS3 at level 0, while canteen facilities were to be sited on the west end of LS4, also at level 0.
27 August 2015	Malta Enterprise submitted an application to MEPA, under reference PA/2220/16, for a change of use of the area earmarked as a childcare centre in LS3 to a food and drink establishment. The area cited in the application was 405 square metres.

11 September 2015	Malta Enterprise published an RfP for the provision of F&B services at the MLSP.	Executive Summary
30 October 2015	Closing date of the RfP. No bids were received.	
20 November 2015	A revised RfP was issued by Malta Enterprise in view of the lack of response. The same provisions as those provided in the previous RfP were cited except for some, yet key, differences.	
4 December 2015	Closing date of the revised RfP. Two bids were received.	
11 December 2015	The tender opening session was held.	
8 January 2016	The adjudication process commenced with the first meeting of the Evaluation Committee.	Chapter 1
14 January 2016	A meeting was held by the MLSP with Roots Integrated Services Ltd whereby supplementary information on the bid submitted was sought. Roots Integrated Services Ltd indicated that, during this meeting, the leased premises was seen from the outside.	
8 February 2016	The second meeting of the Evaluation Committee was held. The Committee concluded that Roots Integrated Services Ltd was to be awarded the tender on the basis that it obtained the higher overall mark and tendered the better rental fee.	Chapter 2
20 February 2016	Correspondence submitted by Roots Integrated Services Ltd to Malta Enterprise wherein reference was made to the favourable outcome regarding the cafeteria. An appointment was sought with Malta Enterprise to discuss the way forward and other technical aspects of the project. Of note to the NAO was that this submission by Roots Integrated Services Ltd, indicative of its confidence in securing the contract, was made prior to the referral of the Evaluation Committee's report to the Malta Enterprise Board of Directors for its endorsement and the notification of award.	
12 April 2016	Referral of the Evaluation Committee's report to the Malta Enterprise Board of Directors for its endorsement.	Chapter 3
27 April 2016	During the tender evaluation process, some of the assets and brand representations of Roots Integrated Services Ltd were purchased by Actif Ltd. One of the assets purchased was the rights to the tender which, at that point, had not yet been awarded. Once the bid by Roots Integrated Services Ltd was selected, Actif Ltd decided that a separate company was to be set up and assume responsibility for the bid and the subsequent contract. The new company, set up on this date, was Cook & Co Ltd.	
17 May 2016	Roots Integrated Services Ltd was informed by the Secretary of the Evaluation Committee that the MLSP had accepted its offer for the provision of F&B services at the MLSP for a total price of €71,565 (excluding VAT).	Chapter 4
18 May 2016	An application for a catering establishment licence filed by the CEO MDH on behalf of Cook & Co Ltd was registered by the MTA.	
20 May 2016	A lease agreement was entered into between the MDH, as the landlord, and Cook & Co Ltd, as the tenant.	Chapter 5
21 May 2016	According to Cook & Co Ltd, the first on-site visit of the leased premises was held.	
25 May 2016	In correspondence to Malta Enterprise, Cook & Co Ltd highlighted several issues that were raised during a meeting held on site with a Malta Enterprise Architect and another official. Cook & Co Ltd emphasised the difficulty in operating the premises due to these issues and requested the assistance of Malta Enterprise to address the problems identified. Also indicated by Cook & Co Ltd were certain structural alterations that it intended to carry out.	

27 May 2016	The MTA issued a Tourism Policy Compliance Certificate allowing for the operation of a third-class restaurant named Zenzero. This Certificate was required by Cook & Co Ltd as part of the process to obtain an operating licence.
31 May 2016	Correspondence on the matters raised by Cook & Co Ltd was exchanged internally by Malta Enterprise. Although the former CEO MLSP was inclined to favourably consider that sought by Cook & Co Ltd, the Architect Malta Enterprise raised several concerns. Of note was that the Architect contended that the structural changes requested by Cook & Co Ltd were extensive and were never considered as part of the RfP.
3 June 2016	Consultation letters were sent by the PA to several authorities with respect to the application for a change of use of the site from a childcare centre to a food and drink establishment, which change was sought in terms of PA/2220/16.
8 June 2016	The MTA indicated that it had no objections to the proposed change in use.
13 June 2016	An inventory list and a condition report was included as a schedule to the lease agreement.
15 June 2016	The PA case officer report recommended the approval of the application PA/2220/16, through which Malta Enterprise sought to regularise the change of use from a childcare facility to a catering establishment. Of note was that the area cited by the PA case officer was 50 square metres.
16 June 2016	In connection with Cook & Co Ltd's efforts to obtain an operating licence, ERA requested the plans and section drawings in relation to the exhaust and effluent from the kitchen/food preparation area and waste disposal.
18 June 2016	Correspondence submitted by Cook & Co Ltd wherein it informed the former CEO MLSP that, following a meeting with Malta Enterprise's maintenance and technical personnel, the alteration works that were to be undertaken were agreed on.
20 June 2016	The former CEO MLSP approved the alteration works cited in the correspondence by Cook & Co Ltd.
20 June 2016	According to the CEO MLSP, the keys to the external doors of the premises were signed for by Cook & Co Ltd.
23 June 2016	The Environmental Health Directorate listed several conditions, relating to adequate ventilation and sewage management, subject to its non-objection to the issuance of the planning permit concerning the change of use of the site.
1 July 2016	Cook & Co Ltd indicated that the keys to the premises were provided. Access to the premises prior to this date was possible through the MLSP security staff.
16 August 2016	In a visit to the leased premises, the Environmental Health Directorate noted several issues that warranted address. This review was part of the process for the sanctioning of the change of use of the property by MEPA.
19 August 2016	Cook & Co Ltd submitted to Malta Enterprise a list of difficulties it was facing in its efforts to open the premises.
22 August 2016	The correspondence submitted by Cook & Co Ltd was discussed internally by Malta Enterprise, wherein reference was made to the need to engage an engineer to verify that claimed by Cook & Co Ltd. No further information was provided to this Office on the outcome of this internal discussion.
24 August 2016	MEPA approved the application submitted by Malta Enterprise for the change of use of the area originally intended as a childcare centre to a food and drink establishment.

1 September 2016	Despite that this was the operational start-up date established in the lease agreement, operations did not commence on this date.
1 September 2016	The moratorium granted to Cook & Co Ltd on the payment of rent expired following the lapse of the first three months of the lease term. This implied that rent was to be charged from this date.
13 October 2016	In correspondence submitted by Cook & Co Ltd to the MLSP, reference was made to a meeting between the parties wherein the former CEO MLSP requested the tenant to forward a claim for out-of-pocket expenses incurred.
1 November 2016	The premises was again inspected by the Environmental Health Directorate. Noted was that most of the works required were still pending.
16 November 2016	Cook & Co Ltd obtained a public sewer discharge permit as required by law and by the MTA, and a necessary element in the licensing process.
24 November 2016	Final inspection by the Environmental Health Directorate wherein it was confirmed that all works were carried out.
25 November 2016	The clearance required in connection with the securing of an operating licence was issued by the Superintendent of Public Health following a visit by the Environmental Health Directorate a day prior.
29 November 2016	Cook & Co Ltd submitted a request to the PA to carry out minor amendments to the internal layout of the premises in terms of PA/2220/16.
12 December 2016	A temporary operating licence was issued by the MTA. The temporary nature of the licence was due to the application for minor amendments submitted to the PA.
1 January 2017	According to Cook & Co Ltd, operations on the ground floor commenced on this date.
19 January 2017	Cook & Co Ltd submitted a request for payment to the MLSP for works undertaken amounting to €30,000. Also highlighted was the proposed way forward in relation to pending matters concerning the leased premises.
19 January 2017	Internal correspondence exchanged by the MLSP wherein the former CEO MLSP proposed the sharing of costs between the parties and the possible reduction of rent payable. Guidance was requested from Malta Enterprise. No further information was provided.
12 March 2017	Expiry of the temporary licence to operate as a catering establishment. No other licence would be issued during the lease period.
16 April 2017	The MLSP Board of Directors instructed the Park to obtain the planning permit for the structural alterations made to the leased premises by Cook & Co Ltd.
May/June 2017	Cook & Co Ltd stated that operations on the first floor commenced at around this time.
16 August 2017	The former CEO MLSP sanctioned the installation of an external canopy subject that Cook & Co Ltd obtain the required planning permit.
10 November 2017	The MTA drew Cook & Co Ltd's attention to the fact that its premises was not covered by a valid operating licence.
23 November 2017	The former CEO MLSP authorised the construction of two storage areas within the common parts of the property adjacent to the leased premises following a request by Cook & Co Ltd.
1 December 2017	The PA case officer requested additional information from the architect representing Cook & Co Ltd regarding the amendments to the internal layout of the premises sought in terms of PA/2220/16.

Executive Summary

Chapter 1

Chapter 2

Chapter 3

Chapter 4

Chapter 5

4 December 2017	The architect representing Cook & Co Ltd informed the PA that the changes proposed to the internal configuration of the premises were not to effect the scale and scope of the operation as approved under PA/2220/16 and that the landlord was in agreement with the changes.
5 December 2017	The architect representing Cook & Co Ltd informed his clients that the amendments sought constituted an extension of the retail area and that consultations with stakeholders could not be waived, as was done in the process of PA/2220/16. The PA proposed the withdrawal of the request made and the submission of a full development application. Despite other requests for direction from Cook & Co Ltd, the architect noted that none was provided.
28 February 2018	A report by a third party engaged by Cook & Co Ltd referred to an onsite inspection and highlighted several defects with the leased premises.
6 June 2018	Cook & Co Ltd indicated that it became aware of the discrepancy regarding the permitted site area during a meeting held with the CEO MLSP and other officials of Malta Enterprise and the MLSP.
4 July 2018	Cook & Co Ltd lodged a judicial protest against the MDH, highlighting issues relating to the lack of a planning permit and licence for the premises and identifying several structural and utility-related deficiencies.
5 July 2018	The CEO MLSP informed the MTA and Cook & Co Ltd that the matter relating to the operating licence remained unresolved pending feedback from the latter's architect.
undated	A meeting was held between Malta Enterprise and Cook & Co Ltd wherein the former acknowledged that the indicated 50 square metres was erroneous and that corrective action was to be taken. According to Cook & Co Ltd, the parties agreed that an architect was to be engaged to regularise the situation, with the relevant professional fees to be borne by Malta Enterprise or the MDH.
3 December 2018	In view of the lack of developments, Cook & Co Ltd submitted an official letter through which it sought that the MDH obtain a planning permit for the leased premises, grant direct access to the passenger lift, ensure a reliable supply of potable water, install a goods lift and undertake the required drainage works.
18 January 2019	Malta Enterprise submitted a development planning application to the PA for the sanctioning of internal alterations and an extension at first floor level under reference PA/3688/19.
16 April 2019	During the meeting of the MLSP Board it was decided to initiate legal proceedings against Cook & Co Ltd and take ownership of the permit application since this was not followed through by Cook & Co Ltd.
23 April 2019	A revised Fire Safety, Light, Noise Mitigation and Ventilation Report of the leased premises was prepared by a third-party Engineer. This was subsequently submitted by Malta Enterprise to the PA as part of the planning application to sanction the works undertaken by Cook & Co Ltd.
27 May 2019	The PA sought the clearance of several stakeholders in connection with the planning application submitted by Malta Enterprise.
14 August 2019	Malta Enterprise revised its planning application to include the sanctioning of the outdoor catering area in addition to the internal alterations and extension at first-floor level.
16 August 2019	A charge was raised by the PA to Malta Enterprise in relation to the planning process for the amount of €1,987, due in respect of the development and environment fees, including street and sewer contributions. This was settled on 10 September 2019.

20 August 2019	The inclusion of the outdoor catering area was deemed a material change by the PA, necessitating a fresh round of review and consultation with stakeholders.
29 November 2019	The PA case officer recommended the application submitted by Malta Enterprise for the sanctioning of alteration works for approval, subject to certain provisions. According to the case officer's report, since the application entailed the sanctioning of a development, a fine of €2,633 was to be imposed prior to the issuing of a permit.
19 December 2019	In correspondence submitted by the CEO Malta Enterprise to the former CEO MLSP reference was made to the contention made by Cook & Co Ltd that the latter had an understanding with the tenant that it was "not to pay rent or any contribution as part of a tacit agreement over the years to which parties acquiesced." The former CEO MLSP maintained that he had never advised any tenant, verbally or written, not to settle the rent due. However, he noted that Cook & Co Ltd had reasonable grounds to request compensation from Malta Enterprise for several latent defects at the leased premises.
9 January 2020	A judicial protest was lodged by Cook & Co Ltd against the MDH wherein the former referred to concerns relating to the leased premises raised in earlier legal proceedings and requested redress by the latter in line with the lease agreement. Cited in the protest was that Cook & Co Ltd had invested €1,500,000 in the leased premises.
20 January 2020	Following submissions by Malta Enterprise, an updated report by the PA case officer was drawn up.
23 January 2020	The PA Planning Commission approved the project and endorsed the updated report by the case officer in relation to PA/3688/19.
31 January 2020	Malta Enterprise paid the fine of €2,633 imposed by the PA for the sanctioning of works already carried out.
March 2020	The premises was closed in March 2020 as a result of the Government-imposed measure to close all catering establishments as part of its efforts to address the COVID-19 pandemic. The premises was still closed as at October 2023.
13 March 2020	The full development planning permit in respect of PA/3688/19 was issued by the PA.
21 July 2020	The NAO received a complaint from Cook & Co Ltd regarding an RfP issued by the MLSP for the provision of F&B services at the MLSP and the MDH.
31 August 2020	Cook & Co Ltd filed an application against the MDH with the Rent Regulation Board citing breaches of the lease agreement by the landlord that rendered it impossible for the tenant to operate the catering establishment at the MLSP.
22 September 2020	In a sworn application to the Rent Regulation Board, the MDH requested the payment of unpaid rent, utility and other charges – amounting to €107,022 – and sought the eviction of Cook & Co Ltd from the premises.
19 May 2021	Expiry of the term of the lease agreement between Cook & Co Ltd and the MDH.
5 June 2023	The NAO carried out a site visit at the premises.
November 2023	At the time of reporting, judicial proceedings between the MDH and Cook & Co Ltd were ongoing.

5.2 Conclusions

5.2.1 Having considered the relevant facts, hereunder are the salient conclusions arrived at by the NAO. These are structured around the key developments that occurred, namely: the issuance of the RfP and the consequent selection of Cook & Co Ltd to operate an F&B establishment at the MLSP; the lease agreement entered into to regulate its relationship with the landlord, that is, the MDH; and the implementation of contractual obligations by the parties.

The request for proposals for the provision of food and beverage services at the Malta Life Sciences Park

5.2.2 The procurement of F&B services at the MLSP formed part of the wider development of the Park and was intended as an ancillary service provided to tenants housed therein. Malta Enterprise sought to engage the services of an F&B operator through an RfP issued in September 2015. Key elements of the service to be provided were outlined in the RfP, as were details of the site, the rent to be charged and other obligations that were to be borne by the service provider. Also specified were the documents that were to be submitted with the bid and information relating to the evaluation process. No bids were received, resulting in a revised RfP being issued by Malta Enterprise in November 2015. Key changes between the RfPs were intended to encourage interest. Nevertheless, two concerns regarding the RfPs emerge. First, was that the heading of the RfPs was ambiguous in that, rather than procuring an F&B service, Malta Enterprise was leasing a site from which such a service was to be provided. Second, was the lack of detailed plans of the site, which point assumes relevance when one considers that the use of the premises to be leased had just been changed from a childcare centre to a catering establishment, rendering the utility of such plans even more important. Aside from these points, the NAO deemed the objectives of procurement as sufficiently defined in the RfP.

5.2.3 The RfPs issued by Malta Enterprise did not refer to the regulations that were to govern the calls. In essence, Malta Enterprise was leasing a site for a specific function, that is, the provision of F&B services. The NAO ascertained that Malta Enterprise could exercise such a function as this was within the remit of its empowering legislation. However, this Office considered the indirect reference to the Public Procurement Regulations, through the obligation to submit a tender form and subscribe to its several requirements, as introducing an element of ambiguity. The source of incongruence emerges as Malta Enterprise was not seeking the procurement of any goods or services but leasing property.

5.2.4 Aspects of the site to be transferred were sufficiently disclosed in the RfP, with its setting and location specified, and the period of control stated. However, other key elements of information, particularly in terms of the envisaged and permitted use of the site and its infrastructural requirements, were not adequately disclosed. In addition, there were inconsistencies between the actual layout of the premises, the plans annexed to the RfPs and the plans submitted by Malta Enterprise to MEPA in its planning application for the change of use of the site. These omissions

were of concern to the NAO as the adequacy of information provided by Malta Enterprise in the RfPs was called into question. More so when one considered the obligation imposed on the prospective F&B operator to start operating within two months from notification of award.

5.2.5 The fact that Malta Enterprise did not offer the possibility for a site visit prior to the submission of bids curtailed the visibility of prospective bidders over the site and impacted their ability to assess its condition and suitability for the tendered F&B service. Although the NAO takes cognisance of the meeting and site visit held with one of the bidders during the evaluation of bids, concerns emerge as to the timing of this visit and that similar access was not afforded to the other bidder. This Office is of the opinion that since no site visit was provided for prior to the deadline for bid submission, the tendering process was not fully transparent, with bidders precluded from developing a full understanding of the premises and Malta Enterprise not capitalising on the return from this tender. The incongruencies between that presented in the site plans annexed to the RfP and the actual premises aggravate these concerns.

5.2.6 The NAO established that the legislative and regulatory framework that prospective bidders were to comply with was not specified in the calls. Obligations associated with permits, licences and insurances required by the operator were broadly specified in the RfPs, as were other operational and specific requirements sought by Malta Enterprise. Notwithstanding this, certain gaps were noted by this Office in relation to these requirements and in connection with the periodical reporting necessary to ensure the maintenance of service standards.

5.2.7 In the NAO's opinion, certain obligations that ought to have been placed on Malta Enterprise were defined in the RfP; however, other requirements were not stated or imprecisely represented. Specified in the calls were the requirements in terms of the F&B service sought as well as other aspects of service, the evaluation criteria that were to be applied in selection, as well as key commercial considerations such as the lease term and rental rates. However, a shortcoming identified by this Office was the omission of reference to the legislative and regulatory framework that ought to have guided Malta Enterprise in the sourcing of the F&B service. Other deficiencies in the setting of obligations to be borne by the contracting authority were largely of a general nature. Also not included in the RfPs was a sample contract.

5.2.8 The process of evaluation undertaken by Malta Enterprise adhered to the conditions established in the RfP, with the criteria set and relevant weightings fairly applied to both bids received. The evaluation led to the selection of the bid that was the most economically advantageous to Malta Enterprise, that is, the bid submitted by Roots Integrated Services Ltd, the rights to which were later assumed by Cook & Co Ltd. Nevertheless, certain shortcomings in the process of evaluation were noted. First, were the gaps in documentation that limited a comprehensive understanding of when key developments in the evaluation process occurred, namely, the date of the evaluation report and that of its endorsement by the Board of Directors Malta Enterprise. Second, was the meeting held solely with Cook & Co Ltd during the evaluation process. While the Evaluation Committee justified this meeting as a means to obtain additional information,

the NAO contends that both bidders should have been treated in the same manner. Third, was that Cook & Co Ltd was informed of the successful outcome of its bid prior to the referral of the evaluation report for the endorsement of the Malta Enterprise Board of Directors.

The lease agreement

- 5.2.9 Generally, the deliverables and obligations specified in the lease agreement reflected the parameters established in the RfP. The key provisions relating to the lease term, use of the site, the obtaining of permits and licences, and rent and other charges due, were consistent in both documents. Other points of consistency were noted by the NAO. Nevertheless, instances of omission were identified, with the RfP silent on matters such as the tenant's obligation to ensure the premises' upkeep, breaches of the lease, and the return of the site on expiry.
- 5.2.10 The main concern that emerged following the NAO's comparison of the lease agreement and the RfP related to the state of the premises and the onus of the works required to render it suitable for the envisaged use. While the lease agreement specified that the property was being transferred on a tale quale basis, the RfP only provided a limited understanding of the condition of the premises and did not specify that the site was being transferred 'as is'. Furthermore, the lease agreement did not provide any warranty to the tenant that the premises could be used as intended, which exclusion was not reflected in the RfP. This anomaly created a scenario where Cook & Co Ltd agreed to take over and adapt the leased site for a specific use, despite having only limited visibility over its state. Linked to this point is the undertaking of works required to render the premises appropriate as a catering establishment. While the lease agreement and the RfP did not specify the extent of works necessary, the agreement stipulated the procedure that Cook & Co Ltd was to adhere to when carrying out such works, and that the cost was to be borne by the tenant. This raises concern in that Cook & Co Ltd assumed responsibility for the works required without having visibility over what such a commitment entailed.
- 5.2.11 When considering the lease agreement in terms of the bid submitted by Roots Integrated Services Ltd, the NAO deemed the link between the two, as captured in a clause in the agreement, as sufficient in regulating the use of the site and the level of F&B service that was to be provided to the MDH. Furthermore, the rental rates stipulated in the lease agreement matched those proposed in the bid; however, a discrepancy in terms of the investment to be made was noted, with the bid stipulating €76,000 and the lease agreement indicating €150,000. Regardless, no major concerns emerge in this respect.
- 5.2.12 Of note to the NAO was that the premises was not inspected prior to entry into the lease agreement, with Cook & Co Ltd maintaining that it was only viewed from the outside during the evaluation process. The right of Cook & Co Ltd to inspect the property prior to it assuming control was a basic and legitimate expectation and ought to have been exercised by it. In this context, it would have been of benefit had Malta Enterprise granted adequate access to the premises at any point prior to entry into the lease agreement. However, Cook & Co Ltd was

not without fault, for it was in its interest to access and assess the property to be leased prior to entering into any commitment.

5.2.13 The NAO noted that the lease agreement was clear as regards the pertinent aspects associated with the MDH's role as landlord in respect of the common areas. The agreement provided well-defined terms relating to access and use, as well as cleaning, upkeep, maintenance and health and safety.

5.2.14 Similarly clear were the provisions of the lease agreement relating to the rights and obligations of the MDH in connection with the leased premises. Fundamental in this respect was that the MDH was leasing the site on a tale quale basis. The term 'tale quale' implied that the property was being leased as is, without any warranties or guarantees regarding its existing condition. The NAO is of the understanding that since the lease agreement stipulated that the MDH was handing over the premises to Cook & Co Ltd on a tale quale basis, this indicated that the former was generally not responsible for repairs or improvements required to the property following entry into the agreement. Also implied was that Cook & Co Ltd was accepting the property in its current condition and was to assume the works, repairs and maintenance needed during the tenancy.

5.2.15 The lease agreement excluded any assurance from the MDH that the premises was fit for the use it was intended for. This was deemed somewhat anomalous by the NAO since the MDH was leasing the premises specifically for the operation of a catering establishment, for which planning and other regulatory permits were required.

5.2.16 The NAO is of the opinion that the agreement clearly specified the responsibilities that were to be borne by Cook & Co Ltd, contributing to the clarity in roles and duties that ought to have been assumed by it as tenant. Notwithstanding this, several observations are warranted.

5.2.17 Specified in the lease agreement was that the premises was being transferred on a tale quale basis, without any warranties or guarantees as to its existing condition. Although the agreement included a report on the condition of the premises, one could argue that more information would have better captured the state of the site. Nonetheless, Cook & Co Ltd accepted the premises 'as is', regardless of its adequacy as a catering establishment. By entering into the lease agreement, Cook & Co Ltd accepted the responsibility to adapt the premises for the intended use and therefore undertake the works required.

5.2.18 In addition, the lease agreement indicated that Cook & Co Ltd was to secure the necessary permits and licences. The NAO noted that the agreement was silent in a scenario where the required permits and licences were not issued or delayed. This observation assumes relevance when one considers that the premises was not covered by a planning permit to operate as a catering establishment at the point of entry into the lease agreement. Moreover, Cook & Co Ltd was obligated to commence operations within three and a half months from signing.

- 5.2.19 In terms of the rights and obligations of Cook & Co Ltd during the lease term, the NAO is of the opinion that the agreement was clear. Key provisions relating to the payment of rent and utility charges, the use of the premises, the level of activity and investment expected, as well as reporting requirements were outlined. Other provisions covered matters concerning health and safety, insurance and access to the premises. The onus to maintain the leased site in good condition and repair and the commitment to seek the MDH's approval for any alteration works were also cited in the lease agreement. The works were to be paid for by Cook & Co Ltd and, unless otherwise specified, were to become the property of the MDH on completion. Aside from these obligations, the lease agreement granted Cook & Co Ltd the right to access the premises for all purposes connected with its use and enjoyment.
- 5.2.20 Also clear was the regulation of the lease towards the end of its term. Specified were provisions regarding the vacation of the premises by Cook & Co Ltd and the state in which the premises was to be left. The lease agreement provided for circumstances where Cook & Co Ltd failed to relinquish the premises, with the provisions that were to come into effect should such a situation materialise specified.
- 5.2.21 Whether the lease agreement was equitable in terms of the rights and obligations that it imposed on the MDH and Cook & Co Ltd is another matter. Nonetheless, the NAO acknowledges that the lease agreement was a private writing that allowed the parties to set the terms and conditions to the contract. More crucial was that both parties signed.

Adherence to contractual obligations

- 5.2.22 The premises was transferred from the MDH to Cook & Co Ltd on 20 May 2016, on the signing of the lease agreement. Both parties agreed that the keys to the premises were not handed over on signing, since works on the site were still ongoing; however, these were provided several weeks later. Notwithstanding this, Cook & Co Ltd and the MDH confirmed that the premises could be accessed through the MLSP security personnel following entry into the lease agreement, despite that this arrangement created an element of inconvenience to Cook & Co Ltd.
- 5.2.23 Cook & Co Ltd did not commence operations on 1 September 2016 as stipulated in the lease agreement. Nevertheless, the NAO is of the opinion that the delay could not be solely attributed to Cook & Co Ltd for several defects were noted when assuming ownership of the premises, with necessary repairs extending beyond the period allowed in the lease agreement for the commencement of operations. While Malta Enterprise initially acknowledged certain deficiencies, this stance was eventually revisited, with the current administration negating the claims by Cook & Co Ltd and maintaining that the premises was adequate for the intended use.
- 5.2.24 The PA permit for the change of use of the site, allowing the leased premises to be used as a catering facility, was issued on 24 August 2016, that is, a mere week prior to the established commencement of operations date. Moreover, the planning permit was subject to several

conditions that necessitated the undertaking of works to adapt the premises to its newly revised use. The extent of works required to render the premises in line with the planning permit remained a contentious issue between Cook & Co Ltd and Malta Enterprise. The delay in the issuance of the planning permit inevitably prolonged the process of obtaining an operating licence, with a temporary licence secured from the MTA on 12 December 2016, several months after the originally designated commencement date of 1 September 2016. The NAO established that Cook & Co Ltd started operating the Zenzero restaurant in January 2017.

5.2.25 In terms of the lease agreement with Cook & Co Ltd, the MDH, as landlord, bore obligations relating to the common areas of the MLSP. Certain obligations were met without concern, with cleaning, waste disposal and health and safety-related requirements as cases in point. Nonetheless, other aspects concerning the repair and maintenance of the site, the provision of utilities, and signage remained contended between the parties.

5.2.26 Regarding repairs and maintenance, the primary concerns of the MDH were the improper use of the shared facilities of the MLSP by Cook & Co Ltd and the latter's inadequate adaptation of the leased premises to cope with its revised use. Conversely, Cook & Co Ltd argued that there were inconsistencies in defining the shared and leased areas, and that specific structural and infrastructural aspects of the leased site were not adequate for its use as a catering facility.

5.2.27 The concerns regarding the suitability of the leased premises for operating as a restaurant extended to the supply of utilities. Malta Enterprise argued that the issues raised by Cook & Co Ltd regarding the supply of water and electricity were a result of the extent and the nature of its operations at the leased premises. On the other hand, Cook & Co Ltd insisted that the supply was insufficient regardless of the scope of use.

5.2.28 A final aspect concerning the MDH's obligations in terms of the common areas was the provision of signage to its tenants. Disagreement was registered in this regard, with Malta Enterprise claiming that it had fulfilled this obligation with Cook & Co Ltd, as with other tenants, with the latter maintaining otherwise.

5.2.29 Regarding the obligations retained by the MDH over the leased premises, these mainly comprised ensuring that the condition of the premises, as leased, was retained. Any necessary adaptation works required by the tenant were to be approved in advance and documented in the contractual agreement on completion. The lease agreement outlined the procedure to be followed in this respect. While the NAO reviewed evidence corresponding to the authorisation of works sought by Cook & Co Ltd and provided by the MLSP, this Office noted that these exchanges did not comply with the provisions stipulated in the lease agreement regulating the registration of adaptations to the premises. The MDH's claim, that it was the tenant's responsibility to obtain authorisation for the undertaken works and ensure their inclusion in the lease agreement, was considered erroneous by the NAO, for the MDH was, by its own admission, aware of the works

being undertaken by Cook & Co Ltd. Therefore, the MDH, as the landlord, failed to comply with the provisions outlined in the lease agreement that governed the authorisation of such works.

- 5.2.30 Irrespective of concerns relating to the authorisation and registration of works not being in line with the terms of the lease agreement, another point of contention in connection therewith was whether these works were the responsibility of the MDH or Cook & Co Ltd. Central to the contention between the parties was that although the lease agreement indicated that works of a structural nature were to be borne by the MDH, the agreement failed to define what constituted works 'of a structural nature'. While some works could be clearly classified as falling under this definition, others were less evident, creating uncertainty about which party was to bear responsibility. Other works could less clearly be defined as structural, but more infrastructural in nature, such as those undertaken in connection with the drainage and electrical systems. It can be argued that these infrastructural deficiencies led to structural defects in the building, thereby rendering the landlord accountable. The latent nature of these deficiencies further complicated matters.
- 5.2.31 The inclusion of the 'tale quale' provision in the lease agreement and that no warranty was provided as to the adequacy of the premises in terms of its intended use add other layers of complexity to this contractual relationship. The NAO asserts that these conditions should have prompted Malta Enterprise to disclose all information concerning the premises before entry into the lease agreement. Nevertheless, this Office is of the opinion that Cook & Co Ltd bore responsibility to thoroughly assess the condition of the premises to be leased prior to its commitment to the contract, especially in view of the tale quale conditionality and the lack of warranty provided. Again, the latent nature of certain defects, also acknowledged by Malta Enterprise, further compounded the contestations between the parties.
- 5.2.32 Lastly, concerning the MDH's responsibility to guarantee the peaceful and undisturbed enjoyment of the leased premises, no concerns were raised by Cook & Co Ltd. However, in respect of its broader responsibility to all tenants at the MLSP in ensuring the peaceful and quiet use of their premises, Malta Enterprise expressed concern regarding the improper use of part of the premises. Nevertheless, no documentation that captured the communication of this concern to Cook & Co Ltd, at the time of its occurrence, was provided to the NAO. Moreover, this Office noted that the lease agreement was silent in terms of the permitted use of the premises, other than that specified by Cook & Co Ltd in its bid.
- 5.2.33 The lease agreement stipulated several obligations that Cook & Co Ltd was to adhere to. In terms of compliance with relevant permits and licences required for the leased premises to operate as a catering facility, the NAO noted that the lease agreement stipulated a three-and-a-half-month period between entry into the agreement and the operational start-up date. This Office established that the permit relating to the change in use of the leased premises was obtained by Malta Enterprise within this period, hence regularising the use of the premises as a catering establishment.

5.2.34 Multiple concerns emerge in the NAO’s review of the sanctioning of the works undertaken at the leased premises. The origin of the matter can be traced to the initial attempt by Cook & Co Ltd to regularise the ‘minor amendments’ to the internal layout of the premises. This attempt drew attention to the discrepancy in terms of the area of the site, which was not in conformity with the planning permit in hand that covered the change in use of the premises from a childcare centre to a catering establishment, as well as the extent of the structural alterations carried out. As regards the discrepancy in the area of the leased premises, the NAO established that this incongruence was not attributable to Malta Enterprise or Cook & Co Ltd, but erroneously arose during the planning application screening process undertaken by the PA. The documentation reviewed by this Office imparted an understanding that Malta Enterprise and Cook & Co Ltd were initially unaware of this error.

5.2.35 The NAO is less tolerant of the structural alterations to the leased premises carried out by Cook & Co Ltd without the prior sanctioning of the PA. The lease agreement stipulated a mechanism that was to be followed when the tenant sought to effect changes to the premises, a process that required the landlord’s authorisation and that ought to have resulted in the documentation of any works undertaken. Correspondence reviewed by this Office indicated that Cook & Co Ltd requested the endorsement of the MDH for works carried out, which approval was granted. However, this exchange did not correspond to all the works undertaken. Regardless, even when works were authorised, the procedure specified in the lease agreement to register such works was not adhered to.

5.2.36 Compounding matters was that, notwithstanding the endorsement of Malta Enterprise, Cook & Co Ltd did not obtain the necessary planning permit before undertaking the works. The argument put forward by Cook & Co Ltd, that its role as specified in the RfP was merely that of an operator and did not include the responsibility to obtain the necessary permits, was deemed incorrect by the NAO. The RfP as bid for by Cook & Co Ltd stipulated that the tenant was to “Provide all necessary permits to operate the facility/ies”. Cook & Co Ltd’s stance when arguing that its role was merely that of an operator was rendered incongruent by the fact that it had carried out all the works to the leased premises that later required sanctioning.

5.2.37 The failure to obtain a planning permit resulted in Cook & Co Ltd’s inability to secure the licence from the MTA required to operate a restaurant, as a valid permit was one of the requirements set for a licence to be issued. While the initial months of operation were covered by a temporary licence, once this expired in March 2017, Cook & Co Ltd continued to operate the restaurant for several years despite not having a valid licence to do so. While primary responsibility for this failure rests with Cook & Co Ltd, for the lease agreement stipulated that it was the tenant who was to ensure that operations were covered by the relevant licences, an element of concern emerges in that the MTA and Malta Enterprise were aware that the restaurant did not have the required licence yet continued to operate for a three-year period regardless. Nevertheless, the NAO is cognisant of the effect that the misrepresentation of the site in the planning permit for the change in use had, for this error led to complications in later efforts to sanction the site with the PA and secure the required operating licence.

- 5.2.38 The NAO is of the understanding that Cook & Co Ltd's failure to pay the rent due and other ancillary charges constituted a breach of the lease agreement. The contention that the premises had several latent defects that resulted in disbursement by the tenant to rectify does not provide justification to withhold the payment of contractual dues. More so when one considers that Cook & Co Ltd was operating from the premises for several years. On the part of the MDH, scope for the better management of this contractual relationship existed. While the MDH had the option to enforce the lease agreement and institute unilateral action to terminate the lease, the context to the relationship between the parties ought to have encouraged greater dialogue leading to settlement. The change in management of Malta Enterprise and the MLSP adds another layer of complexity to the relationship between the landlord and the tenant. Originally, the MDH conceded that it too had erred in certain respects, such as in its decision to engage the architect originally tasked with responsibility for the project to verify the defects alleged by Cook & Co Ltd, whose impartiality could readily be challenged. The stance adopted following the change in management of Malta Enterprise and the MLSP was less amenable to seek compromise on the various issues in contention.
- 5.2.39 Of concern to the NAO was that the procedure established in the lease agreement intended to regulate the authorisation and registration of any works undertaken at the leased premises was not adhered to by Cook & Co Ltd, as tenant. While evidence considered by this Office indicated that Cook & Co Ltd sought the MDH's clearance for the alteration works carried out, with the MDH either sanctioning or not objecting to the works indicated, neither the requests nor the authorisations were made in line with the provisions stipulated in the lease agreement. To honour this obligation, Cook & Co Ltd was to submit duly certified drawings and work method statements relating to the alteration works. No evidence of such submissions to the MDH was provided to the NAO.
- 5.2.40 Graver still was that Cook & Co Ltd did not adhere to the provision of the lease agreement that required the tenant to obtain and comply with the necessary consents of the competent authorities and pay their charges. Cook & Co Ltd carried out the alteration works at the leased premises without the required PA permit, with action to sanction these works proving futile when sought by Cook & Co Ltd in November 2016 through its request for a minor amendment, and later followed up through a full development application submitted by Malta Enterprise in January 2019.
- 5.2.41 The MDH is not without blame in this matter. The NAO is of the opinion that the MDH, acting as a responsible landlord, ought to have ascertained that the alteration works undertaken by Cook & Co Ltd were covered by a planning permit, more so when one considers that the MDH had visibility over the works carried out. Although Malta Enterprise sought to regularise the leased premises through the submission of a planning application in January 2019, the substantial lapse between the undertaking of the works and their subsequent sanctioning drew this Office's attention. Malta Enterprise contended that it was constrained to assume responsibility for the planning application since Cook & Co Ltd failed to pay the architect engaged to aid in the process

of sanctioning alterations already made to the leased premises. While the NAO concedes that the obligation to obtain such a permit fell squarely on Cook & Co Ltd, it was within the right of the MDH to ensure that the works undertaken were legal.

5.2.42 Aside from specific issues of contention, the NAO is of the understanding that Cook & Co Ltd maintained the premises in a good state of repair during the lease term. However, this Office noted that the obligation that ought to have been borne by Cook & Co Ltd, to pay for maintenance undertaken by the MDH at the leased premises, was not honoured.

5.2.43 In terms of the obligation borne by Cook & Co Ltd to conduct periodical risk assessments, the NAO maintains that this requirement arising from the MLSP Users' Manual ought to have been honoured by Cook & Co Ltd and enforced by the MDH.

5.2.44 The NAO was not provided with any documents evidencing the health and safety assessments undertaken by Cook & Co Ltd, despite this being a requirement imposed by the lease agreement. Furthermore, although Cook & Co Ltd referred to an incident concerning the passenger lift, no documentation relating to its obligation to log such events was made available.

5.2.45 Adherence by Cook & Co Ltd in terms of the contractual provisions regulating insurance cover was inadequate. Only one policy of the three established in the lease agreement was obtained, that relating to public liability. Moreover, no evidence of the renewal of this policy was provided to the NAO, casting doubt on whether coverage extended throughout the period of operation. No information relating to the rebuilding and reinstating of the premises and the employers' liability insurance was made available to this Office. Furthermore, the NAO was not provided with any records indicating the attempts made by the MLSP, as landlord, to enforce the provisions stipulated in the lease agreement in this regard.

5.2.46 The several instances of non-adherence to the contractual obligations by the tenant and the landlord must be seen against the tense relationship that existed between the parties. While Cook & Co Ltd argued that this strain became evident following the change in management of the landlord, Malta Enterprise and the MLSP contested this understanding.

5.2.47 As regards the possible termination of the agreement between the MDH and Cook & Co Ltd, the NAO noted that there existed several grounds for the rescinding of the lease. Action in this respect was taken by the MDH in September 2020, when the landlord instigated judicial action for the eviction of Cook & Co Ltd for unpaid rent and utility charges. This development ensued referral to the Rent Regulation Board by Cook & Co Ltd in August 2020 for breaches of the lease agreement by the landlord that rendered it impossible for the tenant to operate the catering establishment at the MLSP. The judicial proceedings were still ongoing at the time of reporting.

2023-2024 (to date) Reports issued by NAO

NAO Annual Report and Financial Statements

July 2023 National Audit Office Annual Report and Financial Statements 2022

NAO Audit Reports

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May 2023 An audit of matters relating to the concession awarded to Vitals Global Healthcare by Government Part 3 | Steward Health Care assumes control of the concession [Abridged]

June 2023 Follow-up Audits Report by the National Audit Office Volume I 2023

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December 2023 Report by the Auditor General 2022