



An Analysis of the Sourcing of Legal Services with respect to the Granting of Concessions to Operate Two Casinos

Table of Contents

	Page
List of Tables	3
List of Boxes	3
List of Abbreviations	4
Executive Summary	6
Chapter 1: Introduction	11
1.1 Background to Investigation	12
1.2 Terms of Reference	14
1.3 A Brief Background on the Key Players Involved	15
1.4 Methodology	16
Chapter 2: A Chronological Account Of The Evaluation And Selection Process	17
2.1 Background to the Expression Of Interest	18
2.2 Appointment of the Evaluation Committee	18
2.3 Establishment of Eligibility Criteria	20
2.4 Advertisement and the Offer Submission Process	24
2.5 The Evaluation Committee's Concerns	24
2.6 Submission of Evaluation Committee's Report	26
2.7 Re-Assessment of Submitted Offers	29
2.8 Direct Order Approval	36
Chapter 3: Conclusions And Recommendations	39
3.1 Timeline of Events	40
3.2 Conclusions and Recommendations	40

List of Tables

Table 1: Excerpt from Project Plan submitted by the Lotteries and Gaming Authority	22
Table 2: Timeline of Events	41

List of Boxes

Box 1: Excerpt from the Privatisation Unit Process Letter	24
Box 2: Excerpt from Email dated 6 May 2013	26
Box 3: Scoring Formula utilised by the Evaluation Committee	28

List of Abbreviations

AG	Auditor General
CEO	Chief Executive Officer
DO	Direct Order
EOI	Expression of Interest
LGA	Lotteries and Gaming Authority
MEIB	Ministry for the Economy, Investment and Small Business
MFIN	Ministry for Finance
MGI	Malta Government Investments Limited
MIMCOL	Malta Investment Management Company Limited
MPs	Members of Parliament
NAO	National Audit Office
PAC	Public Accounts Committee
PU	Privatisation Unit

Executive Summary

1. On 16 August 2013, the three Opposition Members of Parliament on the Public Accounts Committee (PAC) formally requested the Auditor General (AG) to investigate the procurement procedure whereby the Privatisation Unit (PU) engaged the services of a legal firm. The firm was to support and advise during the process for a call for expressions of interest (EOI) for the concession of two casino licences, one in Malta and the other in Gozo, which the Ministry for the Economy, Investment and Small Business (MEIB) was embarking on assisted by a number of other entities, including the PU. The AG was also to report on the intervention of a Minister MEIB during this procurement process.
2. According to the request, which was citing parliamentary reportage and media sources, it appeared that the award decision of the Evaluation Committee was overturned by Minister MEIB, who had publicly declared that he had changed the evaluation criteria decided on in the selection process and changed the legal firm chosen by the Evaluation Committee. It was further alleged that the Minister, aware that he could not effect such changes, then requested the Minister of Finance to sanction the change through the approval of a direct order.
3. On 25 September 2013, AG informed Chair PAC of the terms of reference that the National Audit Office (NAO) was adopting in connection with the investigation on the sourcing of legal services in connection with the grant of concessions to operate two casinos, namely:
 - a. the review of the procurement process adopted by the PU, in particular the call for EOI, the criteria for award and the selection of the preferred bidder;
 - b. the reasons/arguments made by MEIB for the change in the award criteria and the consequent change in the preferred bidder;
 - c. the rationale behind the decision to award a direct order following an open call for offers; and
 - d. the basis for approval of the direct order by the Ministry for Finance (MFIN).
4. As was the practice with respect to other privatisation processes, once this assignment was entrusted to the PU, other key stakeholders were also involved. In this case, these were representatives from the Lotteries and Gaming Authority and the Malta Investment Management Company Limited. These key stakeholders were responsible for the engagement of a legal firm that was to subsequently assist in the EOI process. MEIB, as the ministry responsible for investment, was inevitably also an

active participant. The Direct Orders Section within MFIN was drawn into the process by virtue of its remit.

5. Following the review of documentation submitted and several meetings with officers from all of the aforementioned entities, NAO concluded that:
 - a. The Evaluation Committee was not formally appointed by MEIB, nor was it furnished with clearly defined terms of reference outlining its expected functions and responsibilities. In NAO's opinion, these shortcomings, largely attributable to the Ministry, created a sense of ambiguity that manifested itself at various stages throughout the legal firm selection process. The failure to appropriately define the objectives towards which the Committee was to work subsequently resulted in uncertainty of purpose, fundamentally evident in terms of whether the Committee was tasked with the evaluation of offers, or the adjudication of offers.
 - b. NAO commends the Ministry's initial endeavours at designing a selection process that was open and transparent, most notably so in terms of efforts intended at widening eligibility criteria by removing past experience as an eligibility requirement. Such efforts, if seen through, serve to promote good governance. Moreover, providing all firms with the opportunity to submit an offer simultaneously contributes towards ascertaining the desired level of transparency that should characterise such processes. The considerable number of legal firms that registered interest with respect to this EOI validates MEIB's intentions of adopting an open and therefore competitive process.
 - c. The removal of past experience of privatisation processes as an eligibility requirement subsequently created the need to establish another mechanism whereby the interested legal firms' quality could be assessed and ascertained. The establishment of these evaluation criteria, more precisely, shortcomings relating thereto, were in NAO's opinion, the source of difficulties that subsequently surfaced. This Office considers such shortcomings as attributable to MEIB and the Evaluation Committee.
 - d. On one hand, the evidence reviewed clearly illustrated the Ministry's failure in providing adequate guidance, despite the numerous attempts at sourcing such assistance by the Evaluation Committee. This guidance was critically required in view of changes implemented with respect to eligibility criteria. The widening of eligibility criteria at the offer submission stage of the process shifted and accentuated the need for the establishment of definitive criteria prior to the evaluation stage. In view of the fact that the PU's modus operandi was drastically altered following MEIB's decision to broaden eligibility requirements, NAO is of the considered opinion that attempts made by members of the Evaluation Committee to seek guidance from this Ministry were warranted and merited attention, which unfortunately, was never forthcoming.
 - e. On the other hand, failure on the part of the Evaluation Committee to proactively propose and utilise comprehensive criteria other than the price criterion eventually employed, was deemed as constituting a shortcoming on the Committee's behalf. In truth, the Committee, which was composed of various senior officials from a number of Government entities, should have realised that conducting an evaluation on price alone would result in an incomplete analysis of offers received.

- f. In NAO's opinion, the financial component utilised by the Evaluation Committee was thoroughly devised, agreed to by all members of the Committee, objective, transparent and fair. In fact, no major difficulties subsequently arose with regard to the applied financial component. However, difficulties did emerge with respect to the qualitative component of the Committee's evaluation. In this Office's opinion, the qualitative aspect of this evaluation process was not as well developed, particularly in view of changes instituted with respect to eligibility requirements. As was already highlighted above, this shortcoming is attributable to MEIB for failing to provide the requested guidance, and the Evaluation Committee for failing to devise appropriate qualitative criteria irrespective of Ministerial guidance, or otherwise.
- g. Although all members of the Evaluation Committee verbally expressed agreement with the report submitted to MEIB, and NAO acknowledged concerns expressed by Chair PU relating to limiting circulation of the said report, this Office nonetheless considered the Committee's failure to submit a signed copy of the report to MEIB as a shortcoming.
- h. The re-ranking process carried out directly by Minister MEIB and Parliamentary Secretary MEIB detracted from the process's overall level of transparency. Further accentuating this concern is the fact that the document submitted by Minister MEIB with respect to how the re-ranking process was carried out had various shortcomings. The main limitation of this document centred on the fact that the detailed allocation of points under the qualitative evaluation was not specified, except for the total allocated to each firm. Therefore, it was impossible for NAO to establish a clear understanding of the re-ranking process, especially how each of the firms fared with regard to the individual elements that constituted the qualitative review. Other shortcomings identified by NAO with respect to this document include that compliance to specifications was reckoned as a qualitative element, when this clearly should not be the case, as well as concerns relating to the establishment of firms' ability to achieve results by deadlines prior to actual service delivery. Furthermore, the allocation of points among the financial and qualitative components draws NAO's concern, particularly in view of the fact that this weighting was arrived at after the actual offers were already known. Additional doubts as to the integrity of the document supplied by Minister MEIB arose in view of the inconsistency with other evidence sourced from MEIB with respect to the final rank order. The relevance of such documentation in relation to the re-ranking process assumes critical importance when one considers the significant changes brought about with respect to the original rank order established by the Evaluation Committee.
- i. Other considerations were deemed by NAO as bearing a negative influence on the process's transparency, notably, the fact that the PU was not provided with an account of the re-evaluation methodology employed (despite MEIB originally indicating otherwise) and the fact that only the first seven ranked offers as originally established by the Evaluation Committee were considered. With respect to this latter point, if MEIB considered the original ranking process as flawed, then its selection of the first seven offers as ranked by the same flawed system renders the re-evaluation deficient.
- j. NAO noted that MEIB was effectively constrained in having to resort to the placement of a direct order due to the fact that no advertisement in the Government Gazette had been placed with respect to this request for legal services. Although the process of sourcing legal assistance was in fact advertised in other printed media, MEIB's failure to advertise in the Government Gazette

precluded the procurement process from being recognised as a ‘call for quotations’ and had to be processed as a direct contract.

- k. The fact that the direct order approval sought was for €40,000 indicated that no provisions for possible additional hours required over the established 40-hour monthly retainer were made.

6. Finally, NAO puts forward the following recommendations:

- a. Members on evaluation committees should invariably be formally appointed and provided with clear terms of reference, thereby safeguarding against ambiguity as to their remit;
- b. The establishment of evaluation criteria must invariably be finalised prior to the review of offers received. Any deviations therefrom seriously undermine the integrity of the procurement process;
- c. When possible, open call for tenders should be resorted to, as opposed to direct contracts. This serves to promote good governance, ascertains value for money, while ensuring transparency;
- d. In fulfilling their management function, Ministries should seek to provide guidance and assistance to subsidiary committees, thereby aiding them in the adequate discharge of duties; and
- e. Attention must be directed towards appropriate record-keeping practices, specifically when key decisions are made or documents exchanged. Failure to maintain relevant documentation may detract from the desired level of accountability and transparency.

Chapter 1 - Introduction

1.1 Background to Investigation

- 1.1.1 In this investigation, the National Audit Office (NAO) examined allegations that a contract for the provision of legal services in connection with a concession for casino licences morphed from one where the recommended award of contract followed an open call for applications, to one where the actual award was the result of a ministerial discretionary decision.
- 1.1.2 In April 2013, during debates ensuing the presentation of budgetary estimates, the Prime Minister announced that Government would be launching an international call for expressions of interest (EOIs) for two casino concessions, one in Malta and the other in Gozo. This call for EOIs was in line with Government's aim of generating economic growth and more employment opportunities in the gaming sector, which had become an important economic activity for Malta. Government was committed to an expeditious process in the assessment of the EOIs, while simultaneously ensuring that the process was smooth and transparent. The deadline for the submission of EOIs was set as 1 July 2013. The responsibility for implementation was entrusted to the Ministry for the Economy, Investment and Small Business (MEIB).
- 1.1.3 In initial discussions held between MEIB and other Government entities involved in previous similar processes, it was agreed that the legal support function was essential in such concessions, since these were substantial contracts that Government and the selected bidder would enter into in terms of the concession agreements. Legal support was also deemed vital when addressing queries raised by bidders during the tendering stage and possible contestations later on in the process. It was also recommended that engaged legal advisors were to be involved in the drafting stage of the actual EOI documents.
- 1.1.4 The entities involved in these early discussions were the Privatisation Unit (PU), the Lotteries and Gaming Authority (LGA) and the Malta Investment Management Company Ltd (MIMCOL). These had been involved either in the National Lottery privatisation, or in previous casino concessions.
- 1.1.5 In particular, this investigation concerned the manner in which a legal firm was engaged after an advert for the provision of legal services to assist the PU in the

pre-drafting, adjudication, negotiations and final agreements of EOIs for the granting of two new casino licences was published on 28 April 2013. The closing date for the submission of proposals was that of 6 May 2013.

- 1.1.6 On 6 May 2013, a report by the Evaluation Committee - made up of representatives of the PU, the LGA, MIMCOL and MEIB - was passed to Minister MEIB for approval. The report, in the form of a memorandum, followed the opening of sealed proposals and the ranking of the 14 bids received by the Unit. Minister MEIB, however, objected to the way the Evaluation Committee had carried out its evaluation and ordered the award of the contract to another firm after re-ranking some of the submitted proposals.
- 1.1.7 According to the original evaluation report, Filletti & Filletti Advocates was shortlisted as the winning bidder and recommended the award of contract, having submitted the cheapest proposal. Law firms Dingli & Dingli and GVTH came in second and third place respectively. However, after the Minister's intervention, the first seven ranked proposals by the Evaluation Committee were re-ranked in a different order, placing Deguara Farrugia Advocates - initially placed sixth - as the preferred bidder. Filletti & Filletti Advocates, the firm originally recommended the award, was relegated to third place after Chetcuti Cauchi Advocates. Chair PU objected to the re-evaluation, stating that any re-adjudication process risked adulterating the process with subjectivity.
- 1.1.8 Minister MEIB admitted to having intervened in the call for the provision of legal services, stating that he wanted to ensure that the process was open to all eligible firms. The Minister maintained that he was in disagreement with the selection made by the Evaluation Committee as it had considered the proposals and advised MEIB solely on the basis of price. The Minister maintained that the choice should not have been based exclusively on this criterion but that qualitative factors, such as a firm's expertise and capacity, should have been given due consideration. Furthermore, there was no transparency in the methodology adopted by the PU in previous similar assignments, as legal advisers were handpicked selectively and such services invariably contracted by direct order. In contrast, this process was open to all eligible firms.
- 1.1.9 Opposition Members of Parliament (MPs) on the Public Accounts Committee (PAC) requested the Auditor General (AG) to investigate this case of alleged ministerial interference. They requested the AG to investigate the manner in which Minister MEIB intervened in the process, a decision, it was claimed, which saw him substitute the chosen firm with another one of his choice. According to the Opposition MPs' request, when Minister MEIB realised that he did not have the authority to make this change, he requested the Minister of Finance to sanction the decision by ignoring the process and seek approval for the award of a direct order to the firm of his choice.
- 1.1.10 Reacting to this request, Government MPs on the PAC contended that the investigation should be widened to include the practices used by the previous administration in the choice of legal consultants, especially the Ministry for Finance (MFIN). According to the MPs, such contracts were almost invariably awarded by direct order to the same few firms, on unknown criteria. This was contrary to what happened in this case where all interested firms were given the opportunity to submit a proposal.

1.2 Terms of Reference

- 1.2.1 On 16 August 2013, the three Opposition MPs on the PAC formally requested AG to investigate the procurement procedure whereby the PU engaged the services of a legal firm. The firm was to support and advise during the process for a call for EOIs for the concession of two casino licences, which MEIB was embarking on assisted by a number of other entities, including the PU. The AG was also to report on the intervention of Minister MEIB during this procurement process.
- 1.2.2 According to the request, which was citing parliamentary reportage and media sources, it appeared that the award decision of the Evaluation Committee was overturned by Minister MEIB, who had publicly declared that he had changed the evaluation criteria decided on in the selection process and changed the legal firm chosen by the Evaluation Committee. It was further alleged that the Minister, aware that he could not effect such changes, then requested the Minister of Finance to sanction the change through the approval of a direct order.
- 1.2.3 Later on the same day, the Government MPs on PAC issued a press release whereby they declared that the scope of the investigation by AG should be widened to include the practices adopted during the previous administration in the engagement of legal and other advisers, especially by MFIN. They added that such contracts were invariably awarded by direct order to the same person(s) or firm(s) on indeterminate and unspecified criteria. This contrasted with the procedure presently adopted whereby firms, which previously had been excluded, now had the opportunity to participate in procurement processes.
- 1.2.4 On 20 August 2013, the Government's side on the PAC submitted a formal request to AG to investigate how similar contracts were awarded during the previous legislature, specifically by the Ministry of Finance.
- 1.2.5 On 25 September 2013, the Auditor General informed Chair PAC of the terms of reference that NAO was adopting in connection with the investigation on the sourcing of legal services in connection with the grant of concessions to operate two casinos, namely:
- a. the review of the procurement process adopted by the PU, in particular the call for EOIs, the criteria for award and the selection of the preferred bidder;
 - b. the reasons/arguments made by MEIB for the change in the award criteria and the consequent change in the preferred bidder;
 - c. the rationale behind the decision to award a direct order following an open call for offers; and
 - d. the basis for approval of the direct order by MFIN.
- 1.2.6 The counter-request made by Government's side on the PAC is being dealt with in a parallel audit and will be reported on separately. This report deals solely with the initial request made to AG, namely the investigation of the procurement process adopted for the contracting of a legal firm to assist in a call for EOIs for the concession of two casino licences.

1.3 A Brief Background on the Key Players Involved

1.3.1 It is the praxis that once a privatisation project is assigned to the PU, a number of advisors are appointed. In some privatisations, only legal and financial advisors are required; however, in complex processes, the assistance of technical advisers may be sought. In addition to the Unit, other key stakeholders may be involved in the process. In the concession for casino licences, these were LGA and MIMCOL. MEIB, as the ministry responsible for investment, was inevitably also an active participant. The Direct Orders Section within MFIN was drawn into the process by virtue of its remit.

The Privatisation Unit

1.3.2 The PU was set up in June 2000. The general mandate of the Unit is to conduct the privatisation of a number of public enterprises as prescribed by government. The key objective is to conduct the process in a correct and efficient manner in which the best terms and conditions, both financial and in terms of value added to the national economy, are attained on behalf of government. Privatisation processes vary in their execution. In some instances, the process may basically entail the sale of shares. However, in other instances, the privatisation may be a concession, a sale and purchase agreement, or a sale of shareholding to a strategic partner. Recent privatisations included that of the national lottery, the yacht marinas at Ta' Xbiex, Msida and Gozo and that of the Malta Shipyards, which essentially entailed five separate processes, namely that of the Ship Repair, the Manoel Island Yacht Yard, the Ship Building, the Super Yacht Yard and, at a later date, Ricasoli.

1.3.3 The PU falls within the portfolio of MEIB and is manned by a Chairman and a Transaction Manager. Budgetary allocations to the Unit are minimal (circa €60,000 annually) and costs incurred by the Unit, other than salaries and incidentals, are generally covered by MIMCOL or the government entity directly involved in the privatisation process.

The Malta Investment Management Company Limited

1.3.4 MIMCOL was set up in 1988 to manage government investments. The setting up of this company was in line with the drive to decrease the role of government in the economy and improve the efficiency and value for money of public services through the selling of government firms and better government investment management. MIMCOL also provides public sector and parastatal entities consultancy advice in their planning, negotiation and administration of private public partnerships, as well as professional support with restructuring, privatisations and business practices.

The Lotteries and Gaming Authority

1.3.5 LGA is a single public regulatory body that is responsible for the governance of all forms of gaming in Malta including amusement machines, broadcasting media games, casinos, commercial bingo halls, commercial communication games, the national lottery, non-profit games and remote gaming. Established through the enactment of the Lotteries and Other Games Act, 2001 the LGA regulates the various sectors of the lotteries and gaming industry that fall under the Authority.

The Direct Orders (DO) Section, Ministry of Finance

1.3.6 Direct orders valued in excess of €6,000 but which do not exceed the departmental threshold, may, in exceptional or urgent cases, be resorted to by a contracting authority after obtaining the prior approval of the Minister of Finance or his delegated officer. Requests in writing for the placing of direct orders are forwarded to MFIN through the DO Section.

1.4 Methodology

1.4.1 This investigation was carried out in terms of the provisions of Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act 1997.

1.4.2 One-to-one interviews were held with key public officers involved in the privatisation process, but particularly on their role in the engagement of legal services. These included the Minister, the Parliamentary Secretary and the Permanent Secretary MEIB and senior officers at MFIN. Officials within the other organisations involved, namely the PU, MIMCOL and LGA, were also questioned on their role in the process. Records of meetings held were minuted which, after clarifications/revisions where necessary, were endorsed by the interviewees.

1.4.3 Relevant documentation, although not extensive, was made available to NAO and was reviewed in detail. However, comprehensive written records of crucial decisions taken, such as timelines, the evaluation criteria adopted by the Evaluation Committee and the considerations of Minister MEIB in the re-ranking of proposals, were not maintained. In the absence of documented evidence, NAO endeavoured to corroborate statements made against those of other interviewees.

1.4.4 Findings reported herein and conclusions arrived at were based on these sources.

1.4.5 Public officers cited throughout the report are referred to by their designation at the time reported on.

Chapter 2 - A Chronological Account of the Evaluation and Selection Process

2.1 Background to the EOI

- 2.1.1 During a meeting held with NAO officials on 26 September 2013, the Chief Executive Officer (CEO) of LGA stated that, soon after the change in administration (following the March 2013 General Election), he was asked by the Parliamentary Secretary for Competitiveness and Economic Growth within MEIB to explore the options available for the granting of casino concessions. During discussions ensuing the presentation of budgetary estimates, the Prime Minister announced that two casino concessions were to be issued, one in Malta and the other in Gozo. LGA was then requested to prepare the first iterations of the EOI documents for these concessions.
- 2.1.2 The first draft of the EOI was submitted to Parliamentary Secretary MEIB through an email sent on 14 April 2013 by CEO LGA. In addition to the submission of the draft EOI, CEO LGA had suggested that a similar process to the one adopted for the National Lottery concession be implemented for the casino concessions. Making reference to the success registered with respect to the National Lottery concession, CEO LGA emphasised the importance of exercising due attention in ensuring that the integrity of the privatisation process was safeguarded at all times. To this end, CEO LGA suggested that all persons involved in the drafting and adjudication process were to sign confidentiality agreements.

2.2 Appointment of the Evaluation Committee

- 2.2.1 In this correspondence, CEO LGA recommended that a committee be appointed, whereby it would be tasked with assuming responsibility for the drafting and process of the EOI. Such a committee would, in CEO LGA's view, ensure process ownership and coordination between all parties involved.
- 2.2.2 Parliamentary Secretary MEIB replied to CEO LGA's email on 15 April 2013 raising a number of queries that mostly related to the submitted draft EOI. However, a pertinent point raised with respect to the establishment of the aforementioned committee was Parliamentary Secretary's request for further details relating to the composition of this committee, as well as the competencies of persons appointed thereto.
- 2.2.3 CEO LGA replied on that same day, stating that in order to guarantee impartiality, transparency and good governance, the committee was to be structured in a similar

manner as was the case with respect to the National Lottery Licence concession. The committee composition was proposed as follows:

- The Chairperson of the PU, who was to chair the committee;
- The committee was to be supported by three technical representatives from the LGA;
- One Ministry representative responsible for policy decisions, who was to ensure that Government's policy direction was aptly captured in the relevant documents and who was able to take decisions there and then in order to achieve established deadlines;
- One Ministry representative with a sound knowledge of finance; and
- One representative from Malta Government Investments Limited (MGI) who had previous experience of concessions (though not necessarily in relation to gaming).

2.2.4 It is fundamentally important for NAO to clarify that the aforementioned committee was that tasked with responsibility for oversight of the EOI and not the sourcing of legal services. However, the structure of the above-quoted proposed committee largely mirrored the eventual set-up of the Evaluation Committee tasked with selecting the legal firm that was to assist with the concession process.

2.2.5 Chair PU, who similarly provided a chronological walkthrough of events, corroborated that stated by CEO LGA; however, the involvement of Chair PU did not extend to the commencement of the concession process. In this sense, Chair PU stated that officials from the LGA had met with Parliamentary Secretary MEIB on two other occasions prior to the 19 April 2013 meeting, for which PU representatives were present.

2.2.6 In addition to the PU, and according to its Chair, the 19 April 2013 meeting was attended by Permanent Secretary MEIB, as well as representatives from MIMCOL and LGA. According to Chair PU, it was during this meeting that the roles to be assumed by the various stakeholders within the Evaluation Committee were tacitly developed, with MIMCOL assuming the role of financial consultants and LGA that of technical consultants. Furthermore, Chair PU stated that an agreement in principle with respect to the appointment of legal advisers to assist PU in this privatisation process was reached in this meeting. Permanent Secretary MEIB maintained that she was not present for this meeting.

2.2.7 NAO enquired with MEIB as well as with the various members of the Evaluation Committee as to their formal appointment to the said Committee. All confirmed that no formal letter of appointment was issued, and therefore, no specific terms of reference regulated their engagement in this respect. Notwithstanding the absence of any formal document indicating the appointment of members to the Evaluation Committee, Chair PU confirmed that he was satisfied with the composition of the said Committee. Nevertheless, Chair PU had drawn the Minister's attention that for future adjudication processes, the accepted practice dictated that the Minister was to appoint an adjudication committee of his trust. According to Chair PU, this was the praxis with respect to previous privatisation processes.

2.2.8 The only formal document retrieved in this respect was an agreement signed by all members of the Advisory Committee issued by the PU in relation to the drafting and issuing of public calls for casino concessions. This document terms the signatory's appointment to the Advisory Committee as a *fait accompli*, yet specifically serves as a non-disclosure agreement and a declaration regarding the absence of any conflicts of interest. All members signed their respective agreement prior to, or on 22 April 2013. Eight out of the ten members of the Advisory Committee who signed this

non-disclosure agreement constituted the Committee that eventually evaluated the offers submitted by legal firms interested in assisting with the casino concessions. Throughout this report, this Committee is referred to as the Evaluation Committee.

2.2.9 The ambiguity surrounding the establishment of the Evaluation Committee was further compounded by comments made by Minister MEIB. The Minister stated that MEIB was not involved in the appointment or composition of the Committee. In addition, Minister MEIB was of the opinion that this Committee was to fulfil an evaluation function, as opposed to an adjudication function, since this was a call for EOI for the provision of legal services and not a call for tenders.

2.2.10 NAO's understanding of the distinction alluded to by Minister MEIB is a fine yet significant one, with evaluation resulting in a recommendation submitted for the Minister's consideration in the case of an EOI, while adjudication would have implied a more definite recommendation for the award of tender. In this respect, Chair PU stated that the Evaluation Committee's role was always advisory in nature and would therefore make recommendations for the Minister's approval.

2.2.11 Parliamentary Secretary MEIB confirmed the fact that the Evaluation Committee had not been formally appointed through MEIB and stated that it was Chair PU who had decided upon its composition. According to Parliamentary Secretary MEIB, the members that eventually constituted the Committee were selected according to practices utilised in previous concession processes.

2.2.12 This was in fact corroborated by CEO LGA, who stated that he had informed Parliamentary Secretary MEIB on the role of LGA in previous concessions, specifically noting that the Authority had acted solely in an advisory position and was not responsible for the actual issue of EOIs. MIMCOL and the PU, in conjunction with MGI, had in fact been the entities responsible for the Dragonara Casino and the National Lottery concessions.

2.2.13 CEO LGA further stated that in these cases, a committee made up of representatives from a number of entities was established, and that legal advisers were always engaged to assist in the process. In this particular case, CEO LGA was of the opinion that the PU was to assume the lead and LGA provide the technical assistance required.

2.2.14 Moreover, CEO LGA was of the opinion that the legal support function was essential in such concessions, since these were 'substantial' agreements that the Government and the selected bidder would enter into in terms of the relevant concession agreement. Legal support was also vital when addressing queries raised by bidders during tendering and possible contestations arising later on in the process. It was in this context that CEO LGA recommended that, in the case of the casino concessions, legal advisers were to be engaged in the drafting stage of the EOI documents.

2.3 Establishment of Eligibility Criteria

2.3.1 NAO has conflicting evidence as to what other matters were discussed during the 19 April 2013 meeting. Transaction Manager PU indicated that discussions held during this meeting also served to address the method by which the required legal firm was to be chosen, which subsequently resulted in MEIB expressing disagreement with the PU's previously employed *modus operandi*.

2.3.2 Making reference to previous privatisation processes, Transaction Manager PU indicated that the PU would generally contact a number of legal firms inviting them

to submit an EOI. Received submissions would then be ranked in terms of price, and the contract of service would subsequently be awarded to the cheapest offer.

2.3.3 Irrespective of the discussions held during the aforementioned meeting, what is certain is that the Planning Working Group on the EOI Processes for Casino Concessions submitted a memorandum to Permanent Secretary MEIB on 22 April 2013 through Chair PU. This Planning Working Group was essentially similar in composition to the Evaluation Committee, with members from the PU, LGA and MIMCOL. Discussing the requirements leading to the necessary process for the engagement of a legal firm to advise Government in this concession, the Working Group expressed the critical importance of choosing the external legal advisors prior to the issuance of the EOI.

2.3.4 The Planning Working Group supported this argument on the following basis:

- a. *“The legal advisors would need to vet the EOI document and the process to minimise any potential attack on the process or on conditions issued therewith.*
- b. *There are only a few firms in Malta that have the experience, know-how, set-up and multidisciplinary expertise available on demand on such processes. Typically these same firms are approached by potential bidders to be their legal representatives – the risk is that should the EOI be issued without the selection of the lawyers first, the firms may be taken up by the bidders, leaving Government with the only option of having to choose local firms with no or little experience.*
- c. *The legal firm needs to be part of the process throughout to vet clarifications issued as these have a legal standing as much as the tender document has.*
- d. *The legal firm would be required to vet any queries from the press, as any responses given to the press without due consideration from a legal standpoint may have future consequences on the process.*
- e. *The legal firms will be required for immediate reaction to any possible legal action taken against the process.*
- f. *The legal firm would be required for the drafting of the concession agreement documents, and negotiations thereafter.*
- g. *The legal firm would be required to have resources available on immediate demand, due to potential legal action, immediate clarifications, etc.”*

2.3.5 Against this context, the Planning Working Group proposed two possible courses of action. The first entailed the issuance of a closed request for proposals, that would have been targeted at six or seven firms that, in the Working Group’s view, met the requirements as established in the preceding clauses (a) to (g). These firms would effectively represent the legal practices that had interacted directly with the PU and MIMCOL on past concessions. The firms were to be allowed a one-week offer submission timeframe. Other than this first set of requirements, the selection of the legal firm to assist in the casino concession was to be based on price considerations. The cheapest bid would be selected, provided that they could prove that they had the required expertise immediately available from the point of commencement of the project up to its end. The Working Group stated that pursuing such an option would require a direct order from MFIN.

2.3.6 The second option proposed by the Planning Working Group was similar to the first barring a few key points. The main difference was that the second option envisaged a public advertisement featuring a request for proposals. In this case, the offer submission timeframe would be extended to two weeks. Another important distinction with respect to the first option was the introduction of past involvement in a concession award process as an eligibility requirement. The intention behind the introduction of such a requirement was as follows, *“... In order not to have small firms*

that do not have the resources, expertise and experience to service this process, the RFP [Request for Proposals] would issue a qualification criterion that the bidders should have been part in a concession award process in the past.” In effect, this requirement of past involvement in a concession award process would have allowed legal firms representing counterparties to Government in previous privatisation processes to submit their offer.

2.3.7 Other reasons why the services of the legal advisors that were to assist in the concession process were required at this early stage were also delved into in this memorandum, yet were considered to be tangential to the main objectives of this audit. Finally, the Planning Working Group concluded its submitted memorandum by recommending that the second option be executed, as this would ensure greater transparency. However, the Working Group again emphasised the necessity of including a proviso that would consider past experience on a concession as an essential prerequisite.

2.3.8 The essence of that put forward in the Planning Working Group’s memorandum was mirrored in an email submitted to Parliamentary Secretary MEIB by CEO LGA on 22 April 2013. The email effectively serves as a summary of the salient points emerging from a workshop held at MIMCOL, and attended by representatives from LGA and PU, as well as MIMCOL itself.

2.3.9 The first point raised by CEO LGA was the following, *“The appointment of legal advisors is key to happen before the EOI is issued as per all other public call processes. The Working Group is of the opinion that the public advert option can be entertained, provided that there is a qualification that the law firms would need to have a past experience in a concession process (this so as to avoid having small firms that cannot support the process).”*

2.3.10 Aside from various other important issues relating to how the EOI processes should be structured and planned, included in this email was a highly detailed project plan outlining possible timeframes, action points and other details. Table 1 presents an excerpt from this project plan.

Table 1: Excerpt from Project Plan submitted by LGA

Task Name	Start	Finish	Resource Names	Notes
Casino EOIs	Mon 28/01/13	Mon 03/03/14		
Appoint Team	Sun 28/04/13	Mon 29/04/13	Minister	Appointment of officials by the Minister to oversee the process
Decide on policy areas	Tue 30/04/13	Mon 06/05/13	Ministry	Policy decisions still to be taken at Ministry level
Legal Support	Tue 23/04/13	Fri 17/05/13		Legal team supporting technical team
Decision on process of selection	Tue 23/04/13	Wed 24/04/13	Ministry	Choose between open or closed call
Issue call for law firm	Sun 28/04/13	Sat 11/05/13	MGI	2 weeks to reply for the call and clear conflicts of interest
Adjudicate and agree on TOR	Mon 13/05/13	Fri 17/05/13	Team	TOR normally takes 10 days to agree upon

- 2.3.11 These two issues, namely, past experience in a concession process as an eligibility requirement and project timelines were discussed during a meeting held at MEIB on 23 April 2013. This meeting was attended by Minister MEIB, Parliamentary Secretary MEIB, Permanent Secretary MEIB, together with various representatives from LGA, PU and MIMCOL.
- 2.3.12 No signed minutes were retained with respect to this meeting, with Permanent Secretary MEIB referring to the then recent setup of the Ministry as part justification for this lack of documentation; however, Permanent Secretary MEIB presented some written notes providing details relating to the process' envisaged work plan as well as noting who was in attendance at the said meeting. The timeframes proposed as per 22 April 2013 correspondence were shortened, with the closing date for the submission of offers by interested legal firms set at 6 May 2013. Other than the established deadline for this task, the notes state the following, "*decide legal support team (by 8.00pm)*", and "*1/2/3 ranking.*" NAO here assumed that these notes implied that the Evaluation Committee tasked with this duty was to decide upon a legal support team by 20:00 hours and rank the received offers accordingly.
- 2.3.13 The shortening of the afore indicated timeframes was insisted upon by Minister MEIB and Parliamentary Secretary MEIB. In this context, Minister MEIB stated that he was in disagreement with the deadlines set by Chair PU, which were deemed too long and not in conformity with the Cabinet's decision. Parliamentary Secretary MEIB confirmed that stated by Minister MEIB, duly noting that the conclusion of the Malta casino concession was set for end October 2013, while the Gozo casino concession had to be extended due to unforeseen problems encountered. As indicated in the preceding clause, timeframes were eventually shortened as per Minister MEIB and Parliamentary Secretary MEIB guidance on the matter.
- 2.3.14 Further to the above, from information obtained by NAO, it appears that two opposing views emerged during the meeting held on 23 April 2013 with respect to eligibility requirements. Chair PU and other members of the Evaluation Committee were in favour of stipulating past experience in a concession process as an eligibility requirement and suggested its inclusion as the recommended way forward. On the other hand, it appears that Minister MEIB and Parliamentary Secretary MEIB were against this requirement, declaring that a more transparent and open procurement process was to be pursued.
- 2.3.15 Expanding upon their opposition to the restriction of eligibility, Minister MEIB and Parliamentary Secretary MEIB sought assurance that the process was open to all legal firms. According to Parliamentary Secretary MEIB, this change in approach ensured that firms that would not have otherwise been able to submit proposals were now afforded the opportunity to participate through the submission of their offer.
- 2.3.16 In a bid to keep the process as unrestricted as possible, and upon insistence of Minister MEIB and Parliamentary Secretary MEIB, it was decided that no previous concession experience (either on Government's side or on the operator's side) was to be requested when the call for EOI with respect to legal services was to be eventually published.
- 2.3.17 In elaborating on his viewpoint, Chair PU stated that when appointing legal advisers in previous concession processes, the Unit generally opted to solicit offers from a number of top legal firms. In doing so, the Unit took various factors into account,

such as the necessary expertise, experience and resources required for the task at hand. The final decision was eventually based on price, choosing the cheapest offer submitted. CEO LGA mirrored Chair PU's concerns, stating that he had voiced his concern in this respect and insisted that previous experience in concession processes should be factored in as an eligibility requirement, together with some form of assessment of 'measurable' qualitative criteria.

2.4 Advertisement and the Offer Submission Process

- 2.4.1 Following the conclusion of these initial discussions and plans, advertisements were placed in two local newspapers on 28 April 2013, calling for the EOI with respect to the provision of legal services. By means of this public call, interested parties were invited to communicate with the PU in expressing their interest. The PU would thereafter forward the terms of reference relative to the required assignment, thereby enabling and facilitating interested parties in the formulation of their proposals. The advertisement indicated that proposals would be received in writing by not later than 12:00 hours of 6 May 2013.
- 2.4.2 Once legal firms expressed interest in the casino concessions, the PU would issue a so called 'process letter', whereby more details relating to the request for proposals were outlined. These process letters provided background information with respect to the stakeholders involved in the concession process, and more importantly, outlined key submission requirements. Such requirements are reproduced in Box 1.
- 2.4.3 A total of 22 firms registered interest in the provision of legal assistance to the PU in the granting of casino concessions. After registering such interest, a process letter was sent to each of these firms.

Box 1: Excerpt from PU Process Letter

Process Letter sent to Interested Legal Firms by Chair PU

The Privatisation Unit is hereby requesting a proposal for the provision of Legal Services for all stages of the process, including drafting of the expression of interest, pre-submission phase, all clarification documentation, drafting of Request of Proposal, support and advice during the adjudication process, negotiations and the final agreements. You are invited to submit a detailed proposal to the PU, quoting a monthly retainer fee on the basis of approximately 40 hours per month, and an hourly rate for any hours over and above the 40 hours per month will be paid at the contracted rate. The retainer fee and the hourly rate should include all services provided by the law firm, including any court related procedures. It is envisaged that the process seeing the conclusion of both Public Calls for Concession, will be completed within 12 months. All fees need to be quoted inclusive of VAT. Interested parties are to submit full CVs of the legal team being assigned for the purposes of legal assistance as per above.

2.5 The Evaluation Committee's Concerns

- 2.5.1 From the review of documentation made available by MEIB, PU, LGA and MIMCOL, and subject to that stated during meetings held with the various officials involved in this process, NAO noted that difficulties emerged with respect to the determination of the criteria that were to be adopted in the evaluation of offers. Against this contextual backdrop, CEO LGA stated that during the 23 April 2013 meeting, it was agreed that MEIB was to advise the Committee as to the criteria that were to be adopted in the evaluation of offers.

- 2.5.2 It was not possible for NAO to determine whether such an agreement was reached, particularly in view of the fact that no official record was retained with respect to the 23 April 2013 meeting. However, an email sent by Manager Financial Advisory MIMCOL to PU on 24 April 2013 provides an overview of timeframes set based on notes taken during the meeting. The email sent by Manager Financial Advisory largely confirms that stated above, yet with respect to the specific matter of MEIB guidance on the evaluation criteria, the email reads as follows, *“To check with ranked lawyers (no basis for ranking provided) for their immediate availability.”* Furthermore, Manager Financial Advisory concluded his brief summation of the 23 April 2013 meeting by stating, *“Ministry to provide direction and policies re [regarding] way forward.”*
- 2.5.3 On 3 May 2013, an email was sent by the PU addressed to Permanent Secretary MEIB, copying in a number of the selected Evaluation Committee representatives from LGA and MIMCOL. The relevance of this email is pivotal, as here, three days prior to the actual deadline for the submission of offers by interested legal firms, the Evaluation Committee, through the PU, requested guidance with respect to the execution of its function. Given the absence of input by MEIB in terms of the establishment of evaluation criteria, the Committee proposed the following, *“...We need to set an evaluation criteria before we start opening the proposals. The most transparent criteria is price. Whoever has the lowest price will win.”*
- 2.5.4 The message conveyed by Chair PU was mirrored in another email sent by CEO LGA a few hours later on 3 May 2013, where he claimed that it was important for the selection criteria to be established prior to the opening of offers received. This email was addressed to the PU and Permanent Secretary MEIB while copying in two MIMCOL Evaluation Committee members.
- 2.5.5 The Chief Strategy Officer LGA emphasised the importance of all of the above when stating to NAO that it was, in his opinion, imperative that the selection criteria be established prior to the opening of the submitted bids, as adjusting the selection criteria after having seen the bids would have jeopardised the integrity of the adjudication process.
- 2.5.6 According to evidence provided by CEO LGA, the email dated 3 May 2013 was not replied to by Permanent Secretary MEIB. When confronted with such a statement, Permanent Secretary MEIB stated that CEO LGA’s email had *“not been tracked”*, and therefore could not confirm whether a reply to such an important email had, or had not, been submitted.
- 2.5.7 On the other hand, with respect to the email submitted by PU on 3 May 2013 regarding, among other matters, the request for guidance relating to the evaluation criteria that were to be employed, Permanent Secretary MEIB initially failed to recall receipt of such an email. When queried further, Permanent Secretary MEIB traced such correspondence and provided NAO with a copy of the reply submitted to PU’s 3 May 2013 email. The reply, also dated 3 May 2013, did not address the concerns raised by PU and tangentially provided some information relating to logistical arrangements.
- 2.5.8 In addition to this ambiguous reply provided to PU, Permanent Secretary MEIB forwarded the email sent by PU dated 3 May 2013, whereby the request for guidance with respect to the evaluation criteria was made, to Minister MEIB and Parliamentary Secretary MEIB later that same day.

Email sent by Transaction Manager PU on behalf of Chair PU to Permanent Secretary MEIB on 6 May 2013, 10:59 hours

So far we have no formal assignment and we are carrying out our tasks on the basis of last year's experience in the National Lottery concession. It is important that we are given an official assignment so that if we are challenged we can defend our position.

On the basis of the verbal direction given to us by our Minister we are now in the process of receiving proposals from legal firms for the legal services required for these two processes. As we have no guidance on the selection criteria we will adopt the price level as our guide, this will be the most transparent guide.

Obviously given that we are not familiar with a number of firms we will rely on their explanation of the service they offer and unless we spot some irregular proposals we have to assume that they can provide the services we require to help us complete the processes successfully and on time.

We propose to list the applicants in accordance with their price offers. The cheapest will be the top ranker. We will then check the services offered and unless we spot some inconsistencies we will go for the cheapest offer. We will need some legal assistance to confirm to us that the proposed agreement is acceptable.

- 2.5.9 The Evaluation Committee's efforts at sourcing guidance from MEIB culminated in another email sent by Chair PU to Permanent Secretary MEIB on 6 May 2013 at 10:59 hours, that is, one hour prior to the established submission deadline. This email clearly highlighted the Evaluation Committee's concern, correctly anticipating many of the difficulties that were to subsequently arise. The relevant text is reproduced verbatim in Box 2.
- 2.5.10 In sum, this email reiterates many of the concerns referred to earlier in the text, namely, the absence of any formal assignment, the lack of guidance with respect to the selection criteria, and the resulting classification on the basis of price only.
- 2.5.11 No reply to this email sent by Chair PU on 6 May 2013 was sent by Permanent Secretary MEIB. When queried as to why this email was not replied to, Permanent Secretary MEIB stated this was due to the fact that the email was sent so close to the submission deadline, and expressed concern at the following statement, "...so that if we are challenged we can defend our position." NAO fails to understand the concern raised by Permanent Secretary MEIB, as this Office considers the request for the granting of formal terms of reference as legitimate and warranted in view of possible future contestations.
- 2.5.12 In addition, Permanent Secretary MEIB was of the opinion that the Evaluation Committee consisted of members occupying senior management positions, and therefore it was understood that these officials should have had the right competencies and expertise to set evaluation criteria. Moreover, Permanent Secretary MEIB stated that at no point should she, or any other official, contribute or interfere, in the setting of selection criteria of any committee for which one is not sitting on as a member.

2.6 Submission of Evaluation Committee's Report

- 2.6.1 Prior to the Evaluation Committee meeting of 6 May 2013, which was scheduled to commence at 11:30 hours, Chair PU informed the Committee that no guidance with respect to the criteria that were to be employed in the evaluation process had been provided by MEIB. The Committee therefore decided that if bids received

were compliant with the conditions specified in the process letter, then they would be considered as eligible and subsequently ranked according to price. All Evaluation Committee members expressed agreement with this ranking mechanism.

- 2.6.2 As indicated earlier, the offer submission deadline was that of 12:00 hours on 6 May 2013, and interested bidders were to place their bids in a locked tender box that was housed within the PU. A total of 14 offers were received by the PU by the established submission deadline. Additional bids submitted by two legal firms were refused, as bid submission with respect to these two offers took place after the established deadline.
- 2.6.3 NAO's analysis of this stage of the process is largely based on the exchange of documentation between the Evaluation Committee and MEIB. A key document in this respect is the memorandum submitted by Chair PU to Minister MEIB and copied to Permanent Secretary MEIB on 6 May 2013. This report effectively summarises the Committee's evaluation of submitted offers.
- 2.6.4 According to this memorandum, those present during the ranking process of submitted offers were Chair PU, Transaction Manager PU, CEO LGA, Chief Strategy Officer LGA, Manager Legal LGA, CEO MIMCOL, Manager Financial Advisory MIMCOL and a Clerk from MEIB.
- 2.6.5 Submitted offers were to provide the Evaluation Committee with the following information:
- a. A monthly retainer fee based on an availability of 40 hours per month;
 - b. An additional hourly charge-out rate should the 40 hour requirement be exceeded;
 - c. A curriculum vitae for each member of the firm who would be working on the assignment;
 - d. An explanation substantiating the application;
 - e. A proposed agreement or engagement letter; and
 - f. A statement indicating existing or potential conflicts of interest.
- 2.6.6 The report prepared by the Evaluation Committee stated that out of the 14 offers received, the bid submitted by one particular legal firm did not contain the required information and was therefore immediately disqualified. NAO verified the compliance of submitted offers with the aforementioned requirements, and confirmed that all submissions, barring that put forward by the aforementioned legal firm, were in accordance with the established requirements.
- 2.6.7 In further refinement of the pricing criterion referred to above, CEO MIMCOL together with Chair PU, CEO LGA and Chief Strategy Officer LGA designed a pricing evaluation formula that was to be utilised by the Evaluation Committee in the ranking of eligible offers. As per submitted memorandum, this pricing evaluation formula was established and agreed upon prior to the unlocking of the tender box.
- 2.6.8 The pricing evaluation formula consisted of two components, that is, the monthly retainer fee and the additional hourly charge. The monthly retainer fee was afforded a 75 per cent weighting, while the additional hourly charge rate was afforded a 25 per cent weighting. Computed individually for each of the scoring components, maximum points were to be awarded to the most advantageous bid, while the least advantageous bid was to be assigned a score of zero. The remaining bids were to be allocated points for each of the scoring components as per the formula reproduced in Box 3. In essence, this pricing formula awarded points to the respective bid based on its relative proximity to the most advantageous offer. The scores of the two components were then to be aggregated so as to determine the final ranking of submitted offers.

- 2.6.9 An analysis of the outcome of this ranking process indicated that the bid submitted by Filletti & Filletti Advocates was by far the most favourably priced bid, quoting approximately half the rate proposed by the second placed firm, that is, Dingli & Dingli Law Firm. The difference quoted in terms of the monthly retainer fee that was to be charged by the second to fifth placed firms was insignificant. On the other hand, the additional hourly charge rate varied considerably with respect to these same offers. Nonetheless, the additional hourly charge rate proposed by Filletti & Filletti Advocates was significantly lower than the second and third ranked firms, and less than half the rate submitted by firms ranked fifth and onwards.
- 2.6.10 The report presented by the Evaluation Committee stated that following this ranking exercise, the top three ranked offers were subjected to further scrutiny in order to ensure that all were compliant with the requirements listed as per above bullets (a) to (f) (clause 2.6.5 refers). All three offers were found to be compliant by the Evaluation Committee, and therefore the Committee perceived no need to extend this exercise any further down the ranking order.
- 2.6.11 In sum, the bid by the legal firm Filletti & Filletti Advocates proved to be the most favourable by a considerable margin. Nevertheless, the Evaluation Committee expressed concern with respect to one aspect of Filletti & Filletti Advocate's offer, and requested Minister MEIB's advice in this respect. The source of this concern was that the firm had limited the value of its own liability to five times their total fees should the need to sue arise. Notwithstanding, this liability was unlimited in the event of negligence and fraud.
- 2.6.12 Under the assumption that the concern relating to liability would be ironed out, the Evaluation Committee requested the authorisation of Minister MEIB to initiate direct communication with Filletti & Filletti Advocates with a view to reaching an agreement on all the salient matters and sign the corresponding letter of engagement. In anticipation of possible difficulties arising with respect to the availability of legal resources with the required level of expertise in commercial law, the Evaluation Committee also requested authorisation to resort to the second, and eventually third-ranked firms should agreement with Filletti & Filletti Advocates not be reached.
- 2.6.13 The report, submitted in the form of a memorandum, was sent to Minister MEIB, Parliamentary Secretary MEIB and copied to Permanent Secretary MEIB on 6 May 2013 at 16:29 hours by Transaction Manager PU, on behalf of Chair PU.
- 2.6.14 NAO noted that the memorandum was not signed by each of the Committee's members, and therefore sought to establish whether each of the Committee members was in agreement with that stated in the report. When such queries were raised, various members of the Evaluation Committee stated that the memorandum was read out towards the end of the Committee meeting and all members affirmed their agreement thereto.

Box 3: Scoring Formula utilised by the Evaluation Committee

Scoring Formula	
Highest bid – Actual bid	x weighting
Highest bid – Lowest bid	

- 2.6.15 Further to this Committee-wide agreement, Manager Legal LGA stated that although ranking was to be primarily based on price, the request for proposals letter forwarded by PU to interested legal firms addressed certain qualitative requirements. Manager Legal LGA further claimed that the legal firms that did submit offers had in fact attended to these qualitative requirements, and in the case where such requirements were not met, the legal firm in concern was disqualified from the evaluation process.
- 2.6.16 Notwithstanding the above, NAO was made aware of the fact that copies of the Committee's final report were not given to all of its members. Therefore, at the point of submission of the said memorandum, only PU representatives and CEO MIMCOL (responsible for the actual drafting of the report) were in possession of a copy of the evaluation report.
- 2.6.17 A further issue emerged with respect to access to the Evaluation Committee's report. According to Chair PU, Chief Strategy Officer LGA had at one point requested a copy of the Committee's report from CEO MIMCOL. The latter referred the request to Chair PU who refused, stating that he did not see the need for the members to have an actual copy of the report since all were in agreement with its contents and the evaluation process was a straightforward one. This version of events was also confirmed by Chief Strategy Officer LGA. When queries were raised as to Chair PU's motivation in limiting the report's circulation of the said report, he expressed his concern over possible leakages and the negative impact that this might have on the overall process. Permanent Secretary MEIB was made aware of this state of affairs following correspondence sent by the PU on 22 May 2013.
- 2.6.18 The agreement expressed by all members of the Evaluation Committee with respect to the submitted memorandum was starkly contrasted by that affirmed by Permanent Secretary MEIB. Confirming that a signed copy of the evaluation report was never submitted to the Ministry, Permanent Secretary MEIB proceeded to state the following, *"Presumably, if such [an] evaluation report was presented by the Committee through the Memo by Chair PU sent on 6 May 2013 with details of the conclusions reached by the evaluation board [Evaluation Committee] and a request for the Minister's authorisation of these conclusions; a signed copy was still never submitted. The Memo was not channelled through Chair PU's mailbox so the authenticity and the veracity of the content became more questionable."*
- 2.6.19 NAO considers the allegations expressed by Permanent Secretary MEIB as serious in nature, yet these were not corroborated by any additional evidence retrieved by NAO in this respect. Permanent Secretary MEIB was aware of Chair PU's motivation in limiting circulation of the Committee's report, while all members of the said Committee expressed agreement with the contents of the report.

2.7 Re-Assessment of Submitted Offers

- 2.7.1 A response to the Evaluation Committee's memorandum was returned on 7 May 2013, which was sent through Permanent Secretary MEIB, yet authored by Minister MEIB.
- 2.7.2 In essence, the response submitted by Minister MEIB acknowledged the contents of the memorandum submitted by the Evaluation Committee. However, attention was immediately drawn to the issue brought to the fore in this same memorandum, that is, that the ranking process carried out was purely based on quantitative matters. Minister MEIB proceeded to highlight the importance of factoring in qualitative elements into the selection process.

- 2.7.3 Another point raised by Minister MEIB was that the PU (here understood as implying the Evaluation Committee) did not establish a benchmark with respect to the monthly retainer fee and the additional hourly rate. Driving this point further, Minister MEIB argued that, “... *in no way should it be construed that the less priced bid (in this case Filletti & Filletti bid) be used as the price setter resulting with a maximum score of 100.*”
- 2.7.4 An additional concern that was put forward by Parliamentary Secretary MEIB in discussions with NAO related to the fact that no explanation was provided by the Evaluation Committee as to how it established the weighting formula adopted. Parliamentary Secretary MEIB enquired as to how the Committee had decided to allocate a 75 per cent weighting to the retainer fee and a 25 per cent weighting to the additional hourly rate.
- 2.7.5 Aside from perceived shortcomings relating to the report not being signed, the lack of qualitative criteria and concerns relating to the financial weighting model used, Minister MEIB and Parliamentary Secretary MEIB also indicated that the report submitted by the Evaluation Committee contained certain caveats that were, in their view, unacceptable. In essence, these additional shortcomings were that:
- a. The recommended firm had limited the value of its own liability;
 - b. Despite the conclusion by the Evaluation Committee that the offer by Filletti & Filletti Advocates was the most advantageous, the Committee emphasised the fact that the firm that will eventually be selected must have available resources with profound expertise in commercial law; and
 - c. The discretion of choice was ultimately put on MEIB.
- 2.7.6 In view of the above-perceived shortcomings, Minister MEIB requested the PU to provide copies of the proposals submitted by the first seven ranked law firms, which the Minister proceeded to indicate, were half of the bids received. The Minister intimated that these seven bids, ranked according to the financial criteria established by the Evaluation Committee, were to be subjected to an analysis focusing on the qualitative aspects required for the conduct of this assignment. According to the communication issued by the Minister, a revised methodology encompassing financial and non-financial issues was to be established and subsequently communicated to the PU. Should the ranking order change as a result of the revised methodology that was to be applied, Minister MEIB indicated that the PU would be informed.
- 2.7.7 Finally, Minister MEIB concluded his message to Chair PU by stating that this correspondence specifically and exclusively related to the selection of the legal firm assisting the PU in the process leading to the granting of the two casino concessions. As indicated earlier, the Minister’s message was transmitted by means of an email sent by Permanent Secretary MEIB to Transaction Manager PU on 7 May 2013, copied to Minister MEIB and Parliamentary Secretary MEIB.
- 2.7.8 A day later, that is, on 8 May 2013, the PU forwarded copies of the proposals submitted by the first seven ranked law firms to Minister MEIB. A covering letter signed by Chair PU, and accompanying the submission of these seven offers, provided further details with respect to the method employed in the evaluation process.
- 2.7.9 Here, Chair PU reiterated that all members of the Evaluation Committee, which encompassed the PU, LGA, MIMCOL and a Ministry representative, agreed to the ranking criteria utilised in its evaluation of submitted offers. While acknowledging the fact that ranking was based on quantitative criteria, Chair PU also indicated that there were six conditions (reproduced in clause 2.6.5) that each bid needed to satisfy in

order to qualify for the quantitative ranking stage of the process. Chair PU highlighted the relevance of these six conditions by making specific reference to the submission that was disqualified due to its failure to comply with these criteria. In further clarifications submitted to NAO, Chair PU stated that the top three ranked offers were subjected to additional scrutiny by the Evaluation Committee to ascertain their qualitative element; however, he also acknowledged that this subsequent verification was not sufficiently elaborated upon in the report.

2.7.10 Aside from further clarifications provided with respect to the scoring of the two price components, Chair PU expanded upon the advantages of the rating system employed by the Evaluation Committee. In this context, Chair PU stated that this system takes into account the proximity, or otherwise, of all bids to the most attractive offer. Therefore, if other bids were only marginally more expensive than that submitted by Filletti & Filletti Advocates, their scores would have been extremely close. However, as it so happened, the second most favourable offer in terms of price considerations was twice that of Filletti & Filletti Advocates, which subsequently resulted in a significant difference in scores between the first and second placed offers.

2.7.11 Finally, Chair PU defended the scoring system adopted by the Evaluation Committee by arguing that if another system were to be utilised, the rating of submitted offers would be conditioned by a considerable degree of subjectivity, as scoring under such a revised system would be largely arbitrary. Chair PU stated that the Evaluation Committee, *"... adopted this scoring system because we [the Evaluation Committee] understood it to be the Ministry's intention to depart from past methods of selection and make it possible for other firms that believe they have the required potential to participate in future privatisation processes."* It is against this backdrop that Chair PU questioned whether there was any difference between the PU's previous method of selectively choosing firms based on their past experience, expertise and resources, and the possible introduction of subjective qualitative assessment as proposed by Minister MEIB.

2.7.12 Following the PU's submission of requested documentation on 8 May 2013, MEIB replied on 9 May 2013 by means of an email submitted by Permanent Secretary MEIB to Transaction Manager PU, copied to Minister MEIB and Parliamentary Secretary MEIB. In this correspondence, Permanent Secretary MEIB indicated that after taking into consideration the qualitative factors featured in the submitted offers, the ranking of the legal firms was to be as follows:

- First ranked – Deguara Farrugia Advocates
- Second ranked – Chetcuti Cauchi Advocates
- Third ranked – Filletti & Filletti Advocates

2.7.13 As is rendered amply evident, the re-ranking process instigated following the Minister's intervention resulted in a different rank order to that originally established by the Evaluation Committee. Now, Deguara Farrugia Advocates - initially placed sixth - was the preferred bidder. Filletti & Filletti Advocates, the firm originally recommended for the award, was relegated to third place after Chetcuti Cauchi Advocates (originally ranked fifth).

2.7.14 No further information relating to the re-ranking process was provided to the PU through this communication, aside from the due authorisation that was thereby being granted by Minister MEIB to sign the letter of agreement with Deguara Farrugia Advocates.

- 2.7.15 Given the absence of any other documentation retained within MEIB files and made available to NAO, this Office sought further clarifications from the various stakeholders involved in the process. First and foremost, NAO sought to establish who was involved in this re-ranking process. When queries were raised by NAO as to whether members forming part of the Evaluation Committee were in some manner involved in the re-ranking process, all members replied in the negative, stating that they were not involved or consulted upon in any manner with respect to the re-ranking of submitted offers.
- 2.7.16 Permanent Secretary MEIB also confirmed that she was not involved in any way in the re-adjudication of submitted offers and explained that her role in the process was that of facilitating coordination between Minister MEIB, Parliamentary Secretary MEIB and the PU. From interviews held with Minister MEIB and Parliamentary Secretary MEIB, NAO established that the re-adjudication of submitted offers was carried out by the aforementioned Minister and Parliamentary Secretary alone.
- 2.7.17 In fact, Parliamentary Secretary confirmed that the 'new' qualitative methodology adopted was discussed solely between Minister MEIB and himself, and that the re-ranking of these legal firms was arrived at after such discussions. Further to his confirmation that no other parties were involved in the re-ranking process, Parliamentary Secretary stated that he personally did not compile any written documentation regarding this re-evaluation.
- 2.7.18 Asked why only the first seven ranked proposals were reconsidered, Minister MEIB stated that these were half of the bids received that, excluding the cheapest offer, were quite close in terms of price. Parliamentary Secretary MEIB's response mirrored that stated by the Minister MEIB; however, Permanent Secretary MEIB provided a different response stating that beside being half of all the proposals received, it was only the first seven ranked proposals that obtained more than 50 per cent of the financial weighting score originally arrived at by the Evaluation Committee.
- 2.7.19 An interesting perspective with respect to the selective re-evaluation of the first seven ranked firms was provided by CEO MIMCOL, who was of the firm opinion that there was no bias in the original evaluation carried out by the Committee. In essence, CEO MIMCOL's point of contention was that, if MEIB felt that the conclusions arrived at by the Evaluation Committee were not based on the principles that addressed the direction given by the Ministry, then why was it assumed that any defect in the process necessarily concerned the first seven ranked firms alone (whose documented submissions were requested), and was not extended to all submitted offers.
- 2.7.20 Moreover, Minister MEIB claimed that the scoring of bids against qualitative criteria established by Parliamentary Secretary MEIB and himself constituted an approach that was less restrictive than that previously adopted by the Evaluation Committee, where price was deemed the sole consideration. Although Minister MEIB corroborated that stated by Parliamentary Secretary MEIB with respect to no report on the re-evaluation exercise being drawn up, the Minister MEIB stated that a scorecard was applied in the re-evaluation process.
- 2.7.21 When further queries were raised by NAO as to the nature of the qualitative criteria utilised in the re-ranking process, Minister MEIB put forward the following:
- a. Date of setting up of law firm;
 - b. The firm's reputation;

- c. The ability of the firm to offer a multi-disciplinary approach including commercial, competition and litigation components;
- d. A robust administrative structure; and
- e. The ability to meet deadlines.

2.7.22 Bearing considerable overlap with that stated by Minister MEIB, the qualitative criteria quoted by Parliamentary Secretary MEIB as utilised in the assessment of the selected first seven ranked offers were the following:

- a. That the legal firm had the necessary professional complement and a robust infrastructure;
- b. That the legal firm was knowledgeable in commercial law;
- c. That the firm was able to deliver on time and adhere to the tight timeframes established; and
- d. The reputation and past history of the firm.

2.7.23 According to Parliamentary Secretary MEIB, in addition to the qualitative elements considered, price was also taken into account when re-evaluating the first seven ranked bids. On the other hand, the relevance of price as an evaluation criterion was not highlighted by Minister MEIB.

2.7.24 A document entitled 'Summary and Methodology: Evaluation of Proposals' was submitted by Minister MEIB on 23 February 2014 in response to NAO's request for information relating to the aforementioned scorecard. This document was different to that illustrated during the meeting that NAO held with Minister MEIB on 17 October 2013. However, on the day, Minister MEIB had indicated that he would submit this document once his written notes regarding the utilised scorecard were transcribed.

2.7.25 The document provided an explanation as to how the re-ranking process was carried out. In essence, the document put forward the method employed in awarding the financial and qualitative scores with respect to the seven re-ranked bids. It indicates the relative importance ascribed to the various qualitative evaluation criteria and their compliance thereto. In essence, the qualitative evaluation criteria and their respective weighting were as follows:

- a. Compliance to Offer Specifications (3);
- b. Years of Active Service (1);
- c. Ability of Offering Support in a Multitude of Legal Environments (3);
- d. Reputation (4);
- e. Capability (5); and
- f. Ability to Achieve Results by Deadlines (4).

Finally, the document serves to present a comparison of the scores assigned to each of the seven re-ranked legal firms with respect to the financial and qualitative components.

2.7.26 Following its review, this Office considered the document to be incomplete. The detailed allocation of points under the qualitative evaluation criteria was not specified, except for the total allocated to each firm. Therefore, it was impossible for NAO to establish a clear understanding of the re-ranking process, specifically, how each of the firms fared with regard to the individual elements that constituted the qualitative review.

- 2.7.27 At a more detailed level of analysis, NAO noted that 'Compliance to Offer Specifications' was one of the qualitative criteria utilised in the re-ranking process, and afforded a 15 per cent weighting. NAO questions the validity of reckoning compliance to offer specifications as a measure of a legal firm's qualitative element, as adherence to requirements bears no relevance to a firm's ability to provide a service, and non-compliance to specifications should automatically disqualify an offer from further assessment.
- 2.7.28 An additional concern with respect to the qualitative criteria employed emerged in relation to the 'Ability to Achieve Results by Deadlines' criterion. Again, NAO questions how a legal firm's ability to achieve results by deadlines can be established prior to actual service delivery, and how one could objectively evaluate and anticipate yet unrealised scenarios of service provision. Of note is the fact that this criterion was assigned a significant weighting, equivalent to 20 per cent of the qualitative evaluation component.
- 2.7.29 The re-ranking process attributed a maximum score of 500 to the financial component and a maximum score of 1,000 to the qualitative component. This immediately rendered evident the significant weighting afforded to the qualitative component. This Office found difficulty in understanding the need to ascribe a weighting that was heavily skewed towards the qualitative component. NAO's concern in this respect intensified in view of the fact that the allocation of points among the financial and qualitative components was decided upon after the actual offers were already known.
- 2.7.30 In attempting to verify the methodology outlined in the document provided by Minister MEIB, NAO noted that its result was considerably different to that indicated as per re-ranking process. Although the notable differences in scores did not impact upon the financial ranking, such variations would have changed the final ranking when both financial and qualitative scores were considered. Notwithstanding, Deguara Farrugia Advocates remained the first ranked firm, largely due to the high score awarded with respect to the qualitative component.
- 2.7.31 Further doubts as to the integrity of the document supplied by Minister MEIB were identified by NAO when comparing the re-ranking of firms according to this document with other correspondence circulated by MEIB. In this context, specific reference is made to the email submitted by Permanent Secretary MEIB to PU, dated 9 May 2013. According to the former, the first three ranked firms were Deguara Farrugia Advocates, Dingli & Dingli and GVTH, respectively. On the other hand, Permanent Secretary's correspondence indicated that Deguara Farrugia Advocates, Chetcuti Cauchi Advocates and Filletti & Filletti Advocates were the first three ranked firms after the re-ranking process.
- 2.7.32 NAO put forward its concerns to Minister MEIB, arguing that the qualitative criteria adopted allowed an element of subjectivity, and that a re-ranking exercise based on the same qualitative criteria might not necessarily produce the same results. Although recognising that there was an element of subjectivity introduced with respect to the factoring in of the qualitative criteria, Minister MEIB upheld the decision taken by Parliamentary Secretary MEIB and himself. The Minister argued that this was more in line with the political direction of the current administration, that is, focusing on rendering such processes open to all eligible firms, promoting transparency, while simultaneously ensuring that the absence of any previous experience in concessionary processes was not treated as an excluding factor¹.

¹ Contracts Circular 19/2013, issued on 16 December 2013, (that is, after events highlighted with respect to the matter being reported upon had already taken place) stipulated that experience should no longer be considered as part of the selection criteria in the procurement process.

- 2.7.33 Other concerns raised by NAO related to the fact that, since the qualitative criteria were established after the opening of the bids, the criteria adopted could potentially benefit a particular bidder. In response to NAO queries raised in this respect, Minister MEIB stated that the fact that the ranking by the Evaluation Committee was based solely on price should be of more concern. Furthermore, Minister MEIB claimed that a matter of greater concern to him was the fact that the prospective bidders and their price were known after the Evaluation Committee's adjudication, and that any attempt at reissuing the EOI for the provision of legal services would be undermined by the knowledge of the already submitted proposals.
- 2.7.34 Minister MEIB added that he could not understand the approach adopted by the Evaluation Committee, more so in light of the political commitment undertaken with respect to these concessions as well as other major projects. The Minister also expressed his concern as to the potentially negative repercussions that the wrong choice of legal advisors could have on the actual concession process. Finally, Minister MEIB argued that the cheapest offer would only have made sense if other qualitative criteria had been taken into consideration.
- 2.7.35 In comments to Parliamentary Secretary MEIB, NAO stated that it noted an incongruence between the initial insistence of MEIB on an open and transparent process and the process's ultimate conclusion, which was based solely on the Minister's and Parliamentary Secretary MEIB's verbal assessment and bore no documentary trail. In reply, Parliamentary Secretary MEIB stated that a decision had to be made.
- 2.7.36 Given the importance assigned to the qualitative element in the evaluation process, NAO enquired with the Minister and Parliamentary Secretary as to why MEIB provided no guidance to the Evaluation Committee despite its numerous requests for assistance to this effect. Minister MEIB stated that he felt let down by the PU since he had relied heavily on the guidance of the Unit in this first concession process undertaken by the new administration. When the possibility that the PU could have likewise been disappointed by the lack of direction given by the Ministry on the evaluation criteria to be adopted was raised – despite repeated requests by Chair PU to Permanent Secretary MEIB – Minister MEIB stated that he was not aware of such emails and was never directly contacted by Chair PU with respect to this matter.
- 2.7.37 Evidence provided to this Office indicated otherwise, with Minister MEIB and Parliamentary Secretary MEIB in receipt of the email sent by PU on 3 May 2013, whereby a request for guidance with regard to the evaluation criteria was made. Given the Minister's and Parliamentary Secretary's awareness of such a request, NAO failed to understand MEIB's lack of guidance in this respect.
- 2.7.38 Minister MEIB opined that the Unit had considerable past experience of similar concession processes. Furthermore, the Evaluation Committee was composed of senior officials from LGA, MIMCOL and the PU, who, in the Minister's opinion, could have easily devised evaluation criteria that addressed the qualitative element of the offers, rather than request the Ministry's direction on the issue. In addition, Minister MEIB commented that no reference to problems encountered in this respect were noted in the PU's monthly reports, with the April 2013 report solely citing timeframes as a source of disagreement between the Ministry and the Unit.
- 2.7.39 Similar queries were directed to Parliamentary Secretary MEIB, specifically in relation to why no direction was provided by MEIB to the Committee with respect to the qualitative element of the evaluation criteria, more so since Chair PU had repeatedly

requested the Ministry's guidance on this issue. Parliamentary Secretary MEIB claimed that he was aware of an email submitted by Chair PU an hour prior to closing time for the submission of offers, wherein Chair PU had stated that since no guidance was given on the selection criteria, the Committee was adopting the price level as a guide. On the other hand, Parliamentary Secretary MEIB stated that he was not aware of an earlier email sent by Chair PU to Permanent Secretary MEIB on 3 May 2013, again requesting guidance on the selection criteria to be utilised by the Committee. As already indicated in clause 2.7.37, evidence provided to NAO indicated otherwise, since such correspondence was forwarded to Parliamentary Secretary MEIB.

2.7.40 Notwithstanding the above, Parliamentary Secretary MEIB claimed that it was difficult for him to reconcile the fact that the qualitative element was totally ignored by the Committee during the evaluation of offers, when Chair PU had originally insisted that the chosen legal firm should have experience in similar past processes.

2.7.41 Of particular interest were Permanent Secretary MEIB's concerns relating to the qualitative aspect not being factored into the evaluation of offers received, most notably so given the Evaluation Committee's attempts at soliciting guidance to this effect. Aside from concerns raised, Permanent Secretary MEIB indicated that another shortcoming attributable to the Evaluation Committee was the fact that no capping of the total number of hours of service required was indicated.

2.7.42 Moreover, and more serious still, making reference to Chair PU's explanatory letter of 8 May 2013, Permanent Secretary MEIB stated that, "... the Evaluation Committee never submitted proof that it had effectively performed such tests to ensure that offers passed the six conditions bulleted on the first page of the Memo dated 6 May 2013 (reproduced in clause 2.6.5 for ease of reference)." This criticism provided insight into the manner by which Permanent Secretary MEIB perceived the work carried out by the Evaluation Committee.

2.8 Direct Order Approval

2.8.1 In response to the Permanent Secretary MEIB email dated 9 May 2013, which summarily served to inform the PU of the outcome of the re-ranking process, Transaction Manager PU, acting on behalf of Chair PU, replied on 10 May 2013 indicating the way forward. Prior to MIMCOL's signing of the relevant agreement with Deguara Farrugia Advocates, authorisation from the DO Section within MFIN was required.

2.8.2 MIMCOL's involvement as a signatory to the said agreement with Deguara Farrugia Advocates emerges as a result of their responsibility for honouring arising payments due, and in fact, the Transaction Manager's email confirmed that funds were available at MIMCOL. Other details included in this email related to the legal firm that had been selected to aid in this concession, namely, its VAT registration number and information necessary in establishing the value of the bid.

2.8.3 The value of the bid, as submitted by Deguara Farrugia Advocates, included a monthly retainer fee of €3,304, which corresponded to 40 hours of service per month. Instances when the 40 hour limit were to be exceeded were to be charged at the additional hourly rate, established at €106.20. Both rates indicated were inclusive of VAT, while the contract was to cover a period of 12 months.

2.8.4 On 13 May 2013, Permanent Secretary MEIB forwarded the PU's email dated 10 May 2013 to the DO Section within MFIN (copying in CEO MIMCOL) and requested

authorisation for a direct order. The following day, that is, on 14 May 2013, the DO Section requested further explanations from Permanent Secretary MEIB (also copying in CEO MIMCOL) as to how and why this particular firm was chosen. In addition, the DO Section sought justification as to why the direct orders procedure had been resorted to as opposed to the regular tendering procedures.

- 2.8.5 Furthermore, the DO Section indicated that the proposed fee structure was open-ended, which in turn might have resulted in costs spiralling out of control. Of note is the fact that such an argument was subsequently utilised by Permanent Secretary MEIB as criticism directed towards the Committee's evaluation of submitted offers (clause 2.7.34 refers).
- 2.8.6 In response to the DO Section email, on 14 May 2013, CEO MIMCOL submitted a tentative reply for Permanent Secretary's consideration addressing the concerns raised. Aside from justifications provided relating to the nature of the selection process and how the accepted offer represented value for money, CEO MIMCOL indicated that the Evaluation Committee resorted to the direct orders procedure after being advised to do so by the LGA. Towards this end, CEO MIMCOL noted that as per LGA advice, any process that did not directly involve the Department of Contracts had to end in a formal request for a direct order.
- 2.8.7 As regards the fee structure's open-ended nature, CEO MIMCOL claimed that the PU had effectively utilised this system in the recent past. CEO MIMCOL stated that the targeted usage of services was expected to be capped at the 40 hour per month mark, and that the quote for additional hours was simply intended to provide an element of cover should urgent advice (in excess of the established 40 hours) be required. Attention was also drawn to the fact that the agreement details were yet to be negotiated, and here, reference was made to past instances where the chosen legal firm was requested to carry forward unutilised hours to the following month, thereby further reducing the necessity of having to resort to the additional hours.
- 2.8.8 Nevertheless, CEO MIMCOL clearly highlighted that it was not possible to anticipate the number of actual advisory hours that would be required, as the extent of services necessary depended on the complexity of the process and the possibility of further assistance being required should third parties resort to the courts.
- 2.8.9 This email, drafted by CEO MIMCOL, was sent to the DO Section within MFIN by Permanent Secretary MEIB on 14 May 2013. The DO Section again replied on the same day reiterating concerns raised earlier. Stating that there were a number of legal firms that had the necessary expertise to carry out such services, the DO Section reaffirmed that the direct order procedure should not have been resorted to, and that one could have placed an advert in the Government Gazette asking for sealed quotations.
- 2.8.10 In response to this DO Section email, Permanent Secretary MEIB provided further details relating to the selection of the legal firm that was to aid in the casino concession process by means of another email dated 15 May 2013. In sum, Permanent Secretary MEIB claimed that it was the PU that failed to inform the Ministry of the need to advertise through the Government Gazette. Permanent Secretary MEIB indicated that had such direction been forthcoming, the Ministry would have acted accordingly.
- 2.8.11 This email also provided the DO Section with a comprehensive list of all the firms that submitted a proposal with respect to this EOI. In conclusion, Permanent Secretary

MEIB indicated that the fees payable to Deguara Farrugia Advocates would not exceed €40,000.

2.8.12 Finally, following the above-indicated correspondence between MEIB, MIMCOL and the DO Section within MFIN, the latter issued the required approval, on 15 May 2013, to proceed and place a direct order with Deguara Farrugia Advocates. This approval was granted on the following conditions:

- a. *“Funds are available;*
- b. *MIMCOL ensures that the above-mentioned services are actually and unavoidably required;*
- c. *MIMCOL believes that Deguara Farrugia Advocates is deemed as best suited for this service at most competitive cost;*
- d. *MIMCOL is satisfied that cost is fair and reasonable and represents best value for money, with the inputs involved justifying the costs incurred;*
- e. *The amount of €40,000 covering period of 12 months is in no way exceeded;*
- f. *The appropriate tax regime is applied;*
- g. *The related service is to be provided in time and to the full satisfaction of MIMCOL; and*
- h. *Payment is effected pari passu (with an equal step) following delivery of service, satisfactory in all respects to MIMCOL.”*

2.8.13 From a review of the above-quoted email correspondence, and further to discussions held by NAO with the DO Section, MEIB was effectively constrained in having to resort to the placement of a direct order due to the fact that no advertisement in the Government Gazette had been placed with respect to this request for legal services. Although the process of sourcing legal assistance was in fact advertised in other printed media, MEIB’s failure to advertise in the Government Gazette precluded the procurement process from being recognised as a ‘call for quotations’ (Public Procurement Regulations – Clause 20(1)(d)). Therefore, this procurement of services had to be processed as a direct contract in line with clause 20(4) of the Public Procurement Regulations, which does not stipulate advertisement in the Government Gazette as an essential requirement.

2.8.14 NAO’s understanding was confirmed by the DO Section, and in essence, once the PU failed to advertise in the Government Gazette as stipulated in Regulation 20(1)(d), they only had two options left – either to abrogate and restart the whole process or else seek a direct order approval. The DO Section was satisfied that, in view of the tight timeframes, there existed the right conditions for direct order authorisation to be granted and proceeded accordingly.

Chapter 3 - Conclusions and Recommendations

3.1 Timeline of Events

3.1.1 Table 2 provides a chronological walkthrough of the most salient events that characterised the selection process with respect to the legal firm that was to assist in the granting of casino concessions.

3.2 Conclusions and Recommendations

3.2.1 The Evaluation Committee was not formally appointed by MEIB, nor was it furnished with clearly defined terms of reference outlining its expected functions and responsibilities. In NAO's opinion, these shortcomings, largely attributable to the Ministry, created a sense of ambiguity that manifested itself at various stages throughout the legal firm selection process. The failure to appropriately define the objectives towards which the Committee was to work subsequently resulted in uncertainty of purpose, fundamentally evident in terms of whether the Committee was tasked with the evaluation of offers, or the adjudication of offers.

3.2.2 Notwithstanding the above, NAO commends the Ministry's initial endeavours at designing a selection process that was open and transparent, most notably so in terms of efforts intended at widening eligibility criteria. Such efforts, if seen through, serve to promote good governance. Moreover, providing all firms with the opportunity to submit an offer simultaneously contributes towards ascertaining the desired level of transparency that should characterise such processes.

3.2.3 The considerable number of legal firms that registered interest with respect to this EOI validates MEIB's intentions of adopting an open and therefore competitive process. However, the removal of past experience of privatisation processes as an eligibility requirement subsequently created the need to establish another mechanism whereby the interested legal firms' quality could be assessed and ascertained.

3.2.4 The establishment of these evaluation criteria, more precisely, shortcomings relating thereto, were in NAO's opinion, the source of difficulties that subsequently surfaced. This Office considers such shortcomings as attributable to MEIB and the Evaluation Committee.

Table 2: Timeline of Events

Date	Details of Event
14 April 2013	CEO LGA sends draft EOI to Parliamentary Secretary
15 April 2013	Parliamentary Secretary sends queries to CEO LGA
15 April 2013	CEO LGA sends further correspondence to Parliamentary Secretary
19 April 2013	Meeting regarding roles to be assumed and appointment of legal advisors
22 April 2013	Workshop held at MIMCOL – PU and LGA in attendance
22 April 2013	Memorandum sent to Parliamentary Secretary by Planning Working Group
22 April 2013	CEO LGA sends email to Parliamentary Secretary regarding project plans
22 April 2013	Non-disclosure agreements signed
23 April 2013	Meeting held at MEIB – in attendance: Minister, Parliamentary Secretary, Permanent Secretary, and representatives from PU, LGA and MIMCOL
28 April 2013	Advertisements relating to provision of legal services appear in Sunday papers
3 May 2013	PU sends email to Permanent Secretary requesting guidance with respect to evaluation criteria
3 May 2013	LGA sends email to Permanent Secretary regarding the evaluation criteria
6 May 2013	PU sends another email to Permanent Secretary regarding the evaluation criteria
6 May 2013	Offer submission deadline
6 May 2013	Evaluation Committee submits report to MEIB
7 May 2013	MEIB provides feedback regarding the submitted report to PU and requests documents relating to the first seven ranked offers
8 May 2013	Submission of requested documents together with clarifications relating to the Committee's report
9 May 2013	Permanent Secretary MEIB informs PU of outcome of re-ranking exercise
10 May 2013	PU advises Permanent Secretary MEIB to request direct order authorisation from MFIN
13 May 2013	Permanent Secretary MEIB requests direct order authorisation from MFIN
14 May 2013	MFIN raises queries as to why the direct order procedure was resorted to
14 May 2013	Further justification provided by Permanent Secretary MEIB regarding recourse to direct order
14 May 2013	MFIN raises additional queries with respect to direct order authorisation request
15 May 2013	Additional justification provided by Permanent Secretary MEIB
15 May 2013	MFIN provides authorisation to proceed with direct order

- 3.2.5 On one hand, the evidence reviewed clearly illustrated the Ministry's failure in providing adequate guidance, despite the numerous attempts at sourcing such assistance by the Evaluation Committee. This guidance was critically required in view of changes implemented with respect to eligibility criteria. The widening of eligibility criteria at the offer submission stage of the process shifted and accentuated the need for the establishment of definitive criteria prior to the evaluation stage. In view of the fact that the PU's modus operandi was drastically altered following MEIB's decision to broaden eligibility requirements, NAO is of the considered opinion that attempts made by members of the Evaluation Committee to seek guidance from this Ministry were warranted and merited attention, which unfortunately, was never forthcoming.
- 3.2.6 On the other hand, failure on the part of the Evaluation Committee to proactively propose and utilise comprehensive criteria other than the price criterion eventually employed, was deemed as constituting a shortcoming on the Committee's behalf. In truth, the Committee, which was composed of various senior officials from a number of Government entities, should have realised that conducting an evaluation on price alone would result in an incomplete analysis of offers received.
- 3.2.7 In NAO's opinion, the financial component utilised by the Evaluation Committee was thoroughly devised, agreed to by all members of the Committee, objective, transparent and fair. In fact, no major difficulties subsequently arose with regard to the applied financial component. However, difficulties did emerge with respect to the qualitative component of the Committee's evaluation. In this Office's opinion, the qualitative aspect of this evaluation process was not as well developed, particularly in view of changes instituted with respect to eligibility requirements. As already highlighted above, this shortcoming is attributable to MEIB for failing to provide the requested guidance, and to the Evaluation Committee for failing to devise appropriate qualitative criteria irrespective of Ministerial guidance, or otherwise.
- 3.2.8 Although all members of the Evaluation Committee verbally expressed agreement with the report submitted to MEIB, and NAO acknowledged concerns expressed by Chair PU relating to limiting circulation of the said report, this Office nonetheless considered the Committee's failure to submit a signed copy of the report to MEIB as a shortcoming.
- 3.2.9 Despite the process being initially characterised by its drive for more openness and greater transparency, this Office is of the opinion that such objectives were not achieved. The re-ranking process carried out directly by Minister MEIB and Parliamentary Secretary MEIB detracted from the process's overall level of transparency. Further accentuating this concern is the fact that the document submitted by Minister MEIB with respect to how the re-ranking process was carried out had various shortcomings. The main limitation of this document centred on the fact that the detailed allocation of points under the qualitative evaluation was not specified, except for the total allocated to each firm. Therefore, it was impossible for NAO to establish a clear understanding of the re-ranking process, especially how each of the firms fared with regard to the individual elements that constituted the qualitative review. Other shortcomings identified by NAO with respect to this document include that compliance to specifications was reckoned as a qualitative element, when this clearly should not be the case, as well as concerns relating to the establishment of firms' ability to achieve results by deadlines prior to actual service delivery. Furthermore, the allocation of points among the financial and qualitative components draws NAO's concern, particularly in view of the fact that this weighting was arrived at after

the actual offers were already known. Additional doubts as to the integrity of the document supplied by Minister MEIB arose in view of the inconsistency with other evidence sourced from MEIB with respect to the final rank order. The relevance of such documentation in relation to the re-ranking process assumes critical importance when one considers the significant changes brought about with respect to the original rank order established by the Evaluation Committee.

3.2.10 Other considerations were deemed by NAO as bearing a negative influence on the process's transparency, notably, the fact that the PU was not provided with an account of the re-evaluation methodology employed (despite MEIB originally indicating otherwise) and the fact that only the first seven ranked offers as originally established by the Evaluation Committee were considered. With respect to this latter point, if MEIB considered the original ranking process as flawed, then its selection of the first seven offers as ranked by the same flawed system renders the re-evaluation deficient.

3.2.11 NAO noted that MEIB was effectively constrained in having to resort to the placement of a direct order due to the fact that no advertisement in the Government Gazette had been placed with respect to this request for legal services. Although the process of sourcing legal assistance was in fact advertised in other printed media, MEIB's failure to advertise in the Government Gazette precluded the procurement process from being recognised as a 'call for quotations' (Public Procurement Regulations – Clause 20(1)(d)). Therefore, this procurement of services had to be processed as a direct contract in line with clause 20(4) of the Public Procurement Regulations, which does not stipulate advertisement in the Government Gazette as an essential requirement.

3.2.12 The fact that the direct order approval sought was for €40,000 indicated that no provisions for possible additional hours required over the established 40-hour monthly retainer were made.

3.2.13 Finally, NAO puts forward the following recommendations:

- a. Members on evaluation committees should invariably be formally appointed and provided with clear terms of reference, thereby safeguarding against ambiguity as to their remit;
- b. The establishment of evaluation criteria must invariably be finalised prior to the review of offers received. Any deviations therefrom seriously undermine the integrity of the procurement process;
- c. When possible, open call for tenders should be resorted to, as opposed to direct contracts. This serves to promote good governance, ascertains value for money, while ensuring transparency;
- d. In fulfilling their management function, Ministries should seek to provide guidance and assistance to subsidiary committees, thereby aiding them in the adequate discharge of duties; and
- e. Attention must be directed towards appropriate record-keeping practices, specifically when key decisions are made or documents exchanged. Failure to maintain relevant documentation may detract from the desired level of accountability and transparency.

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