NAO
National Audit Office
MALTA

ENEMALTA CORPORATION
TENDER FOR GENERATING CAPACITY
(GN/DPS 8/2006)

REPORT BY THE AUDITOR GENERAL

APRIL 2010

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ENEMALTA CORPORATION
TENDER FOR GENERATING CAPACITY (GN/DPS 8/2006)

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ABBREVIATIONS

AG	Auditor General
ASL	Associated Supplies Limited
BAT	Best Available Technology
BL	Bateman Litwin
BoD	Board of Directors
BOO	Build, Own and Operate Contracts
BOOT	Build, Own, Operate and Transfer Contracts
BREF	Best available technique REFerence document
BWSC	Burmeister & Wain Scandinavian Contractor AS
CAN	Contract Award Notice
CC	Conditions of Contract
CCGT	Combined Cycle Gas Turbine
CEO	Chief Executive Officer
CFO	Chief Finance Officer
CIF	Cost, Insurance and Freight
CTO	Chief Technical Officer
DECC	Diesel Engine Combined Cycle
De-NOx	De-nitrification of Nitrogen Oxide Emissions
De-SOx	Flue Gas De-sulphurisation
DG	Director General
DGU	Diesel Generating Unit
DoC	Department of Contracts
DPS	Delimara Power Station
EBRD	European Bank for Reconstruction and Development
EGB	Exhaust Gas Boiler
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMC	Enemalta Corporation
EP	Environmental Protection
EPC	Engineering Procurement and Construction
EU	European Union
EV	Evaluation Criteria
FGD	Flue Gas De-sulphurisation
FIDIC	International Federation of Consulting Engineers

GCC	General Contracts Committee
GI	General Issues
GRC	General Requirements and Constraints
GT	Gas Turbine
GTR	General Technical Requirements
HFO	Heavy Fuel Oil
ITT	Invitation to Tender
kWh	Kilowatt Hour
LCP	Large Combustion Plant
LCPD	Large Combustion Plant Directive
LD	Liquidated Damages
LFO	Light Fuel Oil
LGA	Lotteries and Gaming Authority
LI	Lahmeyer International GmbH
LN	Legal Notice
LTSA	Long-Term Service Agreement
MAN	Maschinenfabrik Augsburg-Nürnberg Diesel SE
MC	CCGT Mechanical Engineering Requirements
MCR	Maximum Continuous Rating
MD	Diesel Engine Mechanical Engineering Requirements
MEAT	Most Economically Advantageous Tender
MEPA	Malta Environment Planning Authority
MFEI	Ministry of Finance, the Economy and Investment
MITA	Malta Information Technology Agency
MITC	Ministry for Infrastructure, Transport and Communications
MPS	Marsa Power Station
MRA	Malta Resources Authority
MRAE	Ministry for Rural Affairs and the Environment
MW	Megawatt
NAO	National Audit Office
NG	Natural Gas
NOx	Oxides of Nitrogen
NPV	Net Present Value
OECD	Organisation for Economic Co-operation and Development
OHSA	Occupational Health and Safety Authority
OPM	Office of the Prime Minister

PAC	Public Accounts Committee
PM	Prime Minister
PS	Permanent Secretary
QC	Quality Control
RFP	Request for Proposals
SC	Special Conditions of Contract
SCR	Selective Catalytic Reduction
SOx	Oxides of Sulphur
SPTSA	Spare Parts and Technical Service Agreement
ToR	Terms of Reference
VAT	Value Added Tax

ENEMALTA CORPORATION
TENDER FOR GENERATING CAPACITY

EXECUTIVE SUMMARY

This inquiry concerns the tender issued by Enemalta Corporation for the supply of new power generating plant at Delimara. Its terms of reference, as laid down by the Public Accounts Committee and agreed to with the National Audit Office, were essentially to investigate whether tender procurement procedures had been regular and relative regulations duly adhered to. These terms of reference were approved at the PAC meeting of the 26 May 2009. Eventually, during a PAC meeting held on 22 March 2010, NAO was also directed to deal with allegations appearing in *It-Torca* of the 14 March 2010.

In view of the various financial, technical and legal issues involved in such a complex project, this inquiry proved to be very challenging. It was conducted in accordance with Para 9(a) of the Auditor General and National Audit Office Act, 1997 (XVI of 1997) and in terms of NAO practices.

All findings presented in this Report are essentially based on the considerable number of meetings and interviews, some of which under oath, with various officers and other persons who were either involved in the tendering process or offered to provide information related to this inquiry. Findings are also based on voluminous documentation, as supplied by the main parties involved, which was painstakingly analysed by the investigating team.

In line with its guiding principles of independence, fairness and objectivity, NAO was determined to ensure that the allegations brought to its attention were evaluated, investigated and objectively reported upon. The investigating team endeavoured to establish the facts, based solely and exclusively on hard evidence at its disposal. NAO sought to identify any possible shortcoming or irregularity and put forward feasible and relevant recommendations, as indicated hereunder, essentially meant to ensure that best use is made of public funds, especially through the full compliance with relative public procurement regulations and procedures.

The NAO's inquiry did not come across any hard and conclusive evidence of corruption, even though, for record's sake, one cannot fail to mention the lack of cooperation from certain stakeholders who contended that they could not recall certain events or information. A case in point is Mr J. Mizzi, local representative for the tenderer awarded this contract, who was considered one of the key players throughout this inquiry. Although summoned by the NAO on three separate occasions, he repeatedly cited lack of memory when asked certain questions.

At the same time, various cases of administrative shortcomings, especially on the part of Enemalta Corporation and the Department of Contracts, were identified. As the Report highlights, in a number of instances, this was due mostly either to lack of experience in the procurement process adopted during this tender and/or insufficient coordination between the two entities, both considered as key stakeholders in the procurement process.

The following are some of the main conclusions referred to in the Report:

i. EMC failed to directly inform the unsuccessful bidders of the outcome of adjudication as clearly established in the Invitation to Tender. This gave rise to the claim made by Bateman that the appeal facility was thus effectively denied to any bidder wishing to appeal from such decision.

ii. The selection of Lahmeyer International, through a direct order, as an independent consultant leaves much to be desired especially when one keeps in view that (a) it is presently blacklisted by the World Bank; (b) it had been previously engaged in a joint project with BWSC (one of the bidders on which LI is supposed to have drawn up an independent analysis); and (c) the agent of the company which eventually won this tender, had also worked as Lahmeyer's agent up to 2007.

iii. Once the original tender specifications referring to emission levels were changed through the legislative amendment made in January 2008, the decision by EMC and DoC to continue with the ongoing tender is questioned by the NAO. With the benefit of hindsight, it is felt that much of the controversy surrounding this tender could have been avoided had the tendering process been stopped and reissued to reflect such change in specifications.

iv. The decision by Enemalta Corporation to go for a prototype combination instead of the required 'tried and tested' as clearly stipulated in the Invitation to Tender is considered to have put EMC in a position of very high risk.

v. DoC could have carried out the role stipulated by the pertinent legislation in a more proactive manner. This is evident when the Department did not vet the Request for Proposals and the ITT documents before these were published. Lack of involvement by the DoC occurred also in the final contract, which was subject to heavy changes brought about through negotiations, before this was signed.

vi. DoC's late decision to change the tendering model used from negotiated procedure to the three package model was ill-timed. This was because, by the time the bidders were made to re-submit their financial offer, EMC had already evaluated the original financial offers, negotiated these with the bidders and had even selected a preferred bidder.

vii. Once EMC realised, after the submission of the technical bids, that its original specification for tried and tested combinations of equipment that are compliant with emission legislation did not exist in the case of DECC engines, the Corporation

brought on board the services of a consultancy firm. The firm, LI, declared prototype combinations, to date untested as one complete unit, to be plausibly able to comply. Although the consultant's advice was qualified, EMC went ahead and declared the DECC combinations as technically compliant.

viii. The NAO questions the undue haste with which the agreement was signed.

As stated above, this Report includes a number of recommendations put forward by the NAO with the principal objective of improving the procurement process. The following are the main recommendations:

i. A more collaborative and co-operative attitude especially between Enemalta Corporation, as the contracting authority, and the Department of Contracts, as the regulator of the tendering process. This necessitates that the latter in particular is adequately resourced so as to be in a position to perform its challenging role in an effective manner.

ii. More extensive consultation with relative stakeholders is required, possibly even at the planning stage of such complex projects, thus possibly avoiding unnecessary confrontation and allegations at the tendering and implementation phases.

iii. Rules and regulations must be rigorously applied and followed without exception or fail. Quoting reasons of urgency does not *per se* provide the necessary authorisation for not following such rules and regulations.

iv. Contracting agencies must ascertain that optimal value for money has been attained even after choosing the preferred bidder. Value for money essentially means that prices being ultimately quoted are in line not only with competing bids, but also in relation to prevailing market prices. Such scrutiny and safeguard, which is applied by various contract departments, entities and agencies in other countries, is obviously meant to ensure that public funds are used in the best manner possible.

v. Due monitoring is necessary to ensure the highest levels of transparency, fairness and integrity when identifying and appointing independent evaluators whose findings and recommendations may have a direct bearing on final adjudication, as in this particular case.

Cases of potential conflict of interest must be duly managed to ensure full transparency, fairness and equity in the procurement process and all decisions related thereto. In certain cases, this may necessitate the resignation of officer/s involved in the best long-term interest of both the person/s as well as the public entity involved.

The NAO intends this Report's findings and recommendations to serve as a useful practical learning process for future procurement assignments, especially where such complex and costly projects are involved.

It is true that even the experience of other countries shows that a certain degree of controversy seems to surround major public procurement projects. However, ultimately, the most economic, efficient and effective use of taxpayers' monies is of concern to all Maltese citizens. There is therefore the need to continuously strive to improve the public procurement process in Malta, especially through ongoing training and development of personnel working in this area on the emerging procurement practices and procedures both locally as well as within the European Union. The immediate transposition of EU Directive 2007/66/EC with regard to improving the effectiveness of review procedures concerning the award of public contracts is recommended by the NAO.

Only through such improvements in the public procurement process can a high degree of trust in the fairness, transparency, value for money and equity of local public procurement be guaranteed.

ENEMALTA CORPORATION
TENDER FOR GENERATING CAPACITY

1. THE TERMS OF REFERENCE

The subject of this inquiry concerns the tender issued by Enemalta Corporation (EMC) for the supply of a new power generating plant at Delimara, as referenced in GN/DPS 8/2006 and CT 2491/06. Papers and correspondence relative to this inquiry are recorded in NAO 56/2009 (Volumes I to VI).

The inquiry's original terms of reference, as established in collaboration with the Public Accounts Committee (PAC), at the meeting of 26 May 2009, required the Auditor General (AG) to essentially assess whether:

a. the tender procedure has been regular; and
b. financial regulations have been adhered to.

During PAC's meeting of the 23 March 2010, it was decided to include in the aforesaid terms of reference an investigation on allegations made in a Sunday newspaper regarding a former EMC Chief Executive Officer (CEO). This was in consequence to a formal request submitted by the latter to Chairman, PAC, whereby a formal inquiry by the Auditor General following publication of an article in *It-Torca* of 14 March 2010, was solicited.

2. INTRODUCTION

In July 2006, EMC decided to issue a call for tenders for the supply of a new power generating plant, with a capacity over 100MW, at Delimara. The tender's main objectives were to:

- improve electricity generation capacity and efficiency;
- de-commission the Marsa Power Station (MPS); and
- fulfil environmental obligations.

On the 13 May 2009, Dr Kenneth Grima, legal adviser to Bateman Litwin (BL) - one of the three short-listed bidders for the Delimara Power Station (DPS) tender, wrote to the Chairman, Public Accounts Committee regarding alleged shortcomings in the award of the tender in question *(copy of letter to PAC at Appendix 1)*.

After discussing the matter with all the members of the Committee present, it was unanimously agreed by the Public Accounts Committee to refer the matter to the Auditor General who was to investigate and report on the matter.

The terms of reference to be followed in carrying out the inquiry were determined and agreed to between the Public Accounts Committee and the National Audit Office (NAO), as stated above *(Appendix 2 refers)*.

At this stage, it is pertinent to note that:

a. the procurement legislation applicable to the matter reported upon includes Legal Notice 178/2005 (174.06) - Public Procurement of Entities in the Energy, Transport and Postal Services Sector and applicable sections of Legal Notice 177/2005 (174.04) - Public Contracts Regulations;

b. the contracting authority (Enemalta Corporation) falls under Schedule 2 of the said Regulations *(Appendix 3)*; and

c. it is considered beyond the scope of this report to either comment or enter into merits regarding specifications, or any matter directly concerning the options or decisions taken, in that regard.

3. METHODOLOGY

This extensive and extremely complex inquiry was conducted in terms of Para 9(a) of the Auditor General and National Audit Office Act, 1997 (Act XVI of 1997) and in accordance with generally accepted practices and guidelines applicable to the National Audit Office.

During the course of this inquiry, a considerable number of meetings and interviews were held with various officers and persons either directly or indirectly involved in the tendering process or who offered to provide information related to this inquiry. These included, amongst others, the Minister for Infrastructure, Transport and Communications (MITC), under whose portfolio EMC then formed part; the Leader of the Opposition; the Hon Shadow Minister of Education; the Chairman, CEO and other senior officials of EMC; Director General, Department of Contracts; senior officials from Burmeister & Wain Scandinavian Contractor AS (BWSC) as well as Bateman Litwin; Mr Joseph Mizzi, local agent for BWSC and Mr Joseph Rizzo of Associated Supplies Limited (ASL). Wherever deemed necessary, evidence of key stakeholders was taken under oath. All allegations brought to the attention of the NAO, both in person as well as in writing, were duly investigated and resulting findings reported upon. Relevant documentation and information required, which considering the extensive financial, technical and legal implications involved was

quite voluminous were, to the best of our knowledge, made available to this Office by various parties. NAO findings and conclusions are based on the evaluation of such documentation and information.

As is normal in such complex inquiries, the NAO engaged the services of a professional technical adviser, having extensive knowledge and experience of the subject matter, to assist this Office and to evaluate particular technical aspects related to the inquiry. Whenever necessary, he worked in tandem with the Office's legal adviser.

The findings of this Report are presented in six chapters. Chapter One deals with the various administrative and technical issues related to Enemalta Corporation, as the contracting authority; Chapter Two with the Role and Functions of the Department of Contracts (DoC); Chapter Three with Irregularity Allegations made by the Parliamentary Opposition; Chapter Four with Contentions made by Bateman Litwin and Chapter Five with the Role of Lahmeyer International (LI). The last chapter deals with findings related to the additional investigation with which NAO was mandated by the PAC on 22 March 2010.

Unless otherwise indicated, this Report reflects the position as at 31 March 2010.

4. BACKGROUND CONSIDERATIONS

The NAO acknowledges the various complex financial, technical and legal issues involved in this tender's issuance, adjudication and implementation. Some of these issues, especially in so far as the negotiated procedure is concerned, were relatively new and involved both DoC as well as EMC navigating in uncharted and untested waters with limited previous experience or knowledge. In this context, the results of this inquiry could serve as a practical learning experience as to how the procurement process of such a relatively huge project, involving extensive capital outlay, should be managed in the most efficient, transparent and equitable manner possible.

It should also be stated from the outset that it is not the objective of this Report to go into the merits or demerits of either of the two main technologies considered for power generation. It is also not the purpose of this Report to analyse the efficiency and cost-effectiveness linked with each in operating on liquid or gaseous fossil fuels *viz*. the diesel engines combined cycle (DECC) and the combined cycle gas turbines (CCGT) or both as those capable of operating on a dual system - with or without modification. Thus, the NAO strove to continuously focus on the remit agreed to with the PAC, as described above.

By way of general comment, it should also be underlined that the environmental aspect, though beyond the principal remit of EMC as electricity and power provider, is nonetheless considered a crucial and integral factor in the formulation of a comprehensive strategy aimed at achieving the goals and objectives of the tender. The NAO feels that more extensive consultation with stakeholders involved, particularly at the initial stages of the tendering process, could have avoided some of the environmental issues that were raised later on.

CHAPTER ONE: ISSUES RELATED TO ENEMALTA CORPORATION

The first chapter of the Report deals with the central role of Enemalta Corporation, as the contracting authority for this tender, and with the ensuing issues that emerged during the course of the tendering process in which the Corporation was directly involved. This chapter is structured to (a) initially give a background, a brief chronology of events and a more detailed narrative of these events, (b) discuss the administrative-related concerns that the National Audit Office came across during the course of this inquiry and (c) consider those principal technical-oriented issues which influenced the tendering process and outcome. A certain amount of 'repetition' may be noted in that various concerns are addressed in both the 'administrative' and the 'technical' section. However, detailed review of the text will reveal that the concerns are addressed from the different perspectives (administrative and technical) in the sections.

A. BACKGROUND, BRIEF CHRONOLOGY OF MAIN EVENTS AND A NARRATIVE OF THE EVENTS

1. The legislative and environmental scenarios

In 2002, regulations under the Environment Protection Act (Legal Notice 329/2002) established permitted levels of air pollution for large combustion plants at levels well below that emitted from engines of the diesel engine combined cycle type. Without going into the merit as to whether this has been a wrong transposition of the corresponding European Directive or otherwise, one cannot ignore the fact that this was a law which one must reasonably accept as endorsing an environmentally-friendly policy which prohibited the use of air polluting fuels in large combustion plants to the extent of eliminating completely heavy fuel fired technology. These were the prevailing legal requirements regulating emissions in Malta at the time the tender conditions were drafted and issued.

This was the view at that particular point in time as confirmed by the 2006-15 Electricity Generation Plan published by EMC which condemns the use of DECCs, extols the qualities of natural gas (NG) and expressly and explicitly recommends the employment of gas turbines for power extensions for the near future. These statements and assertions could be interpreted to reflect the spirit of the said law.

2. Chronology of main events

The following is a chronological representation of the more salient events in the tendering process:

Year	Date	Event
2006	18 November	Publication of the Request for Proposals
2007	20 February	Closing date for the submission of proposals
	8 May	Report by the Short Listing Team
	15 May	Short Listing Report by the Adjudication and Negotiating Committee
	31 May	Approval of the Short Listing Report by the General Contracts Committee
	28 August	Publication of the Invitation to Tender
	4 September	Site clarification meeting with bidders
	2 October	Closing date for the submission of tenders
	8 October	First set of negotiations with bidders
	26 November	Second set of negotiations with bidders
2008	4 January	Publication of Legal Notice 2 of 2008
	7 January	EMC amends Technical Specifications and revises time schedule of the tender process
	16 January	Third set of negotiations with bidders
	15 February	Closing date for the submission of queries by bidders and end of negotiations
	4 March	Submission of the detailed and final bids - financial and technical
	July-October	Correspondence between MITC, EMC and DoC regarding the procurement method adopted for this tender (negotiated procedure vs the three package system)
	15 October	DoC instructs EMC to continue the procurement process adopting the three package system
	22 October	Technical Report by the Evaluation Committee
	7 November	Report by the Adjudication Committee
	16 December	The General Contracts Committee endorses the recommendations of the Adjudication Committee and the three compliant bidders (BWSC, MAN Diesel and Bateman) are to submit their financial offer
	17 December	DoC informs BWSC and MAN that their bid was technically compliant and that they will be requested to submit fresh financial offers. In the case of Bateman, however, DoC only managed to contact their local representative by fax on 22 December 2008
	17 December	DoC informs SOCOIN that its tender was adjudicated as technically non-compliant and that objections could be lodged until 12 noon, 23 December 2008
2009	17 February	Financial Report by the Evaluation Committee

2009 (cont)	20 February	Final Report by the Evaluation Committee recommending the award of tender to BWSC
	2 April	EMC makes a presentation to the GCC outlining tender process and recommends the award of contract to BWSC
	3 April	GCC endorses report by EMC Evaluation Committee and publishes Award of Contract
	28 April	Bateman writes to EMC requesting an update on the tender process
	4 May	EMC informs Bateman that contract is now awarded and that appeals period has expired on 13 April 2009
	26 May	EMC signs contract with BWSC

Table 1: Chronology of the more salient events in the tendering process

3. Publication of Request for Proposals

Enemalta Corporation initially started the tendering process in February 2006. At the time, it was decided to procure the plant by adopting the negotiated procedure, as per Legal Notice 178 of 2005. This procedure was adopted in view of the fact that the required generation plant was highly complex, with numerous significantly different technical and technological options available as EMC, at that time, opted for a technology-neutral tender. Entering into negotiations with reputable bidders would, according to EMC, allow the Corporation the opportunity to select the best technology on the market resulting in the lowest cost of operation whilst meeting all technical, environmental and legislative requirements.

In June 2006, discussions regarding the call for tenders were held between Enemalta and the Department of Contracts. Although the possibility of going for the negotiated procedure was discussed, no definite conclusion was arrived at. In fact, during a meeting held on 26 June 2006 between the Department of Contracts and Enemalta Corporation, no instructions were issued by the Director of Contracts for EMC to follow a specific procurement procedure of the three options (negotiated procedure process, the restricted process or the open procedure) permissible.

On 18 November 2006, Enemalta Corporation issued a Request for Proposals (RFP) for a 100 MW of local generating capacity. Closing date for the submission of proposals was 20 February 2007. At this stage of the process, candidates were *"expected to submit an outline proposal complying with the qualification and technical selection criteria as detailed in the RFP for the purpose of being selected to proceed to the negotiation phase"*. Financial proposals presented were to be treated as merely indicative and not considered binding. By the closing date, six candidates - IDO Hutny Projekt AS and Bateman Energies BV (later Bateman Litwin), SOCOIN Ingenieria y

Construccion Industrial SLU, Burmeister & Wain Scandinavian Contractor AS, ISOLUX Ingenieria SA and EFACEC Engenheria SA, Metal Constructions of Greece (METKA) SA and MAN Ferrostaal Power Industry Gmbh - submitted preliminary proposals. Two candidates submitted two plant options making a total of eight technical offers.

A Short Listing Team was appointed by Enemalta Corporation to determine a number of potential offers from those received in reply to EMC's Request for Proposals, prior to the evaluation of offers by the Adjudication and Negotiating Committee.

4. Report by the Short Listing Team

The eight technical plant submissions consisted of five power blocks based on CCGT plant and three power blocks based on DECC plant.

The CCGT submissions raised several issues mainly concerning availability, flexibility and efficiency. Process diagrams submitted indicated that very little engineering input was invested in the submissions. A number of CCGT plant designs presented were based on the GE frame 6B gas turbine similar to the ones installed at Enemalta Corporation. However, in general, CCGT plant designs with better efficiencies were expected.

The diesel-engine based offers all proposed HFO as their primary fuel. All the submissions incorporated post combustion exhaust gas cleanup plant. There were serious concerns as to whether the emissions of this type of plant proposed met current local limit regulations and therefore alterations may have been necessary. There was also missing data considered vital for proper evaluation. In addition, all diesel-engine based offers produced effluents which needed to be disposed of.

The Short Listing Team concluded that given all the missing and conflicting information received, further clarifications were to be sought. Their report was presented on 5 May 2007 and was then referred to the Adjudication and Negotiating Committee.

5. Short Listing Report by the Adjudication and Negotiating Committee

The Short Listing Report by the Adjudication and Negotiating Committee of the offers made in reply to EMC's RFP was submitted on 15 May 2007.

According to the Committee, from the evaluation of proposals received, none of the six candidates presented submissions that met all the necessary requirements. However, the Committee agreed that the non-conformities in the case of administrative and experience requirements were of a relatively minor nature and

were not considered serious enough to disqualify any of the candidates. On the other hand, plant requirements were considered mandatory *"since it is not in Enemalta's interest to obtain plant which is unsuitable for its purposes"* or *"plant which does not meet the various legislative requirements"*. Notwithstanding this requisite, technical proposals submitted at this stage were, according to the Committee, "very basic at best". In conclusion, the Adjudication and Negotiation Committee stated that, *"whilst compliance with all such requirements is a prerequisite for selection and award of contract, it is not necessary at this stage in the proceeding"*. The Committee felt that such requirements would be better applied at a later stage of the tender process, either prior to or during negotiations. According to the Committee, had such criteria been strictly applied, none of the six candidates would have qualified to pass to the next stage of the process. Given the very tight deadlines for this project, *"any such general disqualification and consequent loss of time would have grave consequences for Enemalta's ability to meet the expected demand"*. The new plant was also vital for Malta to comply with EU environmental legislation and therefore avoid or minimise possible infringement proceedings.

According to the Adjudication Committee, the primary scope of this stage of the tender process was the short-listing of candidates to the next phase of the procurement process. Although the Short Listing Team had considered the outline submissions received as inadequate and was therefore unable to recommend a short list, the Committee was of the opinion that this would stall the process. The Committee decided that it was still possible to continue with the procurement process and at the same time satisfy the Short Listing Team's recommendation for further information/clarifications from candidates. This, the Committee concluded, could be addressed by passing all six candidates to the next stage of the process and obtain the required information/clarifications as part of the complete bids that were still to be submitted by candidates. The complete bids would then be assessed by the Technical Evaluation Team who would ensure that all the required information/clarifications are obtained at this stage. This approach, the Committee concluded, would allow the project to continue and would also ensure that the number of potential bidders at the next stage in the tender process is sufficient to ensure adequate competition.

On the conclusions and recommendations of the Adjudication and Negotiating Committee, Enemalta Corporation opted to move on to the next stage of the tender process. The General Contracts Committee concurred with this decision and, on 31 May 2007, concluded that all tenderers *"are to proceed to the next stage, namely the invitation to submit their actual tender"*. On 28 August 2007, Enemalta Corporation issued the Invitation to Tender (ITT).

6. Invitation to tender

The invitation to tender - Specification GN/DPS 8/2006 - issued on 28 August 2007, called for *"a local generating capacity of minimum 100MW net continuous electrical power output"*. In the ITT, Enemalta invited offers for solutions based on both gas turbines and diesel engines. The tendering process was to include the submission of two bids - a Preliminary Bid by 2 October 2007 and a Detailed Final (technical and financial) Bid by 5 February 2008[1]. The tendering process was to follow the negotiated procedure as detailed in Legal Notice 178 of 2005.

The tender document also specified the award criteria on which bids would be evaluated. This was to be based on the sum of the weighted technical and financial points achieved, *viz.*:

points achieved in the technical evaluation x 100/85 x 25% +
points achieved in the financial evaluation x 75%
to a maximum possible points of 100.

The technical merits were quantified by assigning points as follows:

1. emissions - 10 points max
2. land use - 10 points max
3. net power output - 10 points max
4. use of available fuels - 10 points max
5. reduction of solid and liquid sludge wastes - 10 points max
6. lowest cost of conversion to natural gas - 5 points max
7. availability of plant - 20 points max
8. time to commercial operation - 10 points max.

The financial merits were based on the cost of electricity calculated over the evaluation period, using the Net Present Value method. The lowest cost was to be awarded 100 points, 90 for second best, 80 for third best and so on. The technical points were to contribute to 25% and the financial to 75% of the final marks. The bid with the most marks would win the tender.

Section EP 2.1 of the invitation to tender stipulated the emission limits bidders had to adhere to, *viz.*:

"*All proposed plant must comply with the airborne emission limit values of the Large Combustion Plant Directive 2001/80/EC as transposed into Maltese national legislation LN 329 of 2002."*

[1] This latter date was later extended to the 4 March 2008 as a result of changes in emission legislation effected in January 2008.

According to the wording of the ITT, these limits - which were specified therein - would apply to any kind of plant supplied.

A site clarification meeting was held with prospective bidders on 4 September 2007. During this meeting EMC reiterated that, despite any ambiguity with regard to emission limits, prevailing legislation, *viz.* Legal Notice 329/2002, was to be adhered to.

By 2 October 2007, the closing date for the submission of the preliminary bids, five of the short-listed candidates submitted their proposals. One of the original six candidates, METKA, declined to participate whilst another, ISOLUX Ingenieria SA and EFACEC Engenheria SA, failed to submit a valid bid bond and was disqualified by the Department of Contracts.

Negotiations regarding the technical aspects of the bids were held with all four remaining bidders during October and November 2007.

7. Change in legislation

On 4 January 2008, the Government Gazette published Legal Notice 2 of 2008, amending Legal Notice 329 of 2002. In effect, LN 2 of 2008 added this clause to LN 329 of 2002: "*Plants powered by diesel, petrol and gas engines irrespective of the fuel used shall not be covered by these regulations.*" This change was allowed in terms of the EU Directive. As a result of the amendment introduced, diesel engines were no longer subject to the emission limits as established by local legislation.

The change in legislation had a direct impact on the power plant tender. In fact, on 7 January 2008, Enemalta Corporation issued an amendment to Section EP of the specifications of the ITT effectively introducing a new set of emission limits for diesel engines. Enemalta based its new limits on the German legislation for SOx and on the LCP BREF document of 2006[2]. In the light of these legislative amendments, Enemalta extended the period for the submission of the Detailed and Final Bid to 4 March 2008.

The change in legislation, which is one of the main sources of the extensive controversy which was subsequently raised in sections of the local media, raises the question as to whether, once the invitation to tender had been issued calling for offers to meet specified emission limits, Enemalta was correct in changing the specifications whilst the tendering process was ongoing. This is dealt with extensively in another part of this Chapter.

[2] BREF stands for "*Best available technique REFerence document*" and is a document prepared by the European Commission to help Member States abide by directives by presenting them with information regarding the best available technology to reach the aims of a particular directive.

8. Submission of final bids

Detailed and final bids were submitted to the Department of Contracts on 4 March 2008. Although six candidates originally presented preliminary bids at the Request for Proposals stage of the process, only four submitted final bids in reply to the Invitation to Tender. These were IDO Hutny Projekt AS and Bateman Energies BV, SOCOIN Ingenieria y Construccion Industrial SLU, Burmeister & Wain Scandinavian Contractor AS, and MAN Ferrostaal Power Industry Gmbh.

SOCOIN and Hutny Bateman presented combined cycle gas turbine plants while BWSC and MAN presented diesel engine combined cycle plants. All the technical solutions presented operated on liquid fossil fuels. The CCGT plants proposed burning gasoil types of fuel in the gas turbines. The DECC plants proposed burning both heavy fuel oil and gasoil in the diesel engines. Conversion to natural gas firing was possible on all plant proposed.

Bids were examined and clarifications were requested from all bidders. Following the receipt of replies to these clarifications, further analysis was carried out and all bidders were called for final negotiation meetings. One set of meetings was held with Bateman and SOCOIN and two sets of meetings were held with MAN and BWSC. Neither Bateman nor SOCOIN requested a second set of meetings.

Following these meetings, and as agreed during the negotiations, BWSC, Bateman and MAN made further improvements to their offer in order to address the concerns raised by Enemalta. The bidders submitted revised final bids which were "substantially technically compliant" with the Corporation's requirements. SOCOIN did not renew the bid bond and informed Enemalta that they were no longer interested to further pursue the procurement process.

9. Change from the negotiating procedure to the three package model

In July 2008, representations were made by an agent, on behalf of Bateman NV, to the Malta Permanent Representation in Brussels alleging several shortcomings in connection with the tender process. On 22 July 2008, these allegations were forwarded to Minister MITC who then referred the matter to the Department of Contracts since *"the process is owned by Contract*s".

In its reply to the Minister on 23 July 2008, the DoC described the process, at this stage, as a competitive dialogue. The Department also made reference to the three package tendering model, stating that in accordance with the Public Contracts Regulations, the tender in question "will qualify as a three package tender". The Department concluded that, "given the stage reached in this procurement process", no action would be taken on the claims made through the Brussels Permanent Representation. From what could be ascertained by this Office, this

was the first time that the three package model, rather than the negotiated procedure, was specifically referred to in connection with this tender.

Following a meeting between EMC and the DoC on 4 August 2008, more definite advice regarding the three package system was given by the Department to Enemalta's Head of Procurement. In an email dated 11 August 2008 to EMC, DoC stated: *"May I draw your attention to Regulation 68 of LN 178/2005. In this regulation it is stated that amongst others, that Part XII of the Public Contracts Regulations also apply to these regulations. Therefore, given the estimated value of this tender the procedures related to the three package system should be followed"*.

EMC, however, did not concur with the Department of Contracts. The Corporation reiterated that *"Enemalta Corporation, with the approval of the Department of Contracts undertook the negotiated procedure for the procurement of the new electricity plant … The decision to procure the plant by adopting the Negotiated Procedure method was taken in view of the fact that the procurement of the required generation plant would result in a complex contract, and the procedure would allow the Corporation to select the best technology on the market, resulting in the lowest cost of operation …"*. EMC refuted DoC's stand that the three package model applies to this tender stating that *"the DG Contracts and the Department were fully aware that the Corporation proposed to make use of the negotiated procedure since 2006 and granted approval on the way forward proposed"*.

Despite these contentions, on 15 October 2008, specific instructions were given to EMC by the Department of Contracts to continue the procurement process adopting the three package system, *viz*.: *"I would like to draw your attention that a request to open negotiated procedures as per legal notice 178 of 2005 was made by Enemalta Corporation on 8th November 2006. There are no records at this Office that a formal reply was ever submitted by the Department of Contracts. This Department feels that in the absence of any formal directions, the tendering process should have followed the three envelope procedure. Although the tendering process has reached an advanced stage Enemalta should still follow the procedures of the three envelope procedure as regards appeals. …"*.

Moreover, DoC instructed Enemalta *"to submit a report on the technical evaluation of the bids. This report will be discussed by the General Contracts Committee and if approved, the decision will be published on the notice board of the Department of Contracts. Any aggrieved bidder will be given the opportunity to file an appeal. Should there be no appeal each bidder will be requested to submit a financial offer at the Department of Contracts. This will ensure better transparency in the bidding process and maybe produce a better offer for Enemalta …"*.

In view of this change, a technical evaluation report was prepared by EMC on 22 October 2008.

10. Technical Report by the Evaluation Committee (22 October 2008)

The Technical Evaluation Report dealt with the four submitted bids, *viz.*:

SOCOIN: This bidder submitted the poorest bid, both as regard engineering details and in commercial terms. Data submitted was extremely limited and major items of plant were not clearly defined. Several of the schedules were submitted blank and the bid did not include the maintenance agreement. SOCOIN failed to extend the bid bond and the bid could not be considered further.

BWSC: The technical solution as originally proposed had a number of serious shortcomings, mainly on layout and health and safety issues. These issues were however resolved and the final technical solution substantially met the specification requirements as requested by EMC. The DECC solution proposed had significant advantages in that the degradation in power output at site summer conditions is negligible and that this type of plant maintained relatively high efficiency at part loads when compared to CCGT. The plant would operate on heavy fuel oil (HFO) of a better quality than that in use by EMC. Installation of such plant would require the updating of the HFO purchasing specification for the guaranteed performance figures to be achieved. It was recommended that the BWSC bid is approved to proceed to the next stage of the adjudication.

Bateman: The original technical solution as proposed had major shortcomings regarding lack of operational flexibility and long start-up times of the steam cycle. These issues were resolved following clarifications and the final technical solution proposed by Bateman substantially fulfilled the specification requirements requested. This was the most efficient plant proposed and generated the least amount of CO_2/kWh produced. This plant produces negligible amount of waste when compared to DECC plant and utilises no reagents for emission abatement. However, this offer had the longest declared construction time and suffered from significant degradation in output power in summer and reduction in efficiency when not operating at near maximum outputs. It was recommended that this bid is approved to proceed to the next stage of the adjudication.

MAN Diesel: Two offers were originally presented by MAN. The main offer consisted of a DECC plant made up of 7 diesel engines complete with exhaust abatement equipment and an alternative offer of a similar plant however at higher output. At the outset, however, the Corporation declared that it would not consider further the alternative offer and only evaluated the main offer submitted. The Committee concluded that the bid substantially satisfied the technical requirements specified by EMC. This DECC had significant advantages in that

the degradation in power output at site summer conditions was negligible and that it maintained a relatively high efficiency at part loads when compared to CCGT. The plant would operate on HFO of a better quality than that in use by EMC. Installation of such plant would require the updating of the HFO purchasing specification for the guaranteed performance figures to be achieved. The proposed power block produces the highest amount of waste per kWh generated due to the type of de-SO_x reagent proposed. It was recommended that the MAN bid is approved to proceed to the next stage of the adjudication.

Lahmeyer International, an international consulting firm, was engaged by EMC to execute independent plausibility checks of the pollutant emission data stated by the bidders. Various issues related to the LI report and to the use EMC made of this report feature in Technical Sections 2 and 3 of this chapter. The EMC-LI relationship is discussed in Chapter Five of this Report.

The Technical Evaluation Committee concluded that the revised final bids by BWSC, MAN and Bateman substantially complied with the technical requirements of the invitation to tender and recommended that these three offers proceed to the next stage in the adjudication process, i.e. the review by the Adjudication Committee.

11. Report by the Adjudication Committee (7 November 2008)

The Adjudication Committee concluded that the revised final bids by BWSC, MAN and Bateman substantially complied with the technical requirements of the ITT.

In short, the Committee affirmed the following:

- The bids submitted by Bateman and SOCOIN were based on combined cycle gas turbine plant while offers by BWSC and MAN were based on diesel engine combined cycle plant. All four utilised liquid fossil fuels. Conversion to natural gas firing was possible in all the proposed plants. The DECC plants proposed required better quality heavy fuel oil to that in use by Enemalta while the CCGT plants proposed were able to utilise gasoil available on site. The estimated increased cost of better quality HFO was incorporated in the NPV financial analysis as indicated in the ITT.

- The exhaust abatement equipment as a train of plant installed downstream of the diesel engines is a prototype setup. Whilst there are references for each of the proposed plant items, the combination itself is a prototype. In this context, the required long-term service agreements have to include all the plant to ensure that such plant retains the guaranteed performance and availability figures.

- Bidders proposing DECC plants indicated that between 30 and 50 tons per day of hazardous waste will be generated by the exhaust emission abatement equipment. This waste is considered hazardous due to the presence of heavy metals originating in the fuel and would, most probably, have to be exported.

- A points system was adopted to evaluate and rank the technical compliance of the bids with specification requirements. Where necessary, data submitted by bidders was corrected to ensure that all bidders were placed on the same level when the evaluation of the bids was made in order that comparisons on a like-with-like basis could be carried out. The technical evaluation points (out of 25) achieved by each bidder were BWSC 18.82, Bateman 20.88 and MAN 14.41.

The Adjudication Committee endorsed the recommendation made by the Technical Evaluation Committee that offers submitted by BWSC, MAN and Bateman comply with the requirements of the specification and all current environmental legislation and should pass to the next stage of the adjudication. The report of the Adjudication Committee was referred for the consideration of the General Contracts Committee.

On 16 December 2008, the GCC concurred with the recommendation and "agreed that tenderers … are to be invited to submit their financial offer". On 17 December 2008 the GCC published the notice of approval.

On the same day, as per Adjudication Committee report, the Department of Contracts informed BWSC, MAN and Bateman[3] that their bid qualified to the next phase of the procedure and that they were going to be requested to submit a financial offer in due course. DoC also informed SOCOIN that their bid was adjudicated as technically non-compliant and that they had until 12 noon of 23 December 2008 if they wanted to lodge an objection.

12. Evaluation of financial bids by BWSC, MAN and Bateman (17 February 2009)

In October 2008, instructions were given by the Department of Contracts to Enemalta Corporation to continue the procurement process adopting the three package system. In view of this, an evaluation report was prepared by the Adjudication Committee on 7 November 2008 and whose recommendations were approved by the General Contracts Committee on 16 December 2008. The results were published on DoC's notice board and bidders were invited to present any objection to these results by the 23 December 2008. Since no objections were

[3] Actual facts and views regarding this communication feature in the Chapter dealing with Bateman.

presented, on 24 December 2008 BWSC, MAN and Bateman were instructed to submit their financial/commercial offer by 3 February 2009.

The following was required of bidders:

- All prices submitted must be fixed and valid as on the closing date. Prices submitted were to remain fixed and valid until the expected contract signing date of 20 May 2009.
- Unless otherwise indicated, the conditions of contract were to be the same as those agreed during the final negotiations held.
- The financial model on which adjudication was to be held was the NPV model with the values as stated in the technical specification/ITT with subsequent amendments as advised to all bidders prior to 4 March 2008.
- Prices and respective escalations for reagents and consumables which were not quoted for in any of the documentation were to be submitted by the bidder.
- The price of the main contract and the payment terms should be clearly indicated.
- Revised project time schedules and EV schedules should be resubmitted with the financial/commercial offer.
- A five-year service agreement covering the complete supplied plant should be included in the offer. The service agreement should include a yearly fixed contribution and a yearly variable contribution depending on the running hours of the plant. Prices, with any applicable escalations, should be valid for the full five years.
- Bid bonds must be extended up to 20 May 2009.
- Financial/commercial offers should be submitted by 3 February 2009.

According to the report by the Adjudication Committee, financial bids received by EMC were analysed using the NPV method of financial analysis to obtain the Net Present Value cost per kWh of generated electricity based on total project costs for the period up to and including the year 2019. All costs connected with the design and construction of the project and the operation of the plant were included in the analysis, including the cost of emissions abatement and waste disposal. A points system was adopted to evaluate and rank both the technical compliance of the offers with the ITT (as per previous technical evaluation report), as well as the financial aspect of the bids. A sensitivity analysis showing the influence of changes in fuel cost, reagents procurement cost, waste disposal

cost, lube oil cost and maintenance agreement cost on the NPV cost of electricity was also examined.

The Adjudication Committee concluded that, based on the operating regime specified in the ITT and the evaluation criteria established therein, the bid proposed by BWSC obtained 93.82 points with a derived NPV cost of electricity of 12.467 €c/kWh and ranked first. The derived contract price of this offer was 161,357,000 Euro, effective up to 20 May 2009. The declared 164,950,000 Euro bid price included some optional equipment (removed to evaluate on equal terms with other bidders). The power block proposed by BWSC consists of eight Wartsila 18V46 medium speed diesel engines which are to be supplied by Wartsila Finland Oy. Exhaust gas abatement is achieved by means of selective catalytic reactor (SCR), flue gas desulphurisation plant (FGD) and dust particle filters. The plant also converts part of the exhaust waste heat to steam in EGBs utilised to drive a steam turbine generator and for auxiliary heating purposes. The total net guaranteed power output of the power block is 143.7 MW at an efficiency of 46.9%. This DECC solution has significant advantages in that the degradation in power output at site summer conditions is negligible and this type of plant maintains a relatively high efficiency at part loads when compared to CCGT. This plant operates on HFO of a better quality than that currently in use by Enemalta for guaranteed performance figures to be achieved and maintained. Conversion of the proposed diesel engines to natural gas firing is possible at an additional budget price of 27,468,000 Euro.

The bid proposed by MAN obtained 81.91 points with a derived NPV cost of electricity of 13.696 €c/kWh and ranked second. The derived contract price of this offer was 185,601,000 Euro effective up to 20 May 2009. The declared 189,037,000 Euro bid price included a first year maintenance agreement removed to enable evaluation on equal terms with other bidders. The offer consists of a DECC plant comprising seven diesel engines complete with exhaust abatement equipment and steam cycle producing a net power output at site summer conditions of 136.9 MW. Exhaust gases produced by the diesel engines are passed through an SCR, FGD and dust particle filters. NO_x reduction in the SCR is obtained with an ammonia rich reactant and a catalyst while the reduction of SO_x is obtained using semi-dry FGD technology. The proposed power block produces the highest amount of waste per kWh due to the de-SO_x plant and type of reagent proposed. This plant operates on HFO of a better quality than that currently in use by Enemalta for guaranteed performance figures to be achieved and maintained. Conversion to natural gas firing is possible at an additional budget cost of 10,220,000 Euro.

The bid proposed by Bateman obtained 80.88 points with a derived NPV cost of electricity of 16.823 €c/kWh and ranked third. The bid price of this offer was 148,740,000 Euro effective up to 20 May 2009. No adjustment on the bid price was required. This was the most efficient plant proposed with a gross efficiency at 48.7% at MCR and generates the least amount of CO_2/kWh produced. This

plant produces a negligible amount of waste when compared to DECC plant and utilises no reagents for emission abatement. The power block has the lowest capital cost but this advantage is negated by the fact that this power block has the highest running cost due to the utilisation of gasoil as fuel. The cost of conversion to natural gas firing for this plant is zero as the gas turbines shall be delivered already equipped for this capability.

The following is a summary of the total results:

		Bateman	**BWSC**	**MAN**
Capital Cost (as opened)	€	148,740,000	164,950,000	189,037,000
Capital Cost (derived)	€	148,740,000	161,357,000	185,601,000
5-year maintenance agreement	€	33,927,616	18,000,000	28,458,962
Bidder Total Fuel Costs for 10-year period	€	758,900,967	466,369,708	456,580,296
Bidder NPV Unit Cost	€c/kWh	16.823	12.467	13.696
Bidder Technical Evaluation Points	Max 25	20.88	18.82	14.41
Bidder Financial Evaluation Points	Max 75	60.00	75.00	67.50
Total Bidder Points	Max 100	80.88	93.82	81.91
Ranking		**3**	**1**	**2**

Table 2: Summary of Results
(source: Evaluation Committee Report - 17 February 2009)

According to the Committee, due to the emission abatement equipment required by the DECC types of plant offered, the DECC power blocks proposed by BWSC and MAN are more complex than the CCGT plant offered by Bateman. These also require a larger footprint and have higher capital cost expenditure per net kW installed. In addition, more personnel are required to operate and maintain the DECC plant with respect to the CCGT plant. However, due to the fact that DECC plants comprise a number of small units, they are able to allow greater operating flexibility than the CCGT which is composed of a smaller number of larger units.

Notwithstanding the above, a number of pending issues were to be resolved with each bidder before any contract signing. In general, these included details of the maintenance agreement, plant availability figures, request for bonuses, fuel specification in maintenance agreement, rejection of plant and optimised delivery and commissioning schedule.

It was also agreed that during a final set of negotiating meetings with the selected bidder, the maintenance agreement was to be finalised before the contract is awarded.

The Evaluation Committee recommended that, following the satisfactory conclusion of all pending issues, the contract be awarded to BWSC as the preferred bidder. The report was published on 17 February 2009.

13. Final Report by Adjudication Committee (20 February 2009)

On 20 February 2009, EMC's Adjudication Committee presented its final report. The Committee recommended that the contract is awarded to Burmeister & Wain Scandinavian Contractor AS, which proposed a DECC plant *"which fully complies with the requirements of the ITT and all current environmental legislation, and which produces electricity at the lowest evaluated cost per kWh of all the bids"*. This recommendation was however subject to the satisfactory resolution of a number of outstanding points, *viz.*:

- maintenance agreement contract;
- conditions attached to the plant availability figures submitted;
- BWSC's request for bonuses for better than guaranteed performance related to liquidated damages; and
- optimised delivery and commissioning schedule.

In the absence of a satisfactory agreement on these outstanding points, the Committee recommended that the contract be awarded to the second ranked bidder, namely MAN Diesel SE, which contract is also subject to the satisfactory resolution of a number of outstanding points. Should it not be possible that negotiations with both BWSC and MAN result in satisfactory resolution, then Bateman is to be approached as the third preferred bidder.

The Committee also remarked that the costs of the offers may still be subject to variation due to possible additional requirements resulting from the pending Environmental Impact Assessment (EIA) study currently being undertaken. According to the Committee, such potential additional costs will only be known after the EIA process is concluded. The Evaluation Committee presented its final report on 20 February 2009.

14. EMC presentation to the General Contracts Committee and decision by the GCC

On 2 April 2009, EMC officials gave a project overview to the General Contracts Committee. During the presentation, the more salient points of the tender process were given. EMC gave justification for the undertaking of this project, *viz.* the de-commissioning of the Marsa Power Station, the onus on EMC to fulfil its environmental obligations and its commitment to improve electricity generation efficiency. EMC gave an outline of the type and a comparison of the plant proposed by Bateman, BWSC and MAN, the technical and financial criteria

adopted for the evaluation of the three bids and the evaluation results. Possible scenarios of operating costs based on January 2009 fuel prices and assuming that natural gas (NG) is available in 2013, 2015, 2016 or in the case that NG will not be available, giving NPV cost per kWh, were explained. A comparison of running costs for the period the 2008 to 2019 and the Specific Capital Cost (€/kW) were given. Finally, EMC reiterated the conclusion arrived at by the EMC Adjudication Committee and recommended that, following the satisfactory conclusion of all pending issues, the GCC endorses the award of the contract to BWSC.

The General Contracts Committee endorsed this recommendation and on 3 April 2009 published the relevant notice of award of contract to BWSC. In the Contract Award Notice, tenderers were informed that any objection to this decision must reach the Director General (Contracts) by not later than noon, 13 April 2009.

On 28 April 2009, Bateman wrote to the Corporation requesting an update on the status of Bateman's proposal. On 4 May 2009 Enemalta Corporation informed Bateman that *"the procurement procedure for this tender has been concluded. The recommendation made by the General Contracts Committee of the Department of Contracts was published on 3rd April 2009 giving a 10 day period for any appeals. No appeals were received by the appointed date so the process ended there"*. A detailed review of this correspondence is at Section Three of this Report.

15. Signing of Contract with BWSC

On 26 May 2009, EMC signed the Conditions of Contract for Contract No. GN/DPS 8/2006 - CT 2491/06 for the Supply of Delimara Diesel Power Plant by Burmeister Wain Scandinavian Contractor AS. The contract was for the design, manufacture, supply, erection, construction and commissioning of a 144MW Diesel Power Plant at the Delimara Power Station for a contract value of 164,950,000 Euro. An Outline Proposal for Spare Parts and Technical Support Agreement (SPTSA) was included in the contract for an additional amount of 18,000,000 Euro. The date fixed for the completion of works is 26 months from commencement date[4].

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[4] According to Clause SC11.1 *"Commencement date is achieved upon (1) the Contractor has submitted a Down Payment Guarantee which shall have a condition that it will become effective once the Down Payment is received by Contractor; (2) The Contractor has received the agreed Down Payment in available funds into his bank account designated for that purpose and confirmed the receipt to the Purchase; (3) The Purchaser has provided to the Contractor a Letter of Comfort issued from the Government of Malta, guaranteeing the Purchaser's commitment towards the Contractor in terms of this Contract; (4) The Purchaser has provided to the Contractor an irrevocable Standby Letter of Credit covering 10% of the Contract Value …"*.

B. FINDINGS: Administrative-related Concerns

During the course of this extensive inquiry, the National Audit Office came across a number of shortcomings on the part of Enemalta Corporation which have negatively impinged on the call for, and eventual award of, tender. Although not the sole player in so far as the management of the procurement process was concerned, as the contracting authority responsible for the contract, Enemalta Corporation was to a large extent responsible to guarantee a level playing field and thus ensure a fair and unbiased position throughout the whole process.

The following are shortcomings which, though not exclusively, can for the most part be attributed to the Corporation.

1. Selection and award criteria: Best Available Technology (BAT) vs Most Economically Advantageous Tender (MEAT) approaches

In July 2006, EMC had written to the Department of Contracts stating: *"The plant will incorporate BAT to comply with Maltese legislation, safety and emission regulations and will be subject to the necessary regulatory permits to enable operation"*. DoC (and EMC) then quoted MEAT. DoC also stated that there is no relationship between BAT and MEAT; that they are two different concepts, and that procurement legislation assumes MEAT. Incidentally in mid-2008, Bateman had, through an agent, made a complaint with the Maltese Permanent Representation at Brussels. Both Bateman and the Permanent Representation had spoken in terms of BAT (this is discussed in more detail in Chapter Three of the Report).

This Office requested the advice of its technical adviser on whether the tender should have been adjudicated according to BAT or MEAT.

According to NAO's technical adviser, *"It is understandable that an engineer would ideally want the best available technology, but at any price? We are here dealing with a tendering process which is very strictly regulated by the Public Procurement Regulations laid down at law. BAT does not feature in those regulations, so as such, one cannot use the term to define the technology that one wishes to procure in a tendering process, which in any case is defined by the specifications that one has drawn up and published and which are the sole criteria against which to judge whether a bid is compliant or not. In view of the above, there is no need to go further into the argument of whether BAT means Gas Turbines or Diesel Engines. In conclusion, the debate whether it is BAT or MEAT is irrelevant, as the Procurement Regulations do not recognise BAT, but they do recognise MEAT as one of the criteria on which to base the determination of whom to award the tender."*

2. Choosing the negotiated tendering procedure

In the context of changing environmental factors - including the expected increase in demand for electricity, the decommissioning of the Marsa Power Station by not later than 2015 and more stringent environmental obligations - Enemalta Corporation decided that, "in order to keep all options open and not exclude anyone", the best option for the procurement of the new electricity plant was to adopt a sort of competitive dialogue where, in contrast to the open procedure, the thrust would be on competition between proposed solutions. In February 2006, EMC decided to adopt the negotiated procedure for the procurement of the new plant, in line with procurement methods established by Legal Notice 178 of 2005.

Although in June 2006 EMC did sound the Department of Contacts on its intention to go for a negotiated procedure, the latter never approved it. It would have been prudent on the Corporation's part to request and obtain DoC's written approval beforehand. As it turned out, however, EMC proceeded regardless and in so doing deprived itself of the comfort of a regulator. With a developing policy as to emission abatement and with no preliminary studies (based on evidence provided by the Corporation), EMC - which is a corporate body acting within a legal and regulatory framework - set out on the negotiated procedure, a procedure which is relatively new in the ambit of local public contracting.

In August 2008, when the negotiated procedure had been under way for almost two years, the DoC came to the conclusion that the procedure needed to be changed. The decision was then taken by the DoC to incorporate the three package system characteristics of open procurement with the negotiated procedure at practically the concluding stage of negotiations, when a preferred bidder had already been identified by EMC. A hybrid between the negotiated procedure and the three package system ensued. This is also dealt with in the following Chapter dealing with the Department of Contracts.

3. Weakening of EMC's position

EMC's decision for opting for the negotiated procedure was taken in view of the fact that *"entering into a negotiation with reputable bidders would allow the Corporation the opportunity to select the best technology on the market resulting in the lowest cost of operation, whilst meeting all the technical, environmental, regulatory and legislative requirements"*. As it turned out, the way the negotiated procedure was managed tended to allow excessive concessions to the selected bidder. Part 6 of the technical-oriented sub-section of this Chapter highlights such concessions, the more salient of which are:

- changing of the venue of Arbitration from Malta to London;
- waiving of damages in case of plant failure and limiting liquidated damages to 15% of the contract value;

- accepting prototype technology with no international references to back them
- paying extra bonuses for early completion of the contract; and
- entering into a maintenance agreement - which is still unsigned - for a period of five years which is only a small fraction of the plant's expected life span.

4. The 25:75 technical:financial formula

Section EV (Evaluation Criteria) of the ITT specified in detail the process which EMC would apply for the evaluation of bids. While this is described in some detail in the technical sub-section of this Chapter, it is pertinent to note that such evaluation was to be based on a formula combining points gained through both the technical and the financial evaluations. EV.5 of the ITT, Compliance with Award Criteria, stipulated the weighting ratio *viz.* technical points were to be multiplied by a factor of 25%, while financial ones with a factor of 75%.

It is to be noted that none of the bidders contested this weighting during the bidding process.

While it is not within the scope of this inquiry to evaluate the weighting applied or to comment thereon, during the course of the inquiry this Office attempted to trace, through the interviews with EMC Chairman and senior official as well as documented evidence, the process through which the 25/75 formula had originated, was submitted for approval and eventually approved, both within the Corporation and by DoC.

During the PAC sitting of 26 May 2009, Mr David Spiteri Gingell, who held the post of CEO at EMC between 2007 and 2008, described in detail the guiding principle behind the weighting applied in the formula. He stated how, at the time, the cost of ownership model to be designed was to cater for three main objectives: (a) the environment; (b) the closing down of MPS as per the LCPD; and (c) efficiency in electricity generation. Mr Spiteri Gingell commented that the ideal combination for the cost of ownership model was that chosen, namely attributing 25% to the technical issues and 75% to financial ones. EMC Chief Technical Officer supported Mr Spiteri Gingell's statements and went on explaining, in detail, the workings of the financial model implemented.

The NAO asked EMC senior management during an interview held on 8 February 2010 for details of the originator of the formula. EMC's reply was:

"The CEO, CFO and CTO with the declared intention of using MEAT criteria to obtain a generating plant complying with the mandatory technical requirements and capable of generating electricity at the least possible cost."

During the same meeting, NAO asked EMC whether the approval of some other authority within EMC and/or MITC had been sought, in order to endorse the

suggested formula. EMC's response was that *"the full evaluation criteria were approved by the Department of Contracts … The publication of the RFP and the issue of the ITT were both authorised by the Department of Contracts, and both clearly indicated the said criteria"*.

At this stage, however, it is pertinent to note that, when questioned by the NAO as to whether the DoC, in line with the obligations placed upon the Department by the public procurement regulations, had reviewed the EMC DPS tender before publication, DoC's response was that *"There is a long-standing administrative arrangement whereby EMC tenders are published without being vetted by DoC … There are no records that this tender was vetted by DoC"*.

NAO asked EMC whether the approval (for the weighted formula) of Enemalta's Board of Directors was sought and obtained. EMC's response was that *"The Board of Directors approved in principle the evaluation criteria as part of the RFP"*. However, relative Board minutes substantiating such approval have not been produced by EMC, despite NAO's formal written request for same.

This Office is of the opinion that the original discussions and initial proposal of the 25:75 model, including the workings supporting such a proposal, together with iterations using alternative ratios carried out, preferably in the form of a formal report, should ideally have been formally drawn. Even more so, the process with which the proposed weighted formula - which was the crucial and determining factor during the evaluation stage - was submitted to higher authorities, both within the Corporation and otherwise, should have been formally documented and filed.

5. No preliminary studies by independent regulatory bodies

Feasibility and environmental impact studies were not commissioned and discussed by EMC prior to the signing of the contract. Had Enemalta done so, it would have at least ended with a clearer policy decision. However, EMC was ready to move forward without the comfort of having the required permits from the various regulating bodies that would eventually be a *sine qua non* condition before signing any contract with the successful bidder. It is considered risky to sign a contract for a development which requires an Environmental Impact Assessment (EIA) without first carrying out the EIA, as the EIA may lead the Malta Environment Planning Authority (MEPA) to impose conditions that affect the contract. In fact, in the final (February 2009) report by the Adjudicating Committee recommending the award of contract to BWSC, the Committee makes a proviso that the *"costs of the power blocks offered may still be subject to variation due to possible additional requirements resulting from the pending EIA study …"*.

Enemalta Corporation insists that it is difficult to carry out an EIA unless one has in hand all the significant technical details.

6. DoC vetting of EMC's tender documents

Whenever NAO queried EMC as to whether the tender document had been cleared with the Department of Contracts, the Corporation's response was that DoC had already vetted the Request for Proposals document and the commercial sections of the Invitation to Tender, prior to the publication of both documents.

Such a case was, for example, DoC's approval or otherwise to the negotiated procedure prior to the publication of the RFP and the ITT. EMC's position was that, in effect, DoC had accepted this methodology since it (the DoC) had published the documents.

This matter is dealt with more extensively in the following Chapter dealing with the Department of Contracts.

7. Conflict of interest declared by Chairman Enemalta Corporation

The Organisation for Economic Co-operation and Development (OECD) defines conflict of interest as:

A conflict of interest involves a conflict between the public duty and private interests of a public official, in which the public official has private-capacity interests which could improperly influence the performance of their official duties and responsibilities.

Whilst a conflict of interest does not necessarily equate to corruption, there is an increasing realisation that conflicts between public service and private interests of directors could result in corruption. Hence actual, perceived or potential conflicts of interests need to be adequately managed in a coherent framework promoting openness and transparency.

Directors shall not use their position for an improper purpose, shall not take personal advantage of the entity's opportunities or assets or allow their personal interest to conflict with the interests of the organisation.

It shall be the duty of directors, at all times, to avoid actual, perceived, or potential conflicts of interest between their personal interests and their duties towards the entity, and to ensure that they are free from any business, family or other relationship that may create an actual, perceived or potential conflict of interest with their duties as director or which may interfere with the exercise of their independent and impartial judgement.

In the event that an actual or potential conflict of interest arises during the tenure of his post as director, a director shall disclose the conflict in writing, in full and in time.

A director having a continuing material interest that conflicts with the interests of the organisation should, following consultation with the Chairman and the Minister, take effective steps to eliminate the grounds for the actual or perceived conflict. In the event that such steps do not eliminate the grounds for conflict then the director should tender his resignation. Moreover, it shall be the duty of a director to limit the number of any other directorships held in other companies to be able to apply the necessary time and attention to his post of director and to ensure the proper performance of his duties.

During June 2008, Chairman Enemalta declared his conflict of interest in the Delimara Power Station extension especially since in his private capacity he had business links with the local company entrusted with civil works in one of the bids under consideration (which eventually was selected and agreement signed with). For this reason, since his public declaration, he stated under oath, that he refrained from participating in the tendering process.

Everyone agrees that public entities need to be guided by the concepts of integrity, honesty (loyalty to the public interest, fairness, conscientiousness, compassion), transparency, openness, independence, good faith, and service to the public. They also need to consider the risk of how an outside observer may reasonably perceive the situation.

. In NAO's opinion once a conflict of interest has been identified and declared, the entity may need to take further steps to remove any possibility - or even perception - of taxpayers' funds being used improperly.

It was noted that the Chairman, prior to his declared conflict of interest, had appointed the members on the evaluation and adjudicating committees responsible for the evaluation of tenders. Notwithstanding this, the Chairman failed to inform his Minister to approve or otherwise the appointment of these committees following his (Chairman's) declared conflict of interest.

Considering the circumstances of this case it is felt that it would have been more prudent and appropriate had the Enemalta Chairman resigned from his post at the time when he had declared a conflict of interest. This would surely have eliminated the extensive controversies which arose at a later stage, especially in view of the fact that the local company with whom the Chairman had declared having professional connections with was actually sub-contracted the civil works of this tender.

Incidentally, on the 5 March 2010 it was reported that Chairman EMC was resigning from his position within the Corporation in view of the fact that he was

taking employment abroad with a multinational company. He denied that his resignation was in any way related to a potential conflict of interest related to his connections with a company bidding for a public solar energy project as reported in certain sections of the press.

8. Contracting the services of Lahmeyer International

In April 2008, Lahmeyer International contacted Enemalta and offered to assist EMC in the technical evaluation of the bids for the Delimara power plant. At the time, Enemalta declined the unsolicited offer. In May 2008, however, the Corporation directly engaged LI to carry out a study on the emission abatement equipment tendered for Delimara.

The development of the business relationship between EMC and LI, together with the various points of interest that became apparent during the course of the inquiry and which eventually led to so much controversy and allegations, is dealt with in Chapter Five of this Report which refers to the role of Lahmeyer International.

Concerns surfaced in the local media that Mr Joseph Mizzi, the local agent representing one of the bidders, had been previously involved with LI having acted as its agent in a tender awarded to it. Doubts were raised with regard to these ties and whether LI could have been influenced by such connections in the evaluation of the bids for the Delimara plant. These reservations grew more serous once it emerged that Lahmeyer International were blacklisted by the World Bank on counts of bribery and corrupt practices. Enemalta refuted any knowledge of Mr Mizzi's involvement with Lahmeyer and stated that it did not undertake any checks on LI and justified this by stating that it *"did not request Lahmeyer to make any declaration on the matter since Lahmeyer had been working for MRA on the study of Energy Interconnectors for Malta. Accordingly it was deemed unnecessary"*.

The NAO also noted two aspects of the advice given by LI: the cautious and rather vague judgement on the reliability of the combination of plant and abatement equipment and the recommendation of precautionary measures in the event of failure.

9. International references

Enemalta Corporation had discretion to reject a bid if it was not fully compliant. It is important that one understands that this is a discretion and not a duty; and a decision on this point very much depends on a weighting of the seriousness or otherwise of any eventual non-compliance. It appears that as far as the single parts of the plant were concerned, these were proven technology and adequate

reference was given. It was in the combination of these parts that the technology was innovative and therefore not referenced. Enemalta was aware of this and appears to have relied on the Lahmeyer Report; Enemalta seems also to have relied on its own technical knowledge to evaluate the solution proposed as one that was adequate and feasible. In reality, the words of the ITT leave ample room for Enemalta to apply its discretion, and provided such discretion is applied carefully and properly, there is no legal obligation to refuse to accept the bid as non-compliant.

An evident weakness in the evaluation of this part of the tender seems to have been the resort to advice by Lahmeyer when it is now evident that Mr Mizzi, the person representing one of the bidders, had contacts with and had in the past represented Lahmeyer International locally. Of course it could be argued that Enemalta was also relying on its own internal expertise in making the decision, but on the other hand it did then feel the need for the advice of an expert. In NAO's opinion, Enemalta should have been more careful and could have better chosen its consultants to advise it, ensuring they had no connection whatsoever with the parties. Furthermore, in LI's final report, more stringent recommendations on the bidder could have been inserted in this respect.

10. Allegation of unprofessional conduct

The attention of this Office was drawn to allegations appearing in foreign news features in connection with bribery and corrupt practices of BWSC, the bidder awarded the contract. This is referred to also in Chapter Three of this Report dealing with allegations made by the Opposition. This Office is not aware of any decision by any constituted authority finding the bidder at fault at any stage. It, however, must be made clear that had these allegations been made before the award, and had Enemalta been aware of same, greater caution would have had to be exercised in the award and it would have been justified in calling on the bidder to clarify its situation. This Office, however, is not in possession of any evidence which goes to show either that Enemalta was aware of these allegations or that they could have become aware of same before the conclusion of the contract. Indeed, these matters arose in the course of the inquiry and the publications were subsequent to the award.

The further point to be considered is whether Enemalta should proceed to levy a penalty as stipulated by EMC in Section CC.1 of the tender documents - Statement on Excluding Circumstances of Regulation 49 of Public Regulations 2005 *(Appendix 4)*. Even here, the position is extremely flimsy as the sole regulation which could eventually be called into play is sub-regulation 4. The NAO did not come across any declaration of guilt whatsoever but only allegations in the media without any substantive proof which would lead to a certain and unquestioned finding. Naturally, it would be up to the legal advisers of Enemalta

Corporation to evaluate as to whether the legal prerequisites for such course of action exist or otherwise.

11. Delivery of plant

The problems that may arise in connection with the delivery of plant are:

i. taking over, and
ii. liability in damages.

With respect to the taking over, it is to be understood that there is no obligation on the part of EMC to take over the plant offered unless it is in accordance to specifications. In default of a taking over, there is no obligation by the principal to effect payment. The problem created by the contract is that taking over is not contemplated as an all or nothing event, but as a gradual process depending on progress of works. Once a section is taken over and payment affected it may become difficult to reverse the situation even if the holistic project is not acceptable at the end. This problem does not seem to have been specifically tackled in the drafting and this seems to be a weakness. On the part of Enemalta the justification may be that the part taken over would still be useful and serviceable. This, however, would defeat the idea of having a whole plant delivered and fully functional. It is in this respect that the contract should have made specific provision.

The other problem is that liquidated damages as defined in the contract become the only remedy. It may well be that circumstances arise where such liquidated damages are not sufficient to cover the resulting harm to EMC adequately. It is understandable that the bidders would have wanted to cap their liability; the problem is whether such capping is adequate or sufficient to cover losses incurred by EMC.

12. Clause 1.19 of the Conditions of Contract

Clause 1.19 of the Conditions of Contract in the Invitation to Tender states that:

"(CC.1.19.1) When the full procurement is complete, the Purchaser will notify the successful Bidder in writing that his bid has been successful as well as simultaneously in writing inform the unsuccessful bidders."

In May 2009, Bateman's legal adviser complained to EMC that the tender process was concluded without Bateman having been advised of the outcome. He stated that neither DoC nor EMC had adhered to the conditions of contract stipulating that all bidders were to be notified in writing of the tender award. He insisted that according to Clause 1.19, individual notification was called for. Moreover, this

omission on the part of the Corporation seriously prejudiced Bateman's right of appeal. The Corporation, however, refuted Bateman's assertion, stating that both DoC and the Corporation had abided with prevailing legislation where publication and the award of contract were concerned. According to EMC, all allegations put forward by Bateman were unfounded.

Notwithstanding this rebuttal, during meetings held at the NAO, Enemalta's Head of Procurement admitted that he had not informed Bateman of the outcome as he was under the impression that the DoC usually sent such notifications. In this Office's view, such an admission is totally inadmissible and the failure to inform individual bidders in writing, as clearly established in the ITT, is considered as a serious shortcoming.

13. Disposal of flyash

In November 2009, when the NAO asked EMC about waste disposal, EMC stated they were considering two possibilities - one being the export of the material, the other recycling (presumably following export as well). While EMC did not make reference to any fixed agreement, the Corporation stated that it was in negotiations with a foreign-based company involved in the recycling business. However, EMC also stated that, at the time, this company was still considering the proposal as their existing plant was not large enough to handle the volume of waste that the extension will produce.

On 28 January 2010, NAO officials were present for the MEPA Outline Development Permit hearing. Enemalta's Chief Technical Officer (CTO) made public mention of a contract regarding waste disposal signed by EMC in October 2009, following a Request for Proposal. During this hearing, he stated categorically that EMC had entered into a contract for the export of flyash from Marsa Power Station and bottomash from MPS and Delimara Power Station.

On 1 February 2010, NAO asked EMC for a copy of the contract mentioned by the Corporation's CTO during the MEPA hearing. This was duly supplied on 2 February 2010; however it transpired that this contract covered only MPS flyash. When questioned further on the matter during a meeting held at the NAO on 8 February 2010, the CTO stated that at the 28 January 2010 MEPA hearing he actually meant to refer only to MPS waste disposal. When confronted with the fact that presumably the MEPA board was interested solely in EMC's arrangements for the DPS, he negated that he had ever informed the MEPA Board that EMC had any such arrangement for DPS waste. Chairman EMC confirmed that EMC had a contract covering solely existing waste, namely that from MPS. There was no such contractual agreement for the DPS waste.

C. FINDINGS: Technical-oriented Issues

This section of the Report complements the previous one which dealt with EMC's handling of the tendering process from an administrative/legal-related perspective. What follows are a number of issues that are more technically-oriented in nature. These issues were considered during NAO's investigation, analysed in detail, often with the support of the technical expert, and commented upon by NAO. In its comments, NAO referred to the issue and to the actions taken (or not taken) by EMC as a consequence.

Specifically, the issues being addressed in this prevalently technical perspective of the tendering process are the following:

1. The January 2008 legislative changes, the subsequent changes in the tender specifications and EMC's actions in this respect.

2. EMC's deviation in concept from the original demand for tried and tested solutions to the eventual acceptance of untried combinations, basing on theoretical assumptions.

3. Divergences between EMC's Technical Evaluation Report of 22 October 2008 and Lahmeyer International's July 2008 consultancy report on which the Technical Report was based.

4. EMC's agreement to an outline plan where the spare parts and maintenance agreement (SPTSA) is involved.

5. The financial modelling exercise as prepared by EMC and used as (financial) evaluation in the tendering process.

6. Divergences in EMC's position *viz.* contractual obligations of Purchaser and Contractor - a comparison between EMC's point of departure as listed in the tender document and the eventual agreement reached as per the signed contract.
7. Potential areas of improvement identified in the EMC-BWSC contract.

1. The January 2008 legislative changes, the supporting changes in the tender specifications and EMC's actions in this respect

Background to emission limits legislation and the tender

The ITT Specification GN/DPS/8/2006, published in August 2007, called for a minimum of 100MW local generating capacity. The tender documentation made it evident that both gas turbines and diesel engine technologies would be considered, the tender being issued technology neutral.

In 2007 (at the time of the ITT publication), the EU Directive covering airborne emission limit values, that is the Large Combustion Plant Directive (LPCD) had been transposed into local legislation as LN 329/2002, such a transposition having come into effect in 2002.

The ITT, in the Environmental Protection (EP) Section, duly specified that:

"All proposed plant must comply with the airborne emission limit values of the LCPD 2001/80/EC as transposed into Maltese national legislation L.N. 329 of 2002."

In addition, the ITT document contained information in tabular form (p.3 of the EP Section) in which the actual emission limits for each of:

a. light distillate fuel;
b. all other liquid fuel;
c. natural gas; and
d. gaseous liquid natural gas

were all clearly quoted. In each case, the three pollutants' limit values were stipulated: SO_2 - NO_x measured as NO_2 - and dust. The limits quoted in the ITT table tally with those imposed in LN 329/2002, which in turn reflected LCPD limits.

The wording of the ITT left no doubt that these limits were applicable to any kind of plant proposed.

Discrepancy between EU Directive and the local transposition

However, it is very pertinent to note that, apart from other variances that are not relevant to the case under investigation, LN 329/2002 was not a faithful representation of the LCPD in one respect. Article 2 of the LCPD stated that:

"Plants powered by diesel, petrol and gas engines shall not be covered by the directive."

This discrepancy between LN 329/2002 and LCPD was noted at an early stage in the tendering process and made clear to all bidders. During an on-site meeting held at DPS on 4 September 2007, EMC announced that the LN 329/2002 transposition was not the same as the (source) LCPD and referred particular attention to the statement in the Directive that excluded diesel technology from the applicable emission limits. EMC officials made it clear that diesel technology based proposals would have to comply with the same limits as combustion plant proposals.

BWSC's reaction to this discrepancy between EU and local legislation was that the company was considering not complying with locally-imposed limits. Such a statement was made by BWSC during one of its meetings with EMC.

The declared basis for such a stand by BWSC, as quoted by EMC, was that, although the exclusion of diesel engines from the LCPD was not included in LN 329/2002, neither was there a specific requirement in LN 329/2002 to include diesel engines.

However, it is pertinent to note that such a stand was not maintained by BWSC in the final (March 2008) submission, by which time local legislation had been brought fully in line with the LCPD in this regard, excluding diesels from the emission limits set in the Directive for combustion plant.

NAO sought independent advice from its technical expert engaged specifically for this project. Advice afforded in this regard explained how at the Preliminary Stage, bidders were not requested to state the emissions of their proposed plant and hence, at that stage, EMC could not, based on the tender documents, exclude any offer on the grounds that it did not meet the emission standard. In fact, EMC was obliged to assume that the offers submitted based on diesel engines (at the Preliminary Stage) were in conformity with the specifications listed in the ITT.

Compliance of DECCs with LN 329/2002 limits

NAO notes a related issue that has been raised repeatedly through a number of sources, including Bateman, one of the unsuccessful bidders. Allegations have been made that, had the LN 329/2002 LCPD transposition remained unchanged, DECC proposals would not have qualified as this kind of technology would not have complied with the prevailing emission limits and that EMC, cognizant of this fact, should have disqualified these bids.

NAO posed various questions on this matter to EMC technical personnel. EMC's response was:

"Had LN 329 not been amended, and had the emission limits under LN 329 of 2002 remained applicable, the bidders proposing Diesel engines could have attained compliance through the use of more efficient abatement equipment. There are deNO$_x$ plant advertised with 95-98% reduction efficiencies and/or the use of better quality fuel such as grades of marine diesel fuel."

Given the criticality of the issue, NAO likewise referred this matter to its technical expert whose advice is summarised below:

- The problem concerns three pollutants - SO_2 , NO_x and dust.

- SO_2 emission depends on the sulphur content of the fuel, and not on the plant burning it - hence, if CCGTs were able to meet the (SO_2) limits imposed by LN 329/2002, DECCs burning the same fuel would likewise comply.

- While according to the BREF[5], cleaning equipment for particulates (dust) was under current development for large diesel engines, diesel engines burning diesel oil had already been shown capable of reaching the limit imposed by the ITT.

- NO_x is dependent on the combustion method used. Basing on further data included in the BREF and adjusting for 3% oxygen as specified in the ITT, a Selective Catalytic Reducer (SCR) with an efficiency of at least 95.5% is needed.

- EMC backed their claim regarding the existence of $DeNO_x$ plants with 95-98% reduction efficiencies by submitting references of such equipment.

The expert concluded that DECCs running on gasoil would have met the LN 329/2002-imposed limits as far as SO_2 and dust were concerned, and could have just made it for NO_x.

While the above may disprove the allegation that DECCs would not have qualified under the LN 329/2002 regime, it is deemed extremely pertinent to note that qualification is based on the assumption that DECCs are run on gasoil (diesel). Such an assumption has, needless to say, significant implications on the overall economics of the project, given the price differential between gasoil and the less expensive HFO.

NAO commissioned its technical expert to calculate the cost per kWh for DECCs burning diesel oil instead of HFO. The adjustment involved factoring in the difference in cost between the two fuels and the elimination of the cost of SO_x abatement systems (which are not required when burning diesel). Other adjustments included the deduction of the cost of the $DeSO_x$ reagent and the cost of waste disposal. Data for the calculation was taken from the relevant tables included in EMC's Financial Evaluation Report of 17 February 2009. The end result was one wherein the unit cost per kWh of electricity produced through DECCs (burning gasoil) was higher than that for CCGTs (burning the same fuel).

In concluding on the issue of alleged non-compliance on the part of DECCs under the LN 329/2002 regime, it is evident that, while such compliance may have just been achieved, cost of compliance would have rendered the DECC bids more

[5] BREF stands for *Best available technique REFerence document* and is a document prepared by the European Commission to help Member States abide by directives by presenting them with information regarding the best available technology to reach the aims of a particular directive.

expensive than CCGTs and would have thus obtained a lower ranking than they did in the financial evaluation.

In any case, one should note that the above considerations were embarked upon by NAO to ensure that all facets of the problem were addressed. The problem of whether DECCs running any type of fuel would have achieved compliance under the LN 329/2002 limits bears no significant impact upon the tendering process - for two reasons:

1. As has been demonstrated above, EMC had no valid reason to disqualify bids during the Preliminary Stage - a stage where, by definition, bidders were not expected to (and did not) submit any detailed specifications of their proposals.

2. By the time the Detailed and Final Bid was submitted on 4 March 2008, the LCPD as originally transposed was consequently amended through LN 2/2008, issued on 4 January 2008.

The legislative changes - a background

By way of background information, it is pertinent to note that EMC had been liaising with MRAE and with MEPA since 2005, with the aim of ensuring that the local transposition was brought to reflect with precision the current EU Directive (the Large Combustion Plant Directive). EMC was championing this adjustment on the premise that local legislation was more stringent than the corresponding EU Directive and would impinge negatively on (electricity) unit cost, given increased compliance costs.

The process was, however, long winded and it was only in December 2007 that EMC received advance notification from MRAE that it was intended to amend LN 329/2002.

The legislative changes' impact on the tender - the approval process

In a letter of 6 December 2007, EMC wrote to DoC informing the Department of the imminent change, and referring to the DPS Extension Tender, specifically stating that, once LN329 was amended and the revision came into effect, it was EMC's proposal to write to all bidders, informing them of the change and advising them of new limits that would come into effect (for DECCs). EMC also drew DoC's attention to the Tender Clause (Section EP4) which stated that all plant was to comply with any other legislation which may come into effect during the procurement process, before signing of the contract. The Corporation concluded its letter by opining that, once the Tender was a negotiated procedure under the terms of LN178, EMC's proposal would be deemed acceptable to DoC.

The Department eventually informed EMC, via an email in 11 January 2008, that it (DoC) had no objections to EMC's proposal.

The legislative change - and corresponding changes to the tender specifications

It has already been established that the January 2008 legislative changes to the LCPD transposition as per LN 329 of 2002 were made. In essence, LN 2 of 2008 amended Regulation 3, Sub-regulation 2 of the principal regulations (LN 329 of 2002), substituting the original text by:

"Plants powered by diesel, petrol and gas engines irrespective of the fuel used, shall not be covered by these regulations."

It is pertinent to note that at this stage, while the legislative change exonerated DECCs from complying with emission limits stipulated in LN 329/2002, emission limits for such technologies were, in effect, unchecked by any legislation.

For this reason, EMC compiled and circulated amongst bidders the document referred to above and entitled "Amendment and Clarifications to the Technical Specification Document for Local Generation Capacity for Enemalta Corporation GN/DPS/8/2006".

The document contained amendments to two sections of the original tender specifications.

One concerned Section EP (Environmental Protection), where it was announced that, due to amendments to Maltese legislation, the emission limits listed in Section EP.2.1 were not applicable henceforth to diesel engine fired plants. The amendment and clarification document replaced such limits by a set of emission limit values, covering each of the three pollutants SO_2, NO_x measured as NO_2 and Dust.

The second change affected Section CC (Conditions of Contract). The amendments included in this section were administrative in nature and advised bidders that, in view of the legislative changes and the corresponding changes to diesel engine emission limits as specified in the tender, the tendering period was being extended by four weeks, bringing the closing date for the submission of the Detailed and Final Bid to 4 March 2008 (previously this had been set as 5 February 2008). Furthermore, the amendment advised bidders that a third set of negotiation meetings was to be held between EMC and themselves and that the closing date for the submission of written queries was being set to 15 February 2008.

The amendment and clarification document also included a revised time schedule, covering tender process milestone events from the initiation of the third set of negotiation meetings (16 January 2008) to the expected date of notification of award to the successful bidder, set to 15 August 2008.

NAO, in liaison with its technical expert, queried EMC regarding the newly-imposed (by EMC) emission limits covering diesel engines. It transpires that EMC based the replacement (diesel engine) emission limits on the German legislation for SO_x and on the LCP BREF document of 2006. NAO's technical expert concluded that EMC had based the new limits for diesel engines on reliable documents and could not be accused of choosing some loose limits.

Summarising the changes, and their effect on the tendering process, EMC followed up the January 2008 LN 2 amendments to diesel engine emission limits by issuing an advisory document to all bidders, having first informed DoC of the approach the Corporation was intending to adopt. The advisory document contained specification changes as well as changes to the tendering process time schedule. In essence, bidders were allowed an extra four weeks for the submission of the Detailed and Final Bid, to include a detailed technical bid in response to the tender specifications, and a financial proposal.

The legislative change, corresponding changes to the tendering process and EMC's approach to managing the process after the changes - NAO opinion and comments

EMC's approach to managing the tendering process in the aftermath of the January 2008 changes to legislation and tender specifications has been the subject of much controversy. Bateman, one of the unsuccessful bidders, made claims in this regard, stating that the legislative (and tender specification) changes in question were only affected to create unfair competition[6]. This allegation was also taken up with prominence by the local media. Given the seriousness of the concern, NAO pursued the matter further, tackling the issue with both its technical and legal experts. In addition, the matter was also raised on a number of occasions with EMC senior management, with the aim of soliciting the Corporation's pertinent views.

At this stage, reference is made to the pertinent tender clauses hereunder:

4.10 - Other legal Requirements
The proposed plant must comply with any other legislative requirement which is already in force in Malta or the European Union and also any new legal

[6] This allegation made by Bateman is described and commented upon in detail in the Bateman Chapter of this Report.

requirement which may be introduced through national or European Union legislation prior to the award of contract.

The above clause would, *prima facie*, permit EMC to amend tender specifications to be in line with prevailing legislation. On the other hand, the following clauses seemingly limit EMC to effect changes to tender specifications only up to six days before the closing of the Preliminary Bid:

CC.1.5 Amendment of Technical Specifications Documents

CC.1.5.1 At any time prior to the deadline for submission of the Preliminary Bids, the Purchaser may, for any reason, whether at his own initiative or in response to a clarification requested by a prospective Bidder, modify the Technical Specification Documents by amendment/s.

CC.1.5.2 The amendment will be notified either in writing or by fax or e-mail to all Bidders on the contact addresses submitted during the RFP stage or at the presentation meeting/site visit.

CC.1.5.3 The last date by which such amendments shall be notified shall be six (6) days before the closing date of the Bids as per clause CC.1.0[7]*. No amendments shall be issued by the Purchaser after this date.*

In addition, Clause C.1.21.2 likewise is pertinent in this instance:

CC.1.21 Cancellation of the Procurement Procedure

CC.1.21.2 Cancellation may occur where:

...

- *the economic or technical parameters of the project have been fundamentally altered*

...

NAO confronted EMC with the above deliberation and solicited the Corporation's views on the matter. EMC Management responded that the intention in including CC.1.5 (Amendment of Technical Specifications Document) as per above was to enable the Corporation to issue any amendments deemed necessary to correct any errors/shortcomings detected in the ITT prior to the submission of the Preliminary Bids.

Asked whether EMC had considered stopping the tendering process and publishing a new tender after the January 2008 legal changes and the corresponding changes to tender specifications, EMC Management answered that

[7] CC.1.0 was a milestone plan of the tendering process, starting off with the 4 September 2007 Presentation/Site visit up to the Notification of Award to Successful Candidate, targeted for 15 July 2008.

the course of action followed by EMC was covered by the Tender Clause in Section EP4 (4.10 - Other legal Requirements - quoted above). In addition, EMC stated that it was neither necessary nor desirable to delay the process as a result of the change in legislation. The Corporation further stated that all bidders were afforded sufficient time during which to make the necessary changes to their bids and that throughout the process none of these bidders lodged any objection.

The European Commission enquired into the changes in tender parameters, through correspondence issued by the Director General, Internal Market and Services. This correspondence commented on potential discrimination towards interested bidders.

The Maltese authorities replied in July 2009, explaining the necessity of the January 2008 legislative changes and that the tender document allowed for such changes in legislation and for corresponding changes in specifications.

NAO is informed that the Commission's enquiry is still ongoing.

EMC legal advisers also submitted a position paper which was, together with the deliberations reproduced above, analysed by NAO's legal adviser who eventually opined as follows:

"It is immediately to be noted in connection with this advice that the lawyer drawing up the advice disclaimed any responsibility as to the facts and he expressly states that he is taking the facts to be as recited to him by his client. From the point of an audit exercise this is insufficient as the facts have also to be established independently of the auditee. This is an obvious but understandable limitation of this advice.

The main issue for consideration which arises in connection with that advice is the impact which the change in the applicable regulations on emissions had or could have had on the tendering process. The learned lawyer is of the opinion that there was no effect on same. In reality I do not think this is really so.

The first point made in this advice is that the tender incorporated the legal limits as to emissions by way of reference to existing regulations and that therefore there was no change to the ITT as it was foreseen in the tender that a change in applicable regulations could bring about a change in tender.

The point, however, is that the call for tenders does not incorporate the legal limits simply by way of reference. It does indeed refer to applicable regulations and makes them applicable to the tender but then it further specifies the legal emission limits which are to apply in this particular context. The distinction becomes of great relevance in connection with diesel engines; both the old and the amended regulation is phrased on minimal requirements. But the minimal requirements imposed in the call for tenders would not necessarily have been

effected by the change in regulations - it is indeed permissible to require more stringent emission requirements then those provided for in the regulations. In this context the further issue which could be discussed is the allegation that the original regulations were amended in order to be fully compliant with EU stipulated standards. The Office appreciates that on the publication of the legal notice in question Enemalta may have desired to take account of the changed circumstances. The real issue therefore turns out to be not whether the ITT was altered, but given the necessity or wisdom to alter the ITT in the then emerging circumstances what course of action should have been followed by Enemalta.

In this respect the following scenarios can be envisaged.

1. *Enemalta could have ignored the change in regulations and continued with the tendering process without any change whatsoever. This did not appear to Enemalta to have been either wise or attractive, and Enemalta chose to act differently.*

2. *Enemalta takes note of the change, decides that there has been a substantial change and reopens the tendering procedure completely. This means that the tender is aborted and reissued. There would of course have been implications of time and cost, but it would have been a feasible option. Such procedure would probably have been unimpeachable as it would put all tendering parties in the same position without advantaging any of the bidders.*

3. *Enemalta takes note of the change in regulations and changes the ITT to reflect the change. This is the procedure which Enemalta preferred to follow and this has been the source of much of the heavy criticism levied. Enemalta also extended the time for the making of the final bid. The question here rises whether such time extension was sufficient. Naturally had Enemalta taken the option to abort the process, and reissued the bid this problem would have been avoided completely.*

Of these three options, option two is the recommended one.

It is pertinent to point out that the call for tenders itself leaves the possibility open to change specifications up to the closing of the preliminary bid. It is clearly not foreseen that changes in specifications take place after the preliminary bid procedure is closed. Enemalta justifies this by reference to the fact that this is a negotiated procedure. This is true but the measure in which the call is drafted restricts changes after the preliminary phase is over. It may be that contracting authorities are as yet not fully conversant and familiar with the negotiated procedure and greater attention should be paid to this especially in the future to avoid unfortunate recurrences.

Enemalta attempted to be fair by granting an extension to all bidders to make their final bid. In retrospect, this extension may not offer sufficient time especially on bidders who had concentrated on the gas option and had to work all the bid again. A further point is whether a bidder who on the preliminary bid had chosen a different type of engine could now compete on the basis of a wholly different engine. It is however important to point out that it was evidently made possible for all bidders to put in a bid; and that none of the bidders complained formally at that particular stage. This is significant as complaints should have been raised then and not once the whole procedure was over."

NAO concurs with the advice afforded by its legal expert and, even in view of the considerations raised by the Office technical expert, opines that despite implications of time and cost, possibly the best option would have been the abortion and reissuing of the tender in due course. Such a decision would probably have avoided most of the subsequently arising controversy, at the same time ensuring a greater degree of transparency and equity.

2. EMC's deviation in concept from the original demand for tried and tested solutions to the eventual acceptance of untried combinations, basing on theoretical assumptions

Background - technology neutral tenders

EMC, in issuing the DPS extension tender, opted for a tendering model whereby the purchaser adopts an output and outcome driven tender design, in favour of one which is technology driven. In other words, EMC defined the performance requirements (specifications) of the power plant and left it up to the Bidders to suggest solutions, based on technologies of their choice, as long as these satisfied the specifications issued by the Corporation through the tender document.

If applied meticulously, such an approach assures the purchaser that the product ultimately obtained is the one best suited (at least relatively speaking comparing amongst those proposals submitted in response to the call for tenders) to its needs.

Such an approach requires, however, stringent tender clauses to ensure that the purchaser's specification is well defined and is clear to all bidders. In addition, clauses must be built into the tender to ensure that bidders' attention is drawn to those components of the specification that are considered mandatory/critical to the purchaser. The tender must likewise enforce compliance on the part of bidders in connection with these requirements and must allow the purchaser sufficient discretion to be able to disqualify those bids that would not conform to specifications deemed mandatory/critical.

The EMC DPS Extension tender - relevant clauses

Perusal of the EMC DPS Extension tender document reveals a number of clauses, built into diverse sections of the RFP and ITT, which concern the above-mentioned issues of conformity and purchaser discretionary powers of disqualification in instances of deviation from specifications:

MD.1.0 Scope of Supply

Also, details of reference plants working in similar conditions shall preferably be also submitted.

MD.1.1.2 Reliability and Availability

Evidence of reliability and availability capability shall be submitted by the bidder showing that existing plants are and have been successfully utilising the same engines and their components proposed, together with the exhaust treatment equipment, to meet this specification, using similar fuel and in similar service.

CC.6.2.6 The design of the plant shall be already proven. This applies to the basic design itself, the layout, the choice of material, and method of manufacture amongst others.

2.4 Reference Plant (Addendum 'B')

Candidates must provide reference data of plant similar to the type proposed for this project. This reference list must include:
…
iv. Technical Description of Solution offered including type and configuration of plant and emission abatement techniques.
…
vii. Emission limit values achieved during normal operation.

CC.1.1 - Preparation of Bid

CC.1.1.1 - The Bidder shall examine all instructions, schedules, forms, term and specification in the Technical Specification documents. Failure to furnish all information required by the Technical Specification Documents or submission of the Detailed and Final Bid not being substantially responsive to the Technical Specification Documents in every respect will be at Bidder's risk and his Bid may be rejected.

EV.2 - Examination of the Conformity of the Detailed and Final Bids

The aim at this stage is to check that the bids comply with the essential requirements of the Tender Specification dossier. A bid is deemed to comply if it

satisfies all the conditions, procedures and specifications in the Technical Specification dossier without substantially departing from or attaching restrictions to them.

Substantial departures or restrictions are those which affect the scope, quality or execution of the contract, differ widely from the terms of the Technical Specification dossier, limit the rights of the Purchaser or the Bidder's obligations under the contract or distort competition for bidders whose bids do comply. Decisions to the effect that a bid either does not conform to or is not technically compliant must be duly justified in the evaluation minutes.

If a bid does not comply with the Technical Specification dossier, it may be rejected immediately.

CC.1.8 - Compliance with the Specification

The Bid must be based on plant that is in compliance with the Specification. The Bidder is at liberty to offer any alternative plant as a variant as long as the latter also complies with the Specification. The Preliminary Bid may be subject to change during the negotiation procedure.

It is clear, from the above, that when compiling the tender document, EMC was particularly diligent to ensure that its specification was explained clearly to bidders. In a similar manner, bidders were informed with precision as to the manner with which conformity of the bids to the specifications would be examined by EMC. The Corporation likewise manifested clearly its right to reject non-compliant offers.

What is to be noticed is the fact that 'same' and 'similar' are used interchangeably when soliciting proof that the proposed systems are already in operation, through the availability of reference sites.

On the basis of technical advice, NAO is of the opinion that through the tender clauses above *"EMC was seeking to procure plant that was proven technology, in view of the fact that for the past twenty years or so, EMC has been operating solely on steam plant and gas turbine technology, and hence the introduction of diesel engines plus emission abatement equipment represents a new technology for EMC".*

On the basis of the above statement and in view of the tender document clauses quoted above, it seems clear to the NAO that:

a. While EMC issued a tender that was technology neutral, the Corporation was expecting bidders to submit proposals of systems that were up and running successfully elsewhere, and to substantiate such existence through the inclusion of international reference sites:

MD.1.1.2 quoted above specifies "same engines and their components proposed";
CC.6.2.6 states that "the design of the plant shall be already proven".

NAO obtained the view of its technical expert who expressed an opinion that 'layout' - referred to being a component of 'design' - was referring to the whole combination of engines and the complete set of emission abatement systems attached to them.

EMC had set a policy to go for proposals, the elements of which (the combination of power generation and abatement systems covering SO_2, NO_x and dust) were brick and mortar, commercially (and successfully) functional plants.

b. The above conditions were made clear to bidders as was Enemalta's discretion to immediately reject bids that did not comply with the Technical Specifications, which covered adequately EMC's requirements as regard power output, cleaning systems and the provision (by bidders) of international references thereto.

The evaluation and adjudication process as defined by EMC

It is pertinent to note that as early as February 2007 EMC had drawn up a very comprehensive document entitled "Evaluation and Adjudication Process - RFP for Local Generating Capacity for EMC". The Corporation was at the time, apparently lacking specific procedures for managing such tenders, and the document was described as *"aimed at providing a set of suitable guidelines for the evaluation and adjudication process during the short-listing stage, following the submissions of the final bids and also during the subsequent negotiations with the selected bidders in order to formalise an agreement"*.

In this regard, it is especially pertinent to point out that three teams were assigned to handle the evaluation and adjudication process:

a. **The Short Listing Team** - *"responsible for the short-listing of candidates following receipt of the outline bids"* and subsequently *"report their recommendations to the Negotiation and Adjudication Team which if in agreement shall then submit the recommendations to the DoC for their approval"*.

b. **The Technical Evaluation Team -** to *"report and submit its recommendations to the Negotiating and Adjudication Team which will, if it agrees, commence negotiations with selected short listed candidates"*.

c. **The Negotiating and Adjudication Team -** to *"negotiate with the short listed candidates and shall adjudicate their bids according to MEAT criteria. They shall submit their report and recommendations to the EMC Board of Directors (BoD) for approval. The BoD will, if they agree with the recommendations, then submit the report and recommendations to the DoC for final approval"*.

Hence, at the time of compilation of these guidelines which EMC was to follow during the entire tendering process, covering evaluation/adjudication/negotiation and of Preliminary and Detailed/Final bid, of preliminary bid and adjudication process, the Corporation was intending to carry out the entire process by resorting solely to the expertise of the above-mentioned three teams.

The only exception to this is the specific mention of the procedural document to external expertise in the legal and financial fields. These were envisaged to "provide assistance to EMC in the preparation of detailed specifications" and to "advise the Technical Evaluation Team and the Negotiation and Adjudication Team in stages B, C and D[8] of the procedure". The role of these external experts was also enhanced to include the possibility, if necessary, of providing other advice and assistance.

The Detailed and Final Bids of 4 March 2008

The closing date for the submission of the Detailed and Final Bids was 4 March 2008. Four bids were received, each bid containing, in separate enclosures, the Technical Offer and the Financial Proposal.

Perusal of the two DECC's bids, as submitted by MAN and BWSC, immediately highlights a significant departure on the part of the bidders' responses from a particular specification included in the tender. NAO's technical expert stated:

"It is significant to note that none of the references submitted by either MAN or BWSC indicate a complete system of engine, de-NO_x, de-SO_x and dust removal equipment."

This led to a situation whereby, while the individual elements were state of the art and well tried and tested in other combinations, the combination of all three elements of emission abatement equipment and the diesel engines as a whole (which ultimately was the product requirement defined by EMC) was not.

Referring again to the tender clauses regarding compliance with specifications, and NAO's opinion thereon, as covered in the sub-section titled The EMC DPS

[8] Stage 'B' is the Preparation of Specifications, 'C' is Technical Evaluation and 'D' is Negotiation and Adjudication.

Extension tender - relevant clauses above, it is immediately evident that it was at EMC's discretion as to whether the DECC bids were to be rejected or not.

Remedial action taken by EMC

At this stage, it appears that EMC decided to take remedial action. Despite its original policy, as described in the Evaluation and Adjudication guidelines (above), EMC decided to resort to external technical consultancy.

The relationship between the selected consultancy firm, Lahmeyer International and EMC, together with salient points of concern as identified by the NAO, are amply described in Chapter Five of this Report.

What is evident and pertinent to note in the context of this chapter dedicated to technically-oriented matters is that, had EMC adhered to its declared guidelines for evaluation and adjudication, it would have been impossible for EMC to declare the DECC proposals as being in full compliance with the tender requirements (given the lack of submission of international references of complete systems).

Following a brief exchange of communications, EMC awarded LI a direct order in May 2008, commissioning a study with the following Terms of Reference (ToR):

"Advisory services for the assessment of emissions of diesel generators installed at DPS. The overall objective of the services consists in the performance of plausibility checks in reference to the technical proposals for new power generating facilities, for a total amount of Euro 6,700."

The above Terms of Reference reveal that:

a. at this stage, EMC was considering seeking external consultancy solely for the two DECC proposals, and not for the CCGT ones. It was only eventually that EMC extended LI's commission, as per separate request, to include the complementary check on the CCGT proposals; and

b. EMC had become aware that, in the face of prevailing circumstances, straightforward evaluation and adjudication as originally intended by the Corporation was no longer possible. A conceptual shift was necessary - that of resorting to 'plausibility checks' run by external consultants in lieu of the originally declared requirement of combinations that were already in successful commercial operation.

Quite apart from the issue of whether EMC could have or should have disqualified DECC bids for lack of complete references, NAO considers this fundamental departure from the philosophy as originally laid down very clearly by the tender specifications as a crucial issue that causes concern regarding whether the tendering process was, at this particular instance, managed in a manner that could be considered as best practice.

Another issue that is closely related to the acceptance of bids not proposing tried and tested combinations is that of the enhanced risk levels being assumed by EMC.

While a high degree of risk is inherent in any capital project of this complexity, opting for previously-untried combinations increases the risk element considerably.

NAO questioned EMC on this issue and the Corporation's response was that sufficient safeguards have been built into the contract enabling EMC to reject the plant should this not meet the legal emission limits. In addition, EMC stated that it had developed contingency plans to cater for such an eventuality.

EMC is also of the opinion that, once the individual components have functioned correctly in other combinations, no problems should be encountered when the combination to be installed at DPS (of the diesel engines and the three abatement systems) is operated. The Corporation's Senior Management, under oath, confirmed their full confidence in the successful outcome of the project.

NAO Comments

LI's commission consisted in the running of 'plausibility checks' that, with some reservations, enabled the consultancy firm to confirm the emission values quoted by both DECC bidders. One disclaimer included, however, clearly stated that "Compliance with applicable emission limits was confirmed through the plausibility checks on the data given by the Bidders".

LI also found it pertinent to comment that "there are no international references for the proposed combination of flue gas cleaning technologies after a DGU (diesel) power plant" thus confirming the fact that the combination being offered was, in effect, a prototype and that the same combination had not been installed anywhere else up till that time.

EMC, faced with the dilemma of having received bids that were not in full conformity with the declared specifications, and that departed fundamentally in the nature of the product offered from that requested, seemingly found comfort in the plausibility checks run by its commissioned consultant.

When NAO asked EMC whether, in view of LI's comments that such a combination (DECCs with the three emission abatement systems) was a prototype, the Corporation should have disqualified the offer outright, EMC replied:

"Individually each component of the plant is well proven and established technology. The combination is a prototype, however in their report LI confirmed 'compliance with applicable emission limits, through the plausibility checks, based on data given by the bidders.' There was no justification to reject the bid."

It is pertinent to note, however, that such consultancy was only theoretical assertions (albeit scientifically based) that the emission limits would be respected and is, in NAO's opinion, no substitute to the tender requirements for tried/tested combinations.

As deliberated upon above, the issue goes further than potential disqualification of bids due to non-complete compliance with tender specified-requirements. A more conceptual issue is that EMC allowed fundamental divergence from the tender product specification through its acceptance of proposals for as yet uninstalled combinations when its original specification, as expressed in the tender conditions, was for existing combinations that had been successfully up and running. In public procurement, it is an established fact that mandatory specifications as established in the tender documents cannot be deviated from during the entire tendering process.

3. Divergences between EMC's Technical Evaluation Report of 22 October 2008 and Lahmeyer International's July 2008 consultancy report on which the Technical Report was based

Reference has already been made previously in this Report to the commissioning by EMC to LI in May 2008 for the carrying out of an assessment of emission-related performance as stated by the bidders for the DPS tender, in the Detailed and Final Bid of March 2008. The business relationship as developed between EMC and LI is also discussed in detail in Chapter Five of this Report.

LI eventually submitted the consultancy report, entitled "Emission Assessment of Diesel Generator Units and Combined Cycle Gas Turbines" to EMC in July 2008.

Referring significantly to the findings and opinions included in the LI report, the EMC Evaluation Committee compiled a Technical Report dated 22 October 2008[9].

[9] Initially, the Evaluation Committee compiled a report, dated 2 October 2008 which was the result of the evaluation of both technical and financial bids, as submitted by bidders in March 2008, and following negotiations held by EMC with the bidders. This report ranked BWSC first and recommended that the firm

It is to be noted that the EMC report is more wide-scoped than the LI consultancy. LI's commissioned tasks were:

1. review of EMC's Detailed and Final Bid Request and bidders' technical proposals;
2. plausibility calculation for the proposed combined plant configurations;
3. reporting including brief recommendations related to contract documents; and
4. overall comparison of the Bids with regard to pollutant emissions.

Hence, while LI was charged with emission-related aspects of the bids, EMC was concerned with the wider aspect of the proposals, to cover issues including, but not limited to, emissions, footprint, plant layout, fuels, reagents, waste handling, health and safety, project time scales and commissioning times.

One very significant difference to be noted is that, while LI evaluates the four bids submitted in March 2008, namely MAN, BWSC, Bateman and SOCOIN, the EMC technical report leaves out the SOCOIN bid, as the firm's offer was considered poor and impossible to evaluate properly. In addition, SOCOIN signalled its intention not to continue competing in the tendering process and did not renew the Bid Bond in October 2008.

This difference in scope of evaluation accounted for the ranking assigned to and the grades obtained by the bidders. Table 3 below compares rank and grades obtained by the bidders in both the LI and the EMC reports.

Bidder	LI Consultancy Report	EMC Technical Report
Bateman	8.5 (1st)	20.88 (1st)
BWSC	3.0 (3rd)	18.82 (2nd)
MAN	0 (4th)	14.41 (3rd)
SOCOIN	3.5 (2nd)	Eliminated

Table 3: Comparison of ranking and grades obtained by bidders in the LI and EMC reports

Apart from these differences, which are explainable when one considers that the evaluative base was different (as referred to above) for the two exercises, there were other variances between the two reports that NAO deemed fit to include in its report and to comment about.

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be awarded the contract. However, as a separate process, DoC had been, as of July 2008, insisting that the tendering process be converted to follow the three package model, as the Department felt this model was the one applicable to the procurement in question. Eventually, the 2 October 2008 report was deemed no longer pertinent to the process and was replaced by the 22 October 2008 report which evaluated solely the technical aspect of the bids as submitted in March 2008, and as negotiated subsequently.

NAO's technical expert was commissioned to identify such variances.

De-NO_x equipment efficiency for DGU plants

"The LI report found that the emission figures submitted by the bidders were plausible, and the EMC Evaluation Committee quoted this result in their Technical Report. What the EMC Committee did not mention in their report is the comment by LI that 'NO_x removal efficiencies of 92% stated by MAN and 92.5% stated by BWSC are considered to be extremely high'."

This issue was eventually taken up by NAO with EMC. The Corporation submitted proof in the form of online information from manufacturers claiming they can supply De-NO_x equipment with up to 98% efficiency.

NAO's concern in this regard is two-fold: (a) it would seem that LI were not sufficiently thorough in their research on this matter and (b) EMC did not take up the issue with LI.

Long-term maintenance

"*Both reports agree that a long term maintenance agreement is required (in view of the fact that the combination of DECC and abatement systems is a prototype). EMC eventually signed a five-year maintenance agreement. This begs the question: can 5 years be considered long term for plant that has an expected life of at least 20-25 years?"*

It is worthy to note that, in the original ITT, at a time when EMC had laid down requirements for tried/tested combinations and had had no inkling that bidders would be proposing as-yet-unimplemented (and therefore untested) combinations, the Corporation had already specified that it would want to enter into a five-year maintenance agreement. Confronted with the issue, EMC Senior Management stated that a five year maintenance contract was deemed sufficiently 'long-term'. They added that it had been EMC's philosophy since the Corporation's formation to be self-sufficient. Senior Technical Management explained that EMC policy was to resort to the services of manufacturers' technical personnel for the first few years after the installation of plant and subsequently call on such services for purposes of supervision and/or advice. However, EMC.s senior management concluded that the Corporation ensures that its technical staff is trained to take over and maintain the plant.

While NAO considers this a laudable practice, the Office notes that EMC, in this case, is seemingly not attaching too much importance to the fact that the plant (in combination) being installed is the first one of its type (as a configuration) - and that even its consultants LI had advised the Corporation to take the necessary

precautions under the circumstances prevailing. NAO notes, in particular, the element of risk which, while present in the implementation of any major project as the DPS extension, is considerably increased in the prevailing circumstances of the installation of a combination of elements that have, as yet, not been installed and tested (as a combination). Even though, for record's sake, it should be stated that EMC top technical people were convinced such risk can be successfully managed by the Corporation.

Liquidated damages

"LI also recommended the inclusion in the contract of liquidated damages (LDs) for not achieving the emission limits. The EMC report makes no reference to this recommendation."

NAO likewise solicited EMC's views in connection with the above divergence between the two reports. EMC commented:

"EMC does not agree with the concept of LDs to non-compliance with mandatory limits. Such non-compliance is rightly a cause for plant rejection (CC.4.25)."

In principle, NAO considers this stand to be correct, in that should the plant not achieve the legal emission limits, as the contract stands EMC has the right to reject the plant outright and the Contractor would be forced to make amendments as necessary to bring the plant to compliance. Had LDs been stipulated for such a critical deficiency, the Contractor, in case of plant (emission) performance default may have well opted to pay the penalty and thus be absolved of carrying out remedial alterations to ensure compliance. This would have resulted in EMC's ending up owning plant that would have been inoperable.

However, it is pertinent to note that LI, in their advice, recommended:

"It has to be taken into account that in case the plant fails to comply with the applicable emission limits, the environmental authority of Malta may withdraw the operation permit of the facility or at least may force EMC on operating the DGUs on Gasoil base. Today (June 2008), CIF Gasoil price amounts to approximately 1,240 USD/t. This is some 75% higher than the present HFO price (related to the net calorific values of both fuels). Contract documents shall consider liquidated damages for the case that the contract fails to attain the required emission limits in practice. Such LDs shall at least cover the additional cost caused by any operational adjustment (eg switch to Gasoil)."

Such a statement of advice is worthy of comment.

a. NAO notes that, while EMC seemingly took for granted that the "plausible" as expressed by LI (previous section of this chapter refers) translated to a

certainty, and decided to allow bids based on unimplemented combinations, LI is, in this particular case, making specific reference to the possibility that such a DECC + abatement combination may, in fact, not achieve legal requirements where emissions are concerned. The consultancy firm does not rule out such an eventuality.

b. Rather than a simple black/white case of the plant achieving compliance or not, LI is considering complicated shades of grey wherein, while compliance may not be achieved using HFO, switching over to the more expensive Gasoil (diesel) may solve the problem. In such an instance, LI had suggested that EMC build LD clauses in the contract that would have made the Contractor incur the very significant extra charge involved. Once the plant is completed, should emission limits not be achieved when running on HFO, the fault would lie with the Contractor. In such an eventuality, NAO opines that the option to switch over to gasoil, at the expense of the Contractor, would have been more fair and equitable. Whether the contractor would have accepted is obviously another matter.

SCR catalyst lifetime when used with DGU plants

LI, in its consultancy report, drew EMC's attention as follows:

"Since the flue gas from DGUs has some different characteristics compared to the flue gas of conventional power plants, the proposed flue gas cleaning system has to be considered as a prototype after a DGU plant. Especially there is no experience so far available regarding the impact of lubrication oil residuals in the DGU flue gas on the lifetime of the SCR catalyst."

This issue does not seem to have been of particular concern to EMC. The corresponding extract from EMC's report reads:

"This configuration of equipment as a train installed downstream of the diesel engines exhaust is a prototype setup. References for SCR, FGD, Bag filters installed after other types of plant exit, however there is no experience for the whole train of emission reduction train installed on a diesel engine plant as proposed …. Given the innovative setup in the abatement equipment, long term service agreements are being sought to ensure that such plants retains the guaranteed performance and availability figures."

Ample reference to the "long-term service agreements" has already been made above. The EMC report does not seemingly give the same weight to the risk highlighted by LI regarding premature failure of the SCRs when operated with DECCs. On the contrary, EMC's opinion on the issue is quite different from that of LI. Questioned on the matter by NAO, EMC stated:

"There is no evidence that there will be any premature failure or reduction of life of the SCR. Diesel engines already operate with De-NO_x plant (SCR) without this being considered a problem."

The 'prototype combination' issue

While this issue has been discussed at great length previously, it is pertinent to comment on the matter in this context of divergences between the LI consultancy report and the EMC Technical Evaluation which drew on the former in its findings, opinions and recommendations.

LI was categorical in stating that, in the case of DECCs complete with all the abatement systems, no international references for the proposed combination were available and that such combination was a prototype:

"... there are no international references for the proposed combination of flue gas cleaning technologies after a DGU plant...".

"First it has to be noted that there are only few references internationally available for the proposed flue gas cleaning technology in combination with DGU power plants. Even the reference lists included in the Bids of MAN and BWSC do not include reference plants utilising the offered combination of 'high-dust' SCR, spray-absorption FGD and bag filter technologies after DGUs. Since the flue gas from DGUs has some different characteristics compared to the gas of conventional power plants, the proposed flue gas cleaning system has to be considered as a prototype after a DGU plant."

In its report EMC referred to the "DECC + abatement systems combination" as a prototype ("*This configuration of equipment as a train installed downstream of the diesel engines exhaust is a prototype setup"*). However, this attribute of the proposed plant, which has already been demonstrated in this report to have been in fundamental divergence from the originally-requested product specification, did not preclude the Corporation from commenting thus in its October 2008 technical evaluation report:

"Following these meetings (negotiation meetings held after the 4 March 2008 submission) and as agreed during the negotiations, the three Bidders BWSC Bateman and MAN made further improvements to their proposals in order to address the concerns raised by EMC. They resubmitted revised schedules reflecting the changes resulting from the negotiation process ... With the exception of the Bid by SOCOIN, the three other Bids were now substantially to specification and the Bidders were required to submit their amended proposals."

While LI considered the issue of lack of references as substantial enough to merit comment, despite the fact that its main commission was to carry out an

assessment of the emission limiting performance of the bids, EMC apparently did not attribute the same weight to the matter and considered bidders who had omitted to submit complete international references (as they had proposed prototypes as yet unimplemented elsewhere) as being "substantially to specification". NAO questions such an assumption.

Lack of guarantees by BWSC in connection with emission schedules

LI noted "that BWSC crossed out the word 'guaranteed' in all emission guarantee schedules contained in the Bid". The consultancy firm advised EMC that, given the critical nature of emission limits, a clear statement from BWSC be sought in this regard prior to the conduct of (any) negotiations with the Bidder.

The EMC report, on the other hand, stated that BWSC had submitted guaranteed figures for various parameters, to include emission-related (CO_2, SO_2, NO_2, dust and ammonia slip according to the pertinent tender schedules EP.1 to EP.5).

Questioned on this issue and on a number of other issues that the LI report had indicated as requiring further clarification with Bidders, EMC replied that *"the three bids (2 x DECC and 1 x CCGT) were substantially compliant and all remaining issues were subsequently cleared through clarification and further negotiations"*.

NAO notes that, despite the above EMC comment, for its Final and Detailed Bid of 4 March 2008, BWSC had submitted emission limit related figures that it refused to guarantee. NAO is fully cognizant of the fact that in a negotiated procedure clarifications and negotiation meetings may take place after submission of the technical and financial offers. However, the Office opines that, in the case of the EMC DPS tender, guaranteed emission limits were critically fundamental tender specifications. Thus, NAO strongly feels that EMC should have made the submission of such figures (duly guaranteed) mandatory in the Detailed and Final Bid. Failure on the part of bidders would have simply indicated unwillingness on the part of that bidder to guarantee whatever figures were being quoted, rendering the entire set of figures dubious.

4. EMC's agreement to an outline plan where the spare parts and technical support agreement (SPTSA) is involved

EMC signed Contract Agreement Number GN/DPS/8/2006 - CT/2491/06 - for the Supply of Delimara Diesel Power Plant by BWSC on 26 May 2009.

This contract amounted to 164,950,000 Euro and covered the provision, delivery to site, completed erection and handing over in working order, and thereafter maintained of the complete DPS extension, as specified in the contract itself.

It will be noted that on 3 April 2009 General Contracts Committee recommendation, apart from Item 1 covering the power plant itself, recommended the award of Item 3 also to BWSC, this item being the maintenance agreement, termed spare parts and technical support agreement (SPTSA) and covering five years' maintenance. This recommendation for award was adjudicated at a value of 18,000,000 Euro.

During the course of NAO's investigation, it transpired that up to March 2010 the SPTSA had not yet been finalised. In fact, what EMC and BWSC had agreed upon was an interim document entitled "Conceptual Outline Proposal for 5 years SPTSA". This was included as support document within the (main) contract document.

The non-finalised status of the document in question raised concern for the NAO and the matter was referred to NAO's technical expert who opined:

"The Contract actually includes a six-page Maintenance Agreement Framework entitled Concept Outline Proposal for 5 years. Please allow me to make a general comment regarding the Contract. I was very disappointed with its general appearance, particularly the appendices; for example, this Maintenance Framework Agreement is still showing the track changes."

The NAO questioned EMC on a number of occasions on the status of the maintenance agreement. EMC's explanation follows:

"There were still many issues to be discussed and negotiated with BWSC regarding the SPTSA when the EPC contract for the plant was signed and agreement was only reached on essential parts. It was agreed at the time that the consultations/negotiations regarding the SPTSA were not finalised and since this was a different contract to the EPC, negotiations leading to the finalization of the SPTSA contract were to take place at a later date, and ideally after the design of the plant was finalised. This position was taken with all three remaining bidders. Since design engineering is still on-going[10] the SPTSA contract has not yet been finalised."

In view of the implications involved, on a second occasion, NAO again solicited further explanation from EMC regarding the SPTSA status. EMC senior technical management declared that the SPTSA can be concluded any time during the construction period and that from a professional perspective, it would ideally be finalised after the basic engineering of the plant would be concluded. At that stage, the actual components (brand-specific) that would form part of the plant would be identified. EMC declared that the SPTSA could not be crystallised before all such detail was known. EMC substantiated this by stating that plant from a particular manufacturer would probably require a maintenance agreement

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[10] This EMC declaration is dated 12 February 2010.

and would have spares costs different from one obtained through a different source, although both plants would carry out the same function.

On the basis of the above explanation and the fact that, at this stage in the contract implementation, basic engineering of the plant is still ongoing and the specific components (by brand) that will be forming part of the plant have not yet been identified, NAO solicited the opinion of its technical expert:

"I am not surprised as this is normal. In fact, some redesign will also take place during the construction phase. It is normal practice that when a project is finished, one gets a set of 'as finished' drawings which may be different from the original plans as alterations will be made during the construction phase.

But we are in fact at a stage earlier than that. It must be appreciated that Engineering Design costs a lot more money and no contractor can afford to make a complete set of drawings before submitting a tender or signing a contract. There is never in fact enough time to do so in any case. So when preparing the bid, the contractor prepares a general layout, establishes the main bits of equipment that will be required, estimates roughly what he might need in terms of such things as cables, pipe lengths, etc. This estimate is based on the experience gained from previous projects. Once the contractor has signed the contract, the design work starts in earnest, with the preparation of detailed drawings and a final choice of components from a list that would have been agreed with the client at the contract stage."

As referred to above, despite the fact that the SPTSA has not yet been finalised and, as commented by EMC, the exact spare parts (and hence the exact parts costs) cannot as yet be determined, the SPTSA was capped at 18 million Euro for a five-year period, as per tender award.

NAO asked EMC for an explanation of the issue of having a contract's total value agreed to while the contract in detail has not been concluded, with particular emphasis to the situation prevailing in the SPTSA wherein the actual spares (and hence their cost) that would be utilised were not yet identified.

EMC Senior Management stated that the SPTSA was capped at 18 million Euro in the case of BWSC. They described this capping as being "contractual".

However, when NAO asked EMC for a copy of the contract signed fixing the 5-year SPTSA at 18 million Euro, it transpired that no such contract had been signed[11]. EMC supplied NAO with a document entitled "Financial/Commercial

[11] The only signed document relating to the agreed-to service agreement was the previously-referred to "Conceptual Outline Proposal for 5 years SPTSA". This document made reference to technical matters but not to financial remuneration.

Offer for a Maintenance Agreement as requested in a mail by Enemalta dated 24 December 2008", drawn up by BWSC in February 2009.

While this document did not make mention of the "contractual" figure of 18 million Euro, it did specify that BWSC charges would be:

1,584,000 Euro fixed cost per annum, for five years
2,016,000 Euro variable cost per annum, for five years

Extending the above, the total contract figure obtained is in fact 18 million Euro, for the five-year period.

However, NAO questioned EMC regarding the need for distinction between fixed and variable costs. EMC's reply was:

"It is possible that the plant may be operated at close to base load (circa + 7000 hrs annually) and this would mean that we exceed the stipulated 5000 hrs annual operation. In such a case we wanted the variable cost as a basis to calculate a proper pro-rata increase in the annual fee."

It is pertinent to note that the SPTSA as signed, although covering a five-year period, is also limited to 25,000 hours' operation per diesel engine unit, and is based on the plant being operated an average of 5,000 hours per annum.

The above statement by EMC, however makes clear reference to the possibility of an increase in the "contractual" 18 million Euro. If the plant is operated at baseload (7,000 hours), this would result in an increase of 40% to the variable costs for the period during the plant is operated outside contract hours.

While NAO appreciates the fact that it is not technically possible or even feasible to conclude a service agreement while the design engineering is still in progress, the Office still notes with concern that expenditure that was repeatedly described by EMC as "contractual" and hence capped, is in actual fact subject to significant fluctuation.

Given EMC's declaration that even cost of spare parts may vary, depending on the actual plant installed, NAO is assuming that such variation to spares cost will be to the contractor's account and will not cause further increments to the (service) contract price.

Examination of the Conceptual Outline Proposal document revealed various other sources of extra expenditure, confirmed or potential, as listed below:

a. Although the SPTSA spans over the first 25,000 hours of plant operation (per diesel engine unit), spare parts for the engine overhaul that is to be carried out after 24,000 hours operation are excluded from the contract.

While the Contractor is bound, by the SPTSA, to supply parts for the overhauls scheduled at 3,000, 6,000, 8,000, 12,000 and 18,000 hours per engine, cost of parts for the overhaul scheduled for 24,000 hours is specifically set to EMC's account in the agreement.

b. EMC is to affect prorate payment of all unscheduled parts consumed during the service period.

The SPTSA Outline Proposal specifies that unscheduled spare parts consumed during the contract duration are to be supplied by the Contractor but paid for, on a pro-rata basis of actual running hours compared to manufacturers' estimated lifetime, by the Corporation.

NAO questioned EMC on this matter. EMC's response:

"None of the maintenance agreements proposed included parts for unscheduled repairs (similarly, the current GT LTSA does not include this provision). Provisions for the supply of unscheduled repairs are considered more of an insurance rather than a maintenance agreement provision.

As such, therefore, there was never any intention for the provision of 'unscheduled parts' in any of the proposed maintenance contracts. Such parts are the result of breakdowns of plant normally caused by mishandling, or overstressing of equipment. Since subsequent to take over, the plant shall be under EMC's responsibility, as with all plant currently owned by EMC today, such parts are at EMC's risk."

Asked whether, once unscheduled parts did not form part of the SPTSA, were these parts to be considered an additional expense, EMC confirmed this.

a. EMC is to supply the SCR catalysts at the end of lifetimes;

In this instance, the advice given by LI (but not agreed to by EMC) regarding the potential damage by way of reduced life of SCR catalysts when operated with DECC exhaust merits mentioning. (This issue is referred to in greater detail in the section referring to the Lahmeyer - EMC connection - dealing with divergences between EMC's Technical Evaluation Report and LI's July 2008 consultancy report).

b. EMC is to supply one set of Circulation Spare Parts.
In the outline agreement, BWSC added a set of parts, termed "Circulation Spare Parts" which are deemed as "optional" and the cost of which is not included in the SPTSA.

NAO solicited EMC's comments on this matter. EMC's response follows:

"In the SPTSA conceptual outline proposal, the price of the circulating spare parts was not considered to be included in the price. The initial stock of such parts, details of which were to be agreed between EMC and BWSC are to EMC's account. Should such parts be used in order to maintain the plant, then these shall be replaced at BWSC's cost in order to maintain the initial stock level."

Once more, EMC was asked to confirm that such additional cost needs to be added onto the declared maintenance charge as specified in the SPTSA. EMC replied in the positive, stating:

"The initial stock of these parts is to EMC's account and EMC has to bear such costs independently of any contract with BWSC. This is similar to the current LTSA for the gas-turbines operated by EMC."

NAO reiterates the Office's acknowledgement of the fact that the maintenance of projects as complex as the EMC DPS extension involves various costs which cannot, in their entirety, be covered by contracts. As illustrated above, there are significant costs that were, in this case, agreed by both EMC and BWSC to be outside the scope of the SPTSA.

However, NAO feels it pertinent to note that such expenses are still maintenance items and EMC should henceforth be more realistic in its cost projections. If anything, the impression that all service-related expenditure for the first five years' operation is covered by the amount appearing in the tender award, namely the 18 million Euro, should be avoided since this does not properly reflect costs likely to be incurred in this regard.

It is pertinent to note that, up to 31 March 2010, the status of the SPTSA remained unchanged - no finalised formal agreement had been drawn up and signed.

5. The financial modelling exercise as prepared by EMC and used as (financial) evaluation in the tendering process

The EMC DPS ITT, in the Evaluation of Bids (EV) Section, contained a precise and detailed description of the methodology that EMC would utilise in evaluating the bids.

In this manner, it was clearly indicated that the evaluation of the detailed and final bids would commence with an examination of conformity of the bids, a technical evaluation, a financial evaluation and compliance with the award criteria.

Various subsections of the EV Section detailed points the bids would be awarded, depending on the numerous parameters specified in the tender specifications. These technical parameters included: emissions, footprint, net power output, fuel usage, waste material, cost of conversion to natural gas, annual availability and time to commercial operation.

Another subsection of the EV Section explained the financial evaluation process in detail. Following is a summary:

- the selection criteria was based on the most economic cost of electricity based on the total life cycle cost, over the evaluation period;

- the financial evaluation method to be deployed was the Net Present Value (NPV);

- time divisions were annual and the NPV of each year from 2008 to 2019 would be taken, the total cost being derived therefrom;

- the total NPV would then be divided by the net electricity produced in the same period obtaining the final cost/kWh; and

- this would determine the financial ranking.

Financial costs/parameters taken into account comprised one-time and recurrent items. Table 4 overleaf lists these items.

Costs/Parameters	
One-time	**Recurrent**
Time from contract signing to first commercial operation	Fuel cost
	Lubricating Oil cost
Time from contract signing to full commercial operation	Reagent cost
	Maintenance cost/Service agreement
Contract price	Maintenance Personnel cost
Cost of area occupied by plant and ancillaries including any storage area	Cost of CO_2 emissions
	Cost of Waste Disposal
Cost of conversion to natural gas	Operating Personnel cost
	Amount of electricity produced per year
	Cost of electricity supplied to plant
	Cost of evaporated water supplied to plant
	Cost of steam supplied to plant
	SCR Catalyst life and cost of catalyst replacement and regeneration

Table 4: Financial costs/parameters taken into account in the financial evaluation

The EV Section went on to explain, in detail, each line entry. Following these explanations, various parameters and assumptions were listed. Salient issues are mentioned below:

- adjudication period - from 2008 to 2019, both years inclusive;
- Contract signature, anticipated for early 2008;

- discount factor to be applied: 6%;
- inflation rate: 0%
- residual value of all plant at end of evaluation period (end 2019): nil; and
- award criteria: weighted technical (25%) and financial (75%) points achieved.

NAO sought technical advice, commissioning the expert to validate EMC's financial evaluation and opine whether relevant cost items were included at realistic costs. Pertinent extracts from the opinion were as follows:

"This marking scheme, like most, if not all, marking schemes is of course arbitrary, but it was well defined in the ITT. The 25/75 ratio between the technical and the financial considerations means that the financial outcome was considered as being three times as important as the technical one ….

To calculate the cost of electricity for each bid, the procedure envisaged the use of information from the bids themselves… The latter included the price of fuel based on the relative cost as at January 2007 with a linear escalation based on the fuel prices between January 1997 and August 2007….

The costing exercise is quite comprehensive, and I do not think that any cost has been overlooked, except for overheads, for which no provision was made. I doubt whether this would have made much of a difference to the outcome.

It seems to me that the exercise was based on realistic figures obtained, as far as I can tell, from real data, and including figures submitted by the bidders themselves to which they were prepared to bind themselves. Since this is an exercise into the future and since the future is unpredictable, the figures laid down in the Evaluation Procedure Document remain assumptions with which one can agree or disagree. The only certain figures in the equation are those submitted by the bidders in their offers because in this case the bidders are taking the risk of the future."

NAO's expert ran the financial modelling exercise with different parameters. Apart from having the objective of ensuring that EMC's workings were correct, the exercise was also intended to test financial-related claims made by Bateman. The outcome of the latter tests features in the Bateman chapter, wherein all such claims made by the firm are analysed in detail and commented upon.

In this regard, it is pertinent to note that Bateman had, in one such claim, pointed out that EMC had resorted to a method of calculating the unit cost of electricity which was not according to the procedure set out in the ITT. In the ITT, as described in the evaluation process above, unit cost was to be calculated by dividing the NPV of the total project cost by the total amount of electricity generated over the 12 year period. Instead, EMC calculated such cost per unit of electricity such that, through iteration, the NPV of the revenue would equal the

NPV of the total project cost over the 12 years of the project. In other words, EMC decided to apply NPV even to the revenue side of the equation when the Corporation made the financial evaluation.

Workings carried out by NAO's technical expert revealed that, although Bateman were right in claiming that EMC had not adhered to the methodology described in the EV Section of the tender for establishing unit cost of electricity of the proposals, the outcome was unchanged:

"It should be pointed out that in the end, both methods give the same ranking in terms of unit costs of electricity; even the percentage differences remain the same, as per Table 5 below.

Although the method adopted by EMC in their final evaluation is more accurate, EMC should have stuck to the method that they themselves had proposed in the ITT."

	NPV Euro	**Net Electricity MWh**	**Unit cost as per ITT**	**Unit cost as per EMC financial report**
BWSC	554,027,672	6,436,200	8.61 €c/kWh	12.467 €c/kWh
MAN	583.319,954	6,162,358	9.47 €c/kWh	13.696 €c/kWh
Bateman	678,682,780	5,855,997	11.59 €c/kWh	16.823 €c/kWh

Table 5: Comparison of unit cost of electricity as per ITT and as calculated by EMC

NAO opines that, apart from the issue of final unit cost described above, which has been shown to have had a neutral effect on the (financial) ranking, the financial evaluation exercise was conducted in strict adherence with tender-specified procedures and using the values and parameters declared in the ITT and accepted by all bidders during the bidding stage.

In view of claims made by Bateman, NAO commissioned 'what if' exercises, plugging various different values into the financial model. Particular cases were Bateman's claims of higher waste disposal and maintenance costs per annum. It is to be noted that even such increments to the input did not change the ultimate financial ranking achieved by the Bidders.

As a general comment, it is laudable to have a purchasing authority follow meticulously all tender-specified parameters. In this case, one such critical parameter was the cost of the different fuel oils. Analysis of the financial workings immediately shows that the determining factor in establishing unit cost was the price of the fuel used by the particular plant. As mentioned above, the ITT had specified that, for financial evaluation purposes, fuel prices used would be those prevailing in January 2007 (with price escalation factors).

The utilisation of January 2007 prices as reference for the financial evaluation raised questions by Bateman. NAO duly discussed these with its technical expert. The following describes the analysis carried out by NAO's expert on this matter:

"Bateman state that the prices indicated in the tender documents (which were based on January 2007 prices) may no longer be relevant. From what they write, it would appear that the price of HFO is now closer to that of Diesel (Gasoil) than what it was when the tender document was written. This means that the price advantage of plant using HFO is now less pronounced than a couple of years ago. The economics based on more recent prices might tilt the balance in favour of Bateman rather than BWSC. This may be so, but the tender spells out clearly the prices that EMC was going to use in their evaluation (EV.4.2.2.1) and EMC had no choice but to follow what they had written in their ITT.

… we are dealing with a tendering process, and that therefore we need to work things out according to procedures defined in the tender document.

In any case, fuel price volatility is such that the price ratio between HFO and Diesel may change once again any day, and nobody can tell what it will be in the near future … At some point, the decision must be made.

Perhaps the only question to be asked here is the following. Why did EMC base their fuel prices on the average for January 2007, when the ITT was published on 28 August 2007? Perhaps a more detailed analysis of fuel price movement closer to the date of publication of the tender (28 August 2007) might have been more in order. After all, for the price escalation formula, EMC considered prices between January 1997 and August 2006. On the other hand, in their Financial Report of February 2009, which practically decided to whom the tender was to be awarded, EMC considered also the price of January 2009, and came up with this conclusion:

'An analysis was made to determine the power block operational cost of electricity based on current fuel prices and on the first year of full power block operation but excluding the CO_2 rebate. The analysis was based on the fuel costs as per January 2009 prices (EMC official figures) as follows:

a. Heavy Fuel Oil (1% Sulphur): Euro 276.43 / ton
b. Diesel Oil: Euro 472.93 / ton.

The results obtained are shown below:

Operating costs based on current fuel prices	***Bateman***	***BWSC***	***MAN Diesel***
Euro cent per kWh	*12.834*	*7.677*	*8.243*

As can be seen the highest running cost is that obtained from CCGT plant due to the predominant effect of the higher cost of fuel on the running costs, as also highlighted in the sensitivity analysis'."

In view of the above considerations, NAO opines that, when procurement is being affected through a tendering process, the tender document and the specifications/parameters contained therein are to be considered as the point of reference, from which deviation is not permissible.

For this reason, once the tender in question clearly established January 2007 prices as base for the financial evaluation, and once none of the bidders lodged any protest on the matter, EMC's financial calculations based on these reference prices was correct procedure.

This notwithstanding, NAO takes note of the fact that, by the time the financial evaluation was carried out in February 2009, the reference prices as established in the tender were indeed historic. Even when the ITT was published in August 2007, EMC had, in the attached time schedule, indicated that the Detailed and Final Bid (which contained the financial/commercial offer) would have been submitted and opened on 5 February 2008. Subsequently, Notification of Award to the successful bidder was targeted for 15 July 2008. This meant that at a stage so early in the tendering process as the drafting of the ITT document, EMC had already known that the financial evaluation would be carried out some time between February and July 2008. It is in this context that EMC's selection of the January 2007 as reference prices should be considered.

In addition, NAO opines that EMC could have easily avoided the controversy raised after tender award of having resorted to 'historic' prices had the ITT included a clause that would have enabled EMC to use as reference fuel prices prevailing at the time when the Corporation carried out its financial evaluation of bids. Applied with fairness and transparency, such a clause would have resulted in a more realistic calculation, in view of the fuel prices volatility and of the price differential between HFO and Diesel.

6. Divergences in EMC's position *viz.* contractual obligations of purchaser and contractor - a comparison between EMC's point of departure as stipulated in the tender document general conditions and the eventual agreement as per the signed contract

The ITT document for the Tender for Local Generation Capacity for EMC, File Reference Number GN/DPS/8/2006 - CT/2491/06, contained, within the Section CC (Conditions of Contract), sub-section CC.4, General Conditions of Contract.

This set of conditions was meant to be typical of the contents of the contract that would be eventually signed between EMC and the successful bidder and which would serve as framework, binding both parties, in the implementation of the project.

In its analysis of the Contract as signed between EMC and BWSC on 26 May 2009, NAO carried out an exercise in which its Investigations Unit compared contract conditions as included in the CC Section of the ITT and the corresponding clauses as eventually featuring in the May 2009 Contract.

This sub-section of the NAO Report lists a number of salient differences encountered and comments thereon. In the instances listed, for each contract condition, relevant extracts from both the CC Section of the ITT and the Contract as signed are quoted, in addition to NAO's opinions and comments.

CC.4.4 - Drawings

Extract from the Contract as signed:

*"i. ... The period (the '**review** period') during which the Purchaser may review the drawings or other documents which are to be submitted by the Contractor for approval pursuant to the Drawing submittal list contained in section 8.8 of the Bid (the 'Contractor Approval Documents') shall not exceed 10 Working Days in the case of any initial submission and 7 Working Days in the case of any resubmission by the Contractor. Such review period shall be calculated from the date on which the Contractor Approval Document is received by the Purchaser. The Purchaser shall during the review period either specify that the Contractor Approval Document complies with the Contract or the extent to which it does not.*

If the Purchaser fails to review and respond to a Contractor Approval Document within the review period, then such Contractor Approval Document shall be deemed approved from the date of submission by the Contractor."

Corresponding extract from CC Section of the ITT:

"i.…Within a reasonable period after receiving such drawings, the Purchaser shall signify his approval or otherwise."

As may be appreciated from the two extracts above, EMC's position changed considerably, with the Corporation being tied down to specific timings in connection with its approval or otherwise of drawings/documents submitted by the Contractor. From an initial position of "within a reasonable amount of time", the Corporation committed itself to maxima of 10 and 7 working days, depending on the nature of the Contractor submission. Moreover, an additional statement in

the Contract stipulates that, should EMC not submit feedback within the stipulated time, it would be permissible for the Contractor to assume approval by default.

CC.4.5 - Mistakes in Drawings

Extract from the Contract as signed:

"The purchaser shall pay any extra Cost reasonably incurred by the Contractor due to any alterations of the Works necessitated by reason of such inaccurate information so supplied to the Contractor, and the Contractor shall be entitled to a reasonable extension of time, if completion is or will be delayed due to such inaccurate information so supplied to the Contractor."

Corresponding extract from CC Section of the ITT:

"The Contractor's performance of his obligation under this Clause shall not relieve him of his liability under Clause CC.4.25 (Delay in Completion) in so far as that liability arises as a result of such discrepancies, errors or omissions.

… The Purchaser shall pay any extra cost reasonably incurred by the Contractor due to any alterations of the work necessitated by reason of such inaccurate information so supplied to the Contractor."

It is pertinent to note that reference to Contractor's liability for delay in completion, as contemplated in the CC Section of the ITT, and covering instances where mistakes in drawings would not be caused by *"inaccurate information or particulars furnished in writing to the Contractor by the Purchaser"* was omitted from the final Contract.

On the other hand, the Contract as signed now includes the Contractor's right to compensation in instances where mistakes in drawings would be caused by errors on the part of EMC and would trigger delays in project completion.

CC.4.6 - Assignment, sub-letting of the Contract and Nature of Agreement

Extract from the Contract as signed:

"Except as set forth in this CC.4.6, it shall not be lawful for the Contractor to transfer or assign…

The Contractor shall have the right, without the prior written consent of the Purchaser to assign or transfer its rights and obligations in whole or part under the Contract to a wholly owned subsidiary owned by it. Such assignment and

transfer will be formalized through an agreement in a form presented to the Purchaser by the Contractor which the Purchaser shall sign within 10 Working Days following receipt of such an assignment signed by the Contractor. The Contractor acknowledges that no modification shall be made to the Contract by reason of such assignment and transfer."

Corresponding extract from CC Section of the ITT:

"It shall not be lawful for the Contractor to transfer or assign …".

The originally unconditional statement regarding the Purchaser's right to transfer its contractual rights and obligations was eventually changed to take into account the exception of a transfer to a subsidiary that is wholly owned by the Contractor. What is especially concerning to the NAO is the fact that such transfer can take place without the prior written consent of (or even prior notification to) EMC as Purchaser.

CC.4.11 - Contractor's Default

Extract from the Contract as signed:

"If the Contractor abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract, or shall without reasonable excuse refuse or neglect to comply with any reasonable orders given him in writing by the Purchaser in connection with the Works, or shall contravene the provisions of the Contract, the Purchaser may give notice in writing to the Contractor to make good the failure, neglect or contravention complained of.

Should the Contractor fail to comply with the notice within a reasonable time from the date of service thereof, the Purchaser shall be at liberty upon 30 Days' notice to the Contractor notify him that he intends to employ other …".

Corresponding extract from CC Section of the ITT:

"If the Contractor shall neglect to execute the Works with due diligence and expedition, or shall refuse or neglect to comply with any reasonable orders given him in writing by the Purchaser in connection with the Works, or shall contravene the provisions of the Contract, the Purchaser may give notice in writing to the Contractor to make good the failure, neglect or contravention complained of.

Should the Contractor fail to comply with the notice within a reasonable time from the date of service thereof then and in such case the Purchaser shall be at liberty immediately and without the necessity of any further authority to that effect, to employ other personnel and forthwith execute …".

While the original ITT conditions allowed EMC to take action in instances where the Contractor would have shown *"neglect to execute the Works with due diligence and expedition"*, such right is afforded to EMC, in the contract as signed, in instances of work abandonment or a clear demonstration of the intention of discontinuing on the part of the Contractor.

In addition, EMC's position is further weakened as, while in such instances the Corporation, as originally stipulated in the ITT, could have served notice to the defaulting contractor and, after allowing a *"reasonable amount of time"* for remedial action from the contractor's end, would have had the right to re-contract with third parties with immediate effect. As per conditions of the contract as signed, the Corporation is bound to issue a second notice, after a 30-day lapse of the first, prior to taking any such remedial action.

It is also pertinent to note that the following clause, featuring in the CC Section of the ITT and permitting any such third parties re-contracted to make use of Contractor's equipment on Site at the time of the re-contract, was eventually omitted from the final contract as signed:

"... and in that event[12] *the Purchaser shall have the free use of all Contractor's Equipment that may be at any time on the Site in connection with the Works, without being responsible to the Contractor for fair wear and tear thereof, and to the exclusion of any right of the Contractor over the same…"*.

A clause further protecting the interests of the Contractor, not originally included in the ITT, was also inserted in the signed contract:

"If the Purchaser re-contracts with any person pursuant to this Clause, the Contractor shall not be responsible for the loss of or damage to the Works or the Plant done by others."

CC.4.12 - Termination for Contractor Default[13]

Extract from the Contract as signed:

"Should the Contractor become bankrupt or insolvent…then the Purchaser shall upon 30 Days' notice have the power to declare the Contract at an end… However if the Contractor disagrees with the action taken by the Purchaser, he shall be at liberty to refer the matter to arbitration in accordance with the General Conditions CC.4.35."

[12] Of Contractor's default and Purchaser's re-contracting with third parties.

[13] CC.4.12 as featuring in the CC Section of the ITT document was entitled "Bankruptcy".

Corresponding extract from CC Section of the ITT:

"Should the Contractor become bankrupt or insolvent … then the Purchaser shall have the power to declare the Contract at an end…".

From the above extracts, EMC's concessions to the Contractor are evident. Not only does the contract as signed insert a previously inexistent 30-day delay precluding the Purchaser from taking immediate action in case of Contractor bankruptcy/insolvency, it also makes such action on the part of the Purchaser subject to arbitration. Such action was unconditional in the original ITT conditions.

CC.4.14 - Delivery

Extract from the Contract as signed:

(None)

Corresponding extract from CC Section of the ITT:

"No Plant or Contractor's Equipment shall be delivered to the Site until an authorisation in writing has been applied for and obtained by the Contractor from the Purchaser that delivery may be made."

In the contract conditions as set out originally in the ITT, EMC was seemingly aiming at assuring that the Corporation kept adequate monitoring of all plant and equipment that the Contractor was delivering to the DPS site. Such a monitoring function/right does not feature in the final contract as signed.

Extract from the Contract as signed:

*"(vi) …The Contractor shall be entitled to an extension of Time for Completion of the Works in accordance with CC.4.24 (**Extension of Time for Completion**) for each Day that the Plant had been delayed. Any guarantees or warranties provided in connection with the Plant shall be adjusted to take into account of any such delay up to a maximum of four months."*

Corresponding extract from CC Section of the ITT:

(None)

The contract as signed, as in the case of the contract conditions included in the ITT document, defined precise procedures to be followed in cases of delayed plant, being defined as either *"plant which, by delay or failure on the part of the Purchaser … the Contractor is prevented from delivering to the Site at the time*

specified…" or *"plant which has been delivered to the Site but which, by delay or failure on the part of the Purchaser ... the Contractor is for the time being prevented from erecting"*. However, the signed contract features the addition of the statement quoted above, through which, apart from the originally-contemplated procedure to be followed and remedies to be afforded to the Contractor in case of delayed plant, additional compensation is accorded in the form of a time extension for completion. Simultaneously, any guarantee/warranty period that would have provided for the delayed plant would similarly be adjusted. In addition, NAO notices that, while there is no capping on the number of days that the Contractor is allowed in case of delayed plant by way of extensions of time for completion, guarantee/warranty extension in the same instances is capped at four months.

CC.4.16 - Access to, Use and Possession of the Site

Extract from the Contract as signed:

"…This will include necessary access to and use of the harbour quay (free of charge) as agreed upon from time to time related to the arrival of shipments. If the Contractor suffers delay and/or incurs Cost as a result of a failure by the Purchaser to give any such right or possession within such time, the Contractor shall be entitled to an extension of time for any such delay, if completion is or will be delayed and payment of any such Cost plus reasonable profit, which shall be included in the Contract Price."

Corresponding extract from CC Section of the ITT:

(None)

Once again, the contract as signed is more generously compensating the Contractor than had been originally planned by EMC when the Corporation had drafted the contract conditions featuring in the CC Section of the ITT. In addition, while NAO takes note of the fact that such compensation is being granted to make good for inconvenience caused to the Contractor, statements that define such compensation in such a loose fashion as *"payment of any such Cost plus a reasonable profit"* should be avoided in contracts, especially so when the amounts of compensation being considered may be substantially high.

CC.4.17 - Vesting of Plant

Extract from the Contract as signed:

(None)

<u>Corresponding extract from CC Section of the ITT:</u>

"(ii) Contractor's equipment on Site:
All Contractor's Equipment shall on being brought upon the Site for the purpose of the Works, vest in and be the property managed by the Purchaser, and shall be used solely for the purpose of the Works and shall not be taken away by the Contractor while it is required on the Site for the purpose at the Works without the permission in writing of the Purchaser. The Contractor shall be liable for the loss or destruction thereof or for damage thereto, even if due to a fortuitous event or to an Act of God, which may happen otherwise than through the fault of the Purchaser. If there shall be due, owing or accruing to the Purchaser from the Contractor any moneys under or in respect of the Contract, of which the Purchaser shall be unable to obtain payment, the Purchaser shall be at liberty at the cost of the Contractor to sell and dispose of any Contractor's Equipment as he shall think fit and to apply the proceeds in or towards the satisfaction of such moneys as aforesaid. Subject to the foregoing the property in any Contractor's Equipment shall revert to the Contractor on being properly removed from the Site or on the completion of the Works or on termination of the Contract, whichever may be the earliest.

(iii) The Contractor shall procure that every lease instrument or other arrangement under which he acquires or uses anything at the Site for the purpose of the Contract, including by way of amplification but not of limitation, any site, depot, buildings, area, equipment, tools, etc., shall contain and be made subject to an express condition that the rights of the owner or owners thereof shall be subject and without prejudice to the rights conferred on the Purchaser by Clause CC.4.17 (ii) hereof relating to property in equipment, temporary Works, etc., and the Contractor shall satisfy the Purchaser that he is the owner of the equipment, temporary Works, etc., or that this Clause has been complied with."

The above two clauses, included in the CC Section of the ITT, do not feature in the contract as signed. As may be appreciated from the content, the clauses in question (a) afforded EMC as the Purchaser a monitoring function over equipment being brought to and removed from the DPS site by the Contractor; (b) placed the liability in case of damage to such equipment unconditionally on the Contractor; (c) allowed EMC the right to dispose of Contractor's equipment on site in case of moneys owed by the Contractor to the Corporation as per the terms of the Contract; and (d) extended such conditions to cover any leased equipment or property.

CC.4.23 - Rejection

Extract from the Contract as signed:

"*… Upon receipt of such notice, the Contractor shall with all speed and at his own expense make good the defects so specified. In case the Contractor shall fail to do so, then the Purchaser may upon giving the Contractor 30 Days' prior written notice, take, at the cost of the Contractor, such steps as may in all the circumstances be reasonable to make good such defects."*

Corresponding extract from CC Section of the ITT:

"…Then the Contractor shall with all speed and at his own expense make good the defects so specified. In case the Contractor shall fail so to do the Purchaser may immediately and without the necessity of any further authority to that effect, provided he does so without undue delay, take, at the cost of the Contractor, such steps as may in all the circumstances be reasonable to make good such defects."

What in the original (ITT) conditions was a right the Purchaser could immediately avail himself of in instances of non-compliance on the part of the Contractor was, in effect delayed by a 30-day notice in the contract as signed.

It is also pertinent to note that, while in the contract as signed typical delays caused by faults on the part of the Purchaser entitle the Contractor to an extension of time completion, and at times even to extra compensation, delays such as the 30-day notice periods above do not seem to carry the corresponding penalty for late completion, should such a notice period delay project completion.

CC.4.26 - Tests on Completion

Extract from the Contract as signed:

(None)

Corresponding extract from CC Section of the ITT:

"(iii) If, in the opinion of the Purchaser's Representative, the tests are being unduly delayed, he may by notice in writing call upon the Contractor to make such tests within 10 days from the receipt of the said notice and the Contractor shall make the said tests on such day within the said 10 days as the Contractor may fix and of which he shall give notice to the Purchaser's Representative. If the Contractor fails to make such tests within the time aforesaid the Purchaser's Representative may himself proceed to make the tests. All tests so made by the Purchaser's Representative shall be at the risk and expense of the Contractor

unless the Contractor shall establish that the tests were not being unduly delayed, in which case tests so made shall be at the risk and expense of the Purchaser."

The clause included in the originally-drafted conditions as included in the ITT document served as contingency, protecting the Purchaser's interests in the eventuality that the Contractor would delay running tests on completion, even after Purchaser notification. No such safeguard was included in the contract as signed.

Extract from the Contract as signed:

"If the Works fail to pass the Test on Completion following the repetition of the Test on Completion at the election of the Contractor, then the Contractor shall at its discretion be entitled to:

(a) Adjust the Works; or
(b) Agree to pay liquidated damages following Take Over in accordance with Enclosure 3.

The Parties acknowledge and agree that it is difficult or impossible to determine with precision the amount of damages that would or might be incurred by the Purchaser as a result of the Contractor's failure to achieve certain performance levels in connection with the performance of its obligations under this contract…

… The Contractor's maximum liability for liquidated damages, if any, under this Contract shall be:

a. 10% for delays:
b. 15% for performance worse than guaranteed: and
c. combined liquidated damages for delays and performance worse than guaranteed shall in no event exceed a maximum of 15%:

of the Contract Price.

Liquidated damages shall be Purchaser's sole and exclusive measure of damages and remedy against the Contractor with respect to the failure to achieve delivery of the Works by the Time for Completion and/or the failure to achieve the Performance Guarantees…."

Corresponding extract from CC Section of the ITT:

(None)

NAO positively notes that safeguards were added in the contract as signed, covering the eventuality of the Works repeatedly failing the tests on completion. In this regard, however, NAO notes that liquidated damages (LDs) are limited to a

maximum of 15%. It is also pertinent to note that LDs, as per Enclosure 3 of the Contract, are only applicable in cases of (a) late delivery, (b) shortfall in net electrical output, (c) higher than guaranteed heat rate for the power block and (d) higher than guaranteed CO_2 emissions. In the case of non-compliance with emission limits of the major pollutants, namely SO_x, NO_x and dust, EMC reserved the right to reject the plant outright, rather than apply LDs.

Extract from the Contract as signed:

"(v) In case the Contractor succeeds in achieving taking over earlier than Time for Completion, the Contractor shall be entitled to a bonus equal to euro 150,000 per week …".

Corresponding extract from CC Section of the ITT:

(None)

NAO notes that, in this instance as well as in many other clauses of the contract as signed, EMC agreed to the introduction of the concept of early completion whereby, if the Contractor successfully completes the project before the stipulated time, then EMC would reward such performance with a bonus.

In a similar manner, while LDs are levied on the Contractor when the plant does not achieve the guaranteed performance levels, an extra bonus is awarded in instances where such (guaranteed) performance levels are surpassed.

CC.4.35 Arbitration

Extract from the Contract as signed:

"Any disputes arising out of this Contract should be settled through friendly negotiation between both Parties. If the Parties cannot reach an agreement by negotiation, the dispute shall be finally settled, to the exclusion of legal proceedings, under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by an arbitral composed of three arbitrators, appointed under such rules.

The venue of arbitration shall be London, England. The arbitration proceedings and the award shall be in English. During the arbitration proceedings, both Parties shall continue to execute their obligations under the Contract except in respect of the matter under arbitration. Any award issued by a tribunal appointed in accordance with this clause shall be final and binding on the Parties and shall not be subject to any appeal by either Party."

Corresponding extract from CC Section of the ITT:

"Any dispute, controversy or claim arising out of or relating to this Contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the rules of the Malta Arbitration Centre as at present in force."

As may be ascertained from the above extracts, EMC's position changed considerably comparing the perception of the Corporation when the contract conditions were drafted for inclusion in the ITT, compared to what was eventually accepted, following negotiations with the successful bidder, and included in the final contract as signed. The NAO is not aware of the reasons for such shift in the Corporation's position; however the fact is that the agreement as eventually signed ended up being more favourable to the Contractor, obviously at the detriment of the contracting authority and ultimately to the Maltese taxpayer. In this regard, two important related points have already been highlighted in other parts of this Report; namely the undue haste with which this agreement was signed (part of it still including track changes) and the complete exclusion of the DoC during the final negotiations leading to signing of agreement.

In view of the above concerns, the NAO Investigating Team raised a number of related questions to EMC, on varied occasions. Following are EMC's perceptions as disclosed to NAO on the various issues:

Purchaser and Contractor Defaults

NAO commented on the fact that the Contract as signed contained a set of conditions (Special Conditions SC.4) imposed on EMC as Purchaser and remarked that a second set of conditions, of the same detail, should likewise protect the Purchaser, adding that, to the Office, the Contract seemed lacking in this regard.

EMC answered that: *"In the case of Contractor's default, clauses CC.4.11 and CC.4.12 in the contract apply. These conditions for contractor's default were included in the original ITT document. During the negotiations with all four bidders these and other clauses which were included in the original ITT were adopted whilst other clauses were taken from the FIDIC standard Conditions of Contract for international plant design and build contracts were included. Clause SC.4 has been adopted from the equivalent clause 15 in the FIDIC Conditions of Contract which was intended to balance the obligations of the parties to the contract and to share the risk appropriately. The FIDIC Conditions are internationally recognized and are accepted by the Department of Contracts."*

Clause SC.4 is being reproduced in its entirety hereunder:

"SC.4 Purchaser's Default

Purchaser shall be in default hereunder upon the occurrence of anyone of the following events, which shall be events of default (each an 'Event of Purchaser Default') if not cured within 20 Days following the delivery to Purchaser of the written notice of such event as per SC.1(b) or, if capable of being cured but not within such period, if Purchaser has not commenced the cure within such period and does not thereafter diligently pursue such cure, provided that the Event described in paragraph (b) below shall be an Event of Default of Purchaser upon its occurrence:

a) the payment security provided or to be provided to the Contractor by the Purchaser is terminated or ceases to be in effect,

b) Purchaser shall have assigned or transferred this Contract or any right or interest herein except as expressly permitted by this Contract,

c) any representation made by Purchaser in this Contract shall have been deliberately false or misleading,

d) Purchaser shall have defaulted in its performance under any material provision of this Contract,

e) Contractor does not receive from Purchaser the payment(s) due,

f) any proceeding is instituted against Purchaser seeking to adjudicate Purchaser as bankrupt or insolvent, or Purchaser makes a general assignment for the benefit of its creditors, or a receiver is appointed on account of the insolvency of the Purchaser, or Purchaser files a petition seeking to take advantage of any other law relating to bankruptcy, insolvency, reorganization, winding up or composition or readjustment of debts and, in the case of any such proceedings instituted against Purchaser (but not by Purchaser), such proceedings is (sic) not dismissed within 40 days of such filing.

If an Event of Purchaser Default shall have occurred and be continuing notwithstanding action having been taken in terms of this clause, Contractor shall have the right to either suspend or terminate this Contract by delivery of a notice thereof to Purchaser in addition to any right and remedies that may be available by law or in equity or as provided herein. After having issued a notice of termination, Contractor shall promptly ceases all further Work.

In case of such termination, Contractor shall be entitled to receive from Purchaser:

a) payment for the value of the Work actually performed prior to termination for which Contractor has not already received payment,

b) the Cost of Plant and materials ordered for the Works which have been delivered to the Contractor, or of which the Contractor is liable to accept delivery,

c) all other documented Costs and expenses incurred by Contractor in the expectation of completing the Contract or by reason of such termination of this Contract,

d) the documented Cost of removal of any temporary Works and Contractor's Equipment from the Site and the return of these items to the Contractor's works in his country (or to any other destination at no greater cost),

e) the documented Cost of repatriation of the Contractor's staff and labour employed wholly in connection with the Works at the date of termination,

f) the return of the Performance Security and Down Payment Guarantee provided by the Contractor in accordance with this Contract,

g) In addition, title to all Work, material, Equipment, tools and supplies that shall have previously passed to Purchaser shall automatically revert to Contractor until Contractor has received the payment required by this condition, at which time title shall pass to Purchaser,

h) In case of termination, plant and material paid for are to be delivered to the Purchaser."

EMC, as per the Corporation's declaration above, is of the opinion that SC.4, as Purchaser's default, is in effect balancing Contractor's default as covered in CC.4.11 and CC.4.12. NAO feels that obligations imposed on the Purchaser (as per SC.4) are more onerous than those imposed on the Contractor. In addition, it is pertinent to keep in mind that, apart from the addition of SC.4 in the final contract as signed, conditions originally included in CC.4.11 and CC.4.12 (in the ITT) were eased, favouring the Contractor, as may be ascertained through a perusal of the relevant (extracts from) clauses quoted and commented upon above.

It is also pertinent to note that during an interview with EMC technical personnel, the NAO Investigating Team stated that it appeared to the NAO that during the contract negotiations pressure was eased off the Contractor, substantiating this statement by the fact that the contract conditions as published in the ITT were more onerous (on the contractor) than those eventually contracted. EMC did not negate this statement, with the Corporation simply stating that the negotiations had been held with the other bidders as well.

DoC involvement

NAO asked EMC whether DoC was at all involved in the negotiations that led to the eventual contract formulation. EMC's reply was that, as already stated above, *"DoC were not involved in the negotiations. It is not the DoC's function to be involved in contract negotiations because the contract belongs to the entity and DoC supervises the process".*

In view of the above assertion by EMC, NAO asked whether the draft contract was discussed with DoC prior to endorsement by the parties. EMC replied: *"No, because the function of the DoC at law is only to supervise the tendering process. The contract terms and relative negotiations are owned by the entity".*

NAO opines that, even in view of the very substantial concessions allowed by EMC in this particular contract, following negotiations with the successful bidder, it would have been more prudent for EMC, as contracting authority, to discuss the draft contract with DoC, as the legal owner of the entire process, of which the Purchaser-Contractor contract forms a significant, critical element.

The above opinion is being expressed in view of the fact that, as illustrated amply in this section of the Report, there were numerous clauses which were introduced/amended from the original ones included in the ITT (following negotiations) and which effectively reduced contractual safeguards to the Authority by alleviating the responsibilities, duties, penalties and/or related parameters of the Contractor or through the imposing of more onerous conditions on the Purchaser. Emphasis is being made that NAO maintains that, in its opinion, DoC should be actively involved in final negotiations leading to signing of agreement in all tenders and not just in this particular one under investigation.

Early completion bonuses

NAO noted that early completion bonuses were a characteristic of the contract as signed, but had not featured in the contract conditions as published in the ITT. The Office solicited EMC's views on the matter, and was furnished the following explanation:

"These bonuses represent a win-win situation, as EMC will save approximately Euro 400,000 per week on reduced fuel costs, whilst paying Euro 150,000 pro rata per week as an incentive to the Contractor. This was reported to the DoC."

Questioned on whether such incentives were acceptable to DoC, the Department replied that *"There have been tenders where completion clauses were included in tenders".*

While not entering into the merits of allowing such incentives, NAO opines that early completion, even without financial reward, is already a 'win' situation for the Contractor - finishing earlier than targeted will translate in monetary savings by way of the possibility to allocate resources assigned to the project completed prematurely to other projects, thus reducing actual project costs from those budgeted, resulting in increased profit.

Liquidated damages

NAO solicited EMC's views on liquidated damages and the capping thereof as applied in the contract. EMC's response:

"It is standard practice to cap penalties and no bidder would accept uncapped penalties. The level of capping agreed to is reasonable and makes business sense. Had EMC not been convinced of the validity of the proposal, it would not have recommended award of the contract.

If the calculation of the LDs exceeds 20% it will be rejected before taking over."

DoC's views in this regard were also solicited and the Department furnished NAO with the following answer:

"There are limits as to how much an economic operator can be penalized. In case of unsatisfactory performance, EMC can refrain from effecting any payments at all."

NAO discussed the matter with its legal adviser who expressed his opinion that by way of remedies, apart from plant rejection, *"... liquidated damages as defined in the contract become the only remedy. It may well be that circumstances arise where such liquidated damages are not sufficient to cover the resulting harm adequately. No provision is made in the contract; it is understandable that the bidders would have wanted to cap their liability, the problem is whether such capping is adequate or sufficient".*

NAO likewise sought technical advice on the matter. Relevant excerpts are being reproduced hereunder:

"... In the case of non-emission performance, the plant may still be operated but obviously at a higher cost to EMC and the supplier must pay a penalty. Whether the penalty is enough is another question….

On the other hand, it might be possible for the plant to reach the limits if it is operated with gasoil instead of HFO, but this would imply an extra cost due to the higher cost of gasoil. This is why LI recommended that EMC should at least ask for LDs. LI recommended that EMC should ask for LDs equivalent to the cost of

operating the plant on gasoil rather than HFO. This could have been a solution if the LDs would cover the extra cost for the *__whole life__* *of the plant …*

Another important issue is the following. Let us assume that the Plant has passed the commissioning tests and is completely taken over. What guarantees are in place to ensure that the Plant continues to operate within the prescribed limits? The only guarantee that I found is in the SPTSA and comes in the form of the following clause: "If plant emissions of NO_x, SO_x, dust or ammonia emissions exceed the guaranteed values (as indicated in EV schedules), the affected plant shall be considered as not available unless EMC choose to dispatch the engines regardless." Again here, the same concept is kept of not accepting the plant (albeit possibly temporarily until the problem is fixed) if the limits are not kept. The practical effect of this is that BWSC might have to pay a penalty for lack of availability of the plant, but this is capped. There is also the proviso that if EMC is desperate for power and decides to use the plant (or part of) despite it being outside the limit and risking the consequences of breaking the law, then BWSC are exonerated completely. There is not even a provision for holding BWSC responsible for any damages that EMC might suffer, such as fines for exceeding the limits. It must also be pointed out that the SPTSA is only valid for 5 years."

In view of the above advice afforded to NAO by its legal and technical experts, the Office is concerned that the contract as signed does not offer sufficient safeguard for the investment being made by EMC. This concern assumes even greater dimensions when one considers the criticality of the nature of the project itself, and the urgency with which the finished (and successfully operating) power generation plant is required by the Corporation.

NAO is aware of the fact that negotiations leading to the final contract for the procurement of projects of such magnitude and complexity may be difficult and that the successful bidder could take a firm stand. However, the fact remains that a comparison of both texts - namely the contract conditions as included in the ITT and the contract as signed - reveals that EMC consistently conceded significant ground to BWSC during the negotiations.

7. Potential areas of improvement identified in the EMC-BWSC contract

Part 6 of this chapter dealt with the General Conditions as included in the EMC-BWSC contract signed in May 2009 covering the DPS Extension. The sub-section in question consisted of an exercise in which the General Conditions as included in the final contract were compared to the corresponding clauses as published in the ITT.

This subsection, complementary to the previous one, analyses the final contract as signed in absolute, rather than relative, terms and features NAO's opinion and comments thereon in an attempt to identify potential areas of improvement. It is

being recommended that, as far as possible, these be taken into consideration in future public procurement processes, thus ultimately ensuring better use of public funds.

Section CC - General Conditions of Contract

CC.4.4. Drawings

"The Contractor shall submit to the Purchaser for approval ...such drawings ... The period (the review period) during which the Purchaser may review ... The Purchaser shall during the review period either specify that the Contractor Approval Document complies with the Contract or the extent to which it does not.

If the Purchaser fails to review and respond to a Contractor Approval Document within the review period, then such Contractor Approval Document shall be deemed approved…".

In view of the spirit of cooperation that the contract is to instil in both parties, and of the fact that in numerous other instances, methods of notice delivery are availed of, prior to any remedial action being taken, NAO opines that in such a default on the part of the Purchaser, the Contractor should issue a notice, allowing a period of grace during which the Purchaser may respond to the Contractor Approval Document, rather than simply proceed as if the Purchaser had signalled his consent.

CC.4.5. Mistakes in Drawings

The two clauses, separately, cover mistakes caused through Contractor's and Purchaser's default. In the case of mistakes in drawings caused by the Purchaser's actions, the Contractor is allowed an extension of time to make up for such time lost due to the inaccurate information supplied by the Purchaser.

However, in the case of time lost due to mistakes in drawings due to Contractor error, no corresponding clause imposes penalties for such delays. While such a penalty, it may be argued, can be triggered as a default penalty mechanism, NAO opines that inclusion of a clause to the effect that a late delivery penalty will be imposed on the Contractor in such instances is considered fair and reasonable.

CC.4.6. Assignment, Sub-Letting of the Contract and Nature of Agreement

This article contains a clause that allows the Contactor the right to transfer its rights and obligations:

"The Contractor shall have the right, without the prior written consent of the Purchaser to assign or transfer its rights and obligations in whole or part under the Contract to a wholly owned subsidiary owned by it…".

NAO opines that (a) the legal implications of such a clause should be examined in detail, especially in view of the real possibility of unnecessary complications that may arise in cases of eventual problems during project implementation, the subsequent period covered by guarantee and/or maintenance agreement and any eventual need to request technical assistance after expiry of such guarantee/maintenance agreement; and (b) even if such a clause be included in a public procurement contract, such transfer from mother company (the entity that would have been awarded the tender) to a subsidiary (the distinct legal entity that would be implementing the remainder or all of the contract) should not occur without the express written permission of the Purchaser.

CC.4.11. Contractor's Default

Contractor's Default, as defined in the contract, seems to be limited to *"the Contractor abandons the Works or otherwise plainly demonstrates the intention not to continue performance of his obligations under the Contract, or shall without reasonable excuse refuse or neglect to comply with any reasonable orders given him by the Purchaser in connection with the Works, or shall contravene the provisions of the Contract…".*

NAO opines that Purchaser's perception of bad workmanship and/or workmanship that is not considered up to industry/expected standards, or indeed established tender specifications, also is clearly included as being cases of Contractor's Default and similarly subject to the same procedural remedies.

The same article allows a period of 30 days' notice during which, once informed, the Contractor can make amends. In view of the fact that (a) the default might be causing damage to assets that would eventually become the property of the Purchaser, (b) delays might be incurred in order to remedy any damage already caused/being caused by the Contractor's default and (c) as often as not, completion according to the (project) planned schedule would be critical, the 30-day notice period is deemed to be excessive.

In addition, once again a clause clearly stating that any delay caused to project implementation would translate in late-delivery penalties is to be included.

The article imposes a financial penalty on the Contractor, should he fail to regularise his position following the above-mentioned notice and after which the Purchaser would have re-contracted the remaining Works or part thereof. However, such a penalty is capped at 50% of the Contract Price. NAO opines that such a capping might not suffice to cover the damages incurred by the Purchaser.

CC.4.12. Termination for Contractor Default

This clause allows a bankrupt or insolvent Contractor 30 days' grace during which the Purchaser, although cognizant of the state of affairs of the Contractor, needs to wait before he can declare the Contract terminated. It is to be noted that, in the corresponding Purchaser's default (SC.4), the Contractor shall have the right to terminate the Contract after 20 days' notice and such notice period commences from the date *"any proceeding is instituted against Purchaser seeking to adjudicate Purchaser as bankrupt or insolvent…"*. NAO notes the inequity of the Contract conditions above and recommends that identical mechanisms applying identical timings and parameters are applied for both Contractor and Purchaser defaults in this regard.

NAO's concern expressed when commenting on Clause CC.4.11 above and regarding the capped penalty for liability (50% of Contract Price) is likewise deemed pertinent in this instance.

CC.4.16. Access to, Use and Possession of Site

NAO recommends that any financial compensation, award and/or remuneration be quantified clearly and without any leeway for eventual interpretation. This is even more of a necessity when the fiscal amounts in question may be very significant. The Office, as such recommends avoidance of vague terms such as those included in this Clause - wherein Contractor is being guaranteed compensation in the form of a *"payment of any such Cost plus a reasonable profit"*. While 'Cost' needs to be established on the basis of authenticated documents, raised by the Contractor or his Delegate(s), duly certified and endorsed as correct by the contracting authority, the *"reasonable profit"* element needs to be pre-established and agreed to by both parties at the time of the pre-contract signing negotiations.

CC.4.26. Tests on Completion

The issue of capped LDs has already been raised in the previous section. On the one hand, NAO appreciates that it would be difficult to negotiate LDs higher than the contracted 15% with a Bidder. However, it is pertinent to note that, as reported in the Section dealing with differences between the contract conditions in the ITT and those signed, NAO's legal and technical experts expressed their doubts whether the capped 15% is, in effect, adequate and sufficient.

NAO recommends that, while some form of capping cannot be avoided, Contracting Entities should ensure that such capping is not limited in a way as to result in financial loss to their account.

In the particular case of CC.4.26, once the Contractor's maximum liability for LDs was quantified, being 10% for delays, 15% for performance worse than guaranteed and for the two combined, the clause would have been clearer and more complete had the statement contemplating rejection in Enclosure 3, to which Article CC.4.26 refers, been included. The Enclosure 3 statement being referred to reads: *"Rejection for Under Performance - Should the sum of liquidated damages for performance be higher than 20% of the Contract Price, the Owner shall have the right to reject the Plant before Taking Over."*

NAO further recommends that issues related with Plant Rejection are well examined by contracting authorities prior to including pertinent contract conditions and clauses. In connection with the contract in question, NAO's technical expert expressed his doubts whether the contract conditions are robust enough to allow the Corporation to reject the plant, should the eventuality arise. The expert's query in this regard concerns the outcome should the plant not reach the emission limits. Although the Contract specifies that this would not be taken over (referring to the entire plant), the question that arises is what would happen in practice to the parts that would have already been taken over previously and paid for. It is to be noted that the Contract contemplates partial take-over. NAO's legal expert likewise supported this opinion: *"The problem created by the contract is that taking over is not contemplated as an all or nothing event, but as a gradual process depending on progress of works. Once a section is taken over and payment affected it may be difficult to reverse the situation even if the holistic project is not acceptable at the end. The problem does not seem to have been specifically tackled in the drafting and this seems to be a weakness ... It is in this respect that the contract should have made specific provision."*

Clause (v) of CC.4.26 contemplates bonuses for "achieving take over earlier than Time for Completion", that is, early-completion rewards. It is to be noted that, while LDs, as explained above, are capped, early completion bonuses, set at 150,000 Euro per week that the Plant is completed before the Time for Completion, are not similarly capped. NAO recommends that in the drafting of public procurement contracts, concepts are applied in a streamlined fashion - if penalties are capped, then rewards should be similarly specifically capped.

CC.4.27. Taking over

This clause contemplates partial taking over. NAO's opinion on the matter of partial take-over, supported by technical and legal expertise, when combined with the right of the Purchaser to eventually reject the Plant if this does not meet pre-established levels of operation (eg emissions), has been previously expressed in NAO's comments and recommendations on CC.4.26 above.

CC.4.29. Defects after Taking Over

This clause binds the Contractor to make good for any defect due to manufacture, defective design, materials or workmanship for a period of 12 months from take-over of the works or the relevant part thereof. Following such making good, a further period of twelve months is restarted for the affected part of the plant. The Contract contemplates, however, that the maximum period that such cover, termed 'Defects Liability Period' can span is 36 months from date of taking over.

NAO opines that EMC should have ensured the Contract established the procedure that would be followed in case problems continue occurring after the expiry of the 36 months in question.

Questioned on the matter, EMC answered: *"Should the same failure occur repeatedly, Contractor shall be required to redesign the faulty plant or replace it with one of better quality pending release of the performance bond."*

While EMC may make recourse to blocking release of the performance bond, NAO opines that the Contract would have been more transparent and clear had the escalation process been built into the contract clauses.

CC.4.34. Statutory and Other Regulations

The clause deals with regulatory notices, consents, approvals and transfers that may be required for the continuance of the Contract and imposes the obligation of serving same on the Purchaser. The Purchaser is likewise charged with the duty of obtaining planning, zoning and similar permissions.

The clause protects the interests of the Contractor by stating that *"the Purchaser shall indemnify and hold the Contractor harmless against and from the consequences of any failure to do so",* the reference being to the obtaining of the permissions as per above.

NAO notices with grave concern that, while the Contractor's interests are catered for as per above, the Contract does not contain any clauses that would come into effect in the eventuality that the Purchaser fails to obtain the necessary permissions. NAO strongly recommends that the inclusion of such clauses in future contracts is a necessity that contracting authorities and the DoC cannot afford to ignore in public procurement contracts, especially in view of the fact that an EIS, at least in this instance, was not carried out before contract signing.

CC.4.35. Arbitration

This clause deals with arbitration, suggesting that 'friendly' negotiation between the parties should prevail in settling disputes and, simultaneously, determining the escalation process in case such measure does not achieve the desired result.

Final settlement, to the exclusion of legal proceedings, is to be determined under the Rules of Conciliation and Arbitration of the International Chamber of Commerce, with the venue of arbitration being determined to be England.

At this stage, one needs to keep in view that the Malta Arbitration Centre, that was set up to promote and encourage the conduct of both domestic and international commercial arbitration, and which functions independently and autonomously of Government, offers such services.

EMC's views on the matter were solicited. EMC expressed its opinion thus: *"This is a standard procedure in international contracts where a neutral forum is mutually agreed to. This is compatible with procurement regulations, and is consistent with international conditions of contract such as FIDIC, which are recognised by the DoC."*

DoC's comments were likewise solicited. DoC's response, when asked whether disputes should not have been handled by the Department and the GCC, and whether it was normal for the Maltese Government to accept foreign arbitration, was: *"... there may be cases where contractors will not accept the position of the contracting authority and DoC. The instruments used to settle such disputes are arbitration or legal action at the courts. In many cases arbitration is carried out locally but there are cases where contracts refer to international arbitration centres"*.

NAO recommends that, once project implementation is being carried out on Maltese territory and is being financed through Maltese public funds and/or administered by Maltese authorities, any recourse to arbitration in case of dispute unresolved through friendly negotiations by the contracting parties in public procurement contracts be preferably referred to the Malta Arbitration Centre.

CC.4.38.1. Down Payment Guarantee
CC.4.38.2. Performance Security

These clauses cover the Down Payment Guarantee, amounting to an initial 15% of the Contract Price and eventually reduced according to agreed project milestones, and the Performance Security set at 10% of the Contract Price and eventually reducing to 5% once the plant is taken over. While the contract stipulates, in both instances, that the instruments are to be issued by *"a financial*

institution acceptable to the Contractor and the Purchaser" it is noted that the institutions specifically referred to by name are Danish, as is BWSC.

Again, NAO opines that the same concepts should be applied throughout when drafting contracts - if arbitration is set, obviously at the Bidder's insistence, to take place in a country that is neutral, avoiding recourse to the services of reputable centres operating in the country where the project is to be implemented, it is likewise recommended that the Purchaser would insist that the financial institution would not be one registered in the same country as that from which the Contractor runs his operations.

CC.4.40. Regulatory Permits

This clause puts the onus on the Purchaser to obtain the necessary permits from the various authorities for both the construction and the operation of the Plant. In doing so, the Contract, and hence the Contractor, is taking cognizance of the fact that the Purchaser, in this case EMC, is simply an operator in the field, albeit the Corporation is state owned, and as such is a distinct entity from the pertinent regulatory bodies such as those listed in the Clause, namely MEPA, MRA and OHSA.

The opening sentence of the clause reads: *"The plant and works shall be subject to the approval of various regulatory authorities …"*. NAO does not question this statement - on the contrary, the Office positively notes the element of transparency and equity being applied with no special privileges being allowed to the operator, despite state ownership.

However, as per NAO recommendation expressed in CC.4.34. (Statutory and Other Regulations) above, the Office has one major reservation in this regard.

The contract in question involves large capital expenditures and is technically complex, impinging as it does on sensitive issues of national, European and global importance such as the environment and the protection thereof.

It is a well known fact that the contract was signed by EMC before the Corporation had obtained the necessary permits, even covering construction, let alone operation, of the Plant and its combined abatement systems.

While the sequence of events is debated in other chapters of this Report, NAO expresses its deepest concern regarding the fact that there is no one condition in the contract that stipulates the process to be followed in the eventuality that the authorities do not issue the permission for the construction of the plant.

EMC's comments in this regard are that: *"The site is part of a designated power station and the plant conforms to all relevant EU directives so there is no reason*

why such permits should not be obtained. ... The process of carrying out the EIA could only commence once the plant was selected. It would be impossible to apply for a permit without the plant having been chosen beforehand."

Whilst taking note of EMC's stand in this regard, NAO still notes that the Corporation does not seemingly have any contingency plans should the construction permit not be issued. The Office strongly recommends that a stage in the process that is so critical and fundamental to the outcome of the entire project be given serious consideration in future procurement contracts.

Section SC - Special Conditions of Contract

SC.4. Purchaser's Default

NAO has commented on SC.4 in the previous section (Purchaser and Contractor Defaults), dealing with changes between contract conditions as included in the ITT and those eventually featuring in the contract as signed. In the case of SC.4, this had not featured in the original (ITT) contract conditions and was, according to EMC, intended to balance the obligations of the two parties. EMC further stated that the Clause had been adopted from FIDIC Conditions of Contact Clause 15. SC.4 was reproduced in full in the mentioned section.

Perusal of the conditions of SC.4 demonstrates that very strict terms regulate Purchaser's actions and allow the Contractor adequate access to remedial action in case of various categories of Purchaser Default. NAO, in the section mentioned above, opined that the corresponding clauses covering Contractor Default, namely CC.4.11 and CC.4.12, were much more 'lenient' and afforded (a) the Contractor more leeway in action and (b) the Purchaser less possibility to take remedial action.

In this regard, NAO again recommends that a consistent line of thought/concept be maintained when drafting contracts. In this particular instance, if Purchaser's Default was extracted from FIDIC, pertinent clauses covering other aspects of the DPS Contract, especially Contractor's Default, should have likewise been sourced from FIDIC.

Both EMC and DoC seem to find comfort in the fact that various mechanisms and clauses of the contract were based on FIDIC. NAO had, in a previous PAC-commissioned enquiry related to major construction works, received advice from the technical expert commissioned specifically for that enquiry as follows:

"One could argue that the FIDIC form of contract could be modified to suit a specific procurement and approvals process… However, experience has shown that it is a mistake to take a standard form of contract, and to tweak it without an

overall appreciation of the basic philosophy of that form of contract. A FIDIC contract which has been tweaked is no longer a FIDIC contract, and therefore no longer gives the guarantee that a standard form of contract could give, or the comfort of the case-law which can guide the resolution of unforeseen circumstances."

NAO recommends that Purchasing Authorities and DoC alike take heed of the above technical advice.

SC.6.3. Consequences of *Force Majeure*

This clause protects the Contractor in cases of non-ability to perform due to *force majeure*. While NAO accepts the logic of the clause and likewise accepts that the Contractor be granted an extension of time if such circumstances/events cause a delay that will impinge negatively on project completion date, NAO cannot agree with the additional condition that allows for *"payment of any such Cost*[14]*, which shall be included in the Contract Price"*.

Force Majeure, by definition, is an exceptional event or circumstance that is beyond both Parties' control, could not have been reasonably avoided and is not attributable to them. For this reason, NAO cannot comprehend why any financial loss sustained by the Contractor by way of *force majeure* should be made good by the Purchaser. For this reason, NAO recommends that such a clause entitling the Contractor to reimbursement is no longer included in future procurement contracts.

SC.7. Delays by Authorities

It is an established fact that EMC is simply an operator in the field of electricity generation, despite the fact that the Corporation is state owned. For this reason, EMC is still required by law to follow all procedural steps required by any other company, even private sector entities, interested in implementing a project.

NAO, in making recommendations on Clause CC.4.40 (Regulatory Permits) above, commented on this issue, highlighting the fact that EMC is a distinct entity from the pertinent regulatory bodies and public authorities.

Thus, the reason for inclusion of Clause SC.7 in the DPS contract is enigmatic. The clause reads:

"If the following conditions apply, namely:

[14] Suffered by reason of such Force Majeure.

(a) the Contractor has diligently followed the procedures laid down by the relevant legally constituted public authorities in Malta; and either

(b) these authorities delay or disrupt the Contractor's work; or

(c) the delay or disruption was unforeseeable, then the Contractor shall give notice to the Purchaser and shall be entitled to:

(d) an extension of time for any such delay or disruption under CC.4.24 (Extension of Time for Completion), and

(e) payment for any Cost in connection with resulting from such delay or disruption, which shall be included in the Contract Price."

NAO fails to comprehend why any delay/disruption imposed by local authorities, when the Contractor would have *"diligently followed the procedures laid down by the relevant legally constituted public authorities in Malta"* should be blamed on, and paid for by, the Purchaser. It is strongly recommended that such a clause will not be included in future public procurement contracts.

SC.11.1. Commencement of Work

This clause sets the Commencement Date as being conditionally achieved (subject to other provisions of the Contract) when four conditions are fulfilled. Three of these conditions refer to actions that need to be taken by the Purchaser, while one refers to an obligation of the Contractor.

This notwithstanding, the clauses following these conditions assume that non-achievement of the Commencement Date must be per force due to Purchaser default and remedies listed are solely to the benefit of the Contractor.

It is recommended that, in formulating such clauses, contracting authorities exercise greater care and diligence to ensure that all and any escalation processes defined in the contract sufficiently cover all possible eventualities and defaults.

The same clause refers to the (project) delivery date, being defined as a function of the Commencement date. While referring to *"other provisions of this Contract relating to the obligation on the Contractor to deliver by a fixed period from the Commencement Date",* the previously-referred to Purchaser obligation to have obtained *"all approvals and project related permits ... from the authorities as required to commence the Work... as set forth in the Contract and are in full force and effect, by the time required by the Master Schedule"* features again, very clearly putting the onus on, in this case, EMC, an operator, to obtain the necessary licences, and charging the account of the Purchaser should all the conditions placed upon him are not satisfied within *"the respective deadlines"*.

NAO again recommends that once EMC is simply an operator and not a regulatory body commissioning works, the Corporation, as Purchaser, should not be unconditionally made to pay for any delays, regardless of nature, that may be encountered in the issuance of the required legislative permissions and licences. While the fault for such delays may not lie directly with the Contractor or the proposed project design, it may likewise not lie with any act or omission on the part of the Purchaser.

SC.11.3. Taking over in Sections

This clause stipulates that Works may be delivered or taken over in parts. Provision for the reduction pro-rata of the Contractor potential liability for liquidated damages is included. However, there are no conditions defining the process to be followed should, despite this gradual take-over, a total plant rejection by the Purchaser be necessary.

As has been amply discussed in CC.4.26 (Tests on Completion) above, NAO's legal and technical experts expressed their reserves in this regard. NAO recommends that henceforth contracting authorities ensure that adequate clauses are built into public procurement contracts that enable the Purchaser to exercise his right to reject a completed project, despite having previously taken over sections/parts of it. Such a right will have to have the supporting mechanism to determine resolution, and should take into account any and all monies that would have been paid by the Purchaser to the Contractor with each Taking-Over Certificate issued.

SC.17. Limitation of Liability

This clause limits Contractor to Purchaser liability under or in connection with the Contract to 50% of the Contract Price. In view of the fact that such a capping may not suffice to make good for the damage sustained by the Purchaser, it is recommended that in future contracts such capping be increased to the equivalent of Total Contract Price.

NAO feels it pertinent to point out that, in this particular instance, the opted-for solution, in its combined entirety, is an untested prototype. As stated previously in this Report (Point 2, EMC Technical), NAO opines that such a choice increases the level of project inherent risk. NAO feels this to be another reason for which, in this particular contract, capping of Contractor liability at 50% should not have been accepted by the Purchaser.

Enclosure No. 3.2. Liquidated Damages/Bonuses for Delivery and/or Performance Guarantees

Delivery

In case of late delivery, a mechanism was devised to calculate liquidated damages. Such mechanism is capped at a maximum of 10% of the total Contract Price.

In the alternate case of early completion, the bonus, set at 150,000 Euro per week, is not similarly capped.

In addition, NAO has already expressed its opinion that early completion constitutes, in itself, a bonus to the Contractor. The entitlement of a financial bonus payable to the Contractor by the Purchaser is not deemed necessary.

Liquidated Damages/Bonus for Performance

Liquidated damages for non achievement of guaranteed performance cover:

- shortfall in net electrical output;
- higher than guaranteed heat rate; and
- higher than guaranteed CO_2 emissions.

For each of the three parameters above, mechanisms of measurement and the unit amount of LDs to be applied are specified in detail. However, it is to be noted that each LD is capped. The capped (individual) maximum for each parameter is 5%. Furthermore the sum total of LDs payable for delay and performance is limited to 15% of the Contract Price.

It is to be noted that Enclosure 3.2. clearly specifies that, notwithstanding the 15% capping above, should the sum of LDs for performance be calculated (before capping) to be higher than 20% of the Total Contract Price, it would be within the Purchaser's rights to reject the Plant before Taking Over.

Notwithstanding the above condition, NAO legal and technical experts have expressed their concern on the adequacy of the capped limits. This features in CC.4.26 (Tests on Completion) above and in Section 6 of the EMC Technical, under 'Liquidated Damages'.

NAO recommends that, henceforth, despite the fact that bidders may resist increasing the capping of LDs, Procuring Entities exercise their negotiation skills and their vantage position as purchasers to achieve such higher capping.

NAO reiterates its awareness of the fact that concluding contractual agreements covering capital projects of substantial financial expenditure and of a relatively high degree of technical complexity requires considerable negotiation skills on the part of the contracting authorities. It is being recommended that all such Authorities involved in purchases of this nature invest in HR and bring on board the necessary expertise and skills necessary for the conclusion of contracts, through fair and equitable negotiations, that are of benefit to themselves and to the taxpayer whose money they are spending. Moreover, NAO reiterates its previous recommendation that the DoC should also play an active role during such negotiations leading to the signing of agreement.

CONCLUSION

NAO's exercise revealed a number of shortcomings, both administrative and technical in nature, in the manner with which EMC managed the tendering process. The Office believes that greater diligence and familiarity/compliance with prevailing legislation would have avoided several of the mistakes made. In addition, NAO opines that better communication and synchronisation between the respective contracting authority and the DoC, as the main overseer of public procurement, would have likewise ensured a smoother process, less open to controversy and perceived as being more transparent and equitable.

What follows is a list of the more salient shortcomings identified:

- Adoption of the negotiated process by EMC without having first obtained assurance of DoC's approval.
- EMC's lack of formal recording and authorisation of critical decisions such as that to implement the 25:75 weighting model for bids evaluation.
- EMC Chairman's holding his position despite the declared conflict of interest.
- Lack of diligence in vetting external consultants engaged to conduct an independent evaluation prior to engagement.
- Conceptual shift from the original demand for tried and tested combinations to the acceptance of untried combinations, basing on theoretical assumptions.
- Non-compliance with own tender clauses - changing tender specifications after closure of the Preliminary Bid and failing to individually notify unsuccessful bidders.
- EMC's weakened position during negotiations carried out prior to signing of the final contract with the successful bidder. This resulted in an agreement considered by the NAO to be too much in favour of the selected tenderer.

RECOMMENDATIONS

NAO stresses the need for more consistent communication and synchronisation between the DoC and the contracting authority involved. The spirit of the law, wherein the Department is meant to serve as an overseer and to guide procuring entities ensuring these comply with prevailing legislation needs to be respected. In addition, such communication would have avoided a number of occurrences that manifested themselves during this tender process and that led to much controversy and debate.

EMC and all procuring entities should acknowledge the fact that, especially in the initial stages of the planning of a project, a number of critical decisions are taken, at times on a highly technical level. In view that public monies are spent in realising these projects, it is mandatory that efficient recording systems be utilised to ensure that all such decision making is recorded and duly filed, to include working and technical papers supporting the decision and the eventual authorisation process.

NAO recommends that any person occupying an official position such as a member of a short-listing/evaluation/adjudication board or a member of a Board of Directors who feels that he has a conflict of interest, whether real or perceived, should, in the interests of the board he serves on, resign with immediate effect. Failure to do so may end up with a loss of credibility of the person in question and of the entity when such a conflict of interest becomes public domain.

Public procurement tenders contain a declaration form that prospective bidders must fill revealing whether they would have been previously found guilty of unprofessional conduct. When Procuring Entities resort to direct orders, it is even more imperative that the entities request such statement from their suppliers/service providers. In cases, as the one being investigated, where the services being sought were those of an independent referee, such declarations by the prospective suppliers/service providers should be extended to ascertain that the chosen referee is indeed independent and free of any ties, perceived or actual, with any of the firms whose proposals it would be asked to evaluate.

Mandatory tender specifications are inviolable, for tenderers and for the contracting authority alike. NAO recommends that once a contracting authority clearly issues a set of specifications, such specifications are invariably adhered to.

Likewise, compliance with tender conditions on the part of Contracting Entities is a necessity, if the corporate image of the Entities and of the DoC is to be safeguarded.

Finally, while it is accepted that bilateral negotiations and bargaining form an integral part of such a complex and costly contract, it is a well established fact that, invariably, Contractors employ personnel who are highly specialised in such matters and possess strong negotiation skills. It is imperative that, in a similar manner, contracting authorities invest in the employment of officials who can negotiate at par with their counterparts, so as to ensure that any contract signed represents good value-for-money for the contracting authority.

CHAPTER TWO: THE ROLE AND FUNCTIONS OF THE DEPARTMENT OF CONTRACTS

1. "OPEN/RESTRICTED" vs "NEGOTIATED" PROCEDURE

Before starting this analysis NAO feels the need to clarify a term that will feature prominently throughout this section, namely, the negotiated procedure.

One will be sufficiently familiar with the classic procedure utilised in the tendering evaluation, adjudication and award of public contracts known and referred to in the Regulations as the open or restricted procedures. Up to now, this has been by far the most common mode for a contracting authority to secure a public contract on its own terms. Open procedures essentially provide for unrestricted and unhindered open competition, are preceded by a published call for competition in the contract notice and, applied properly, should ensure the best possible choice by a process of publicly conducted successive eliminations of non-compliant elements on three distinct levels. These levels correspond to three sealed packages that together make up the bid: (a) the Bid Bond; (b) Technical Specifications and (c) Price Schedules.

In sharp contrast, the definition given in both Legal Notice 177/2005 and Legal Notice 178/2005 to "negotiated procedure" is one where the contracting entity "consults the economic operators of its choice and negotiates the terms of the contract with one or more of these".

In such cases, no prior call for competition is usually published. Instead, a Request for Proposals is issued and a solution negotiated with applicants individually. As the name implies, the procedure itself ends up being negotiated between the contracting parties. Apart from excluding open competition, the risk exists that a recommended solution, presented to the General Contracts Committee, would itself have been shaped in a closed context that might have favoured one over some other bidder, and possibly over the best interests of the contracting authority itself. Negotiations imply and do not exclude the possibility of concessions on crucial safeguard contract clauses, and even on pricing.

The fact that the negotiated procedure is relatively new may explain the lack of experience, leading to certain administrative shortcomings which both the DoC as well as the contracting authority itself seem to have suffered from during this tendering process. As illustrated throughout this Report, some of these shortcomings could have been avoided through enhanced collaboration between the two entities involved in the procurement process - a crucial factor which seems to be often lacking. Assuming that such procurement procedure will become more widespread over time, the NAO strongly feels that all stakeholders involved need to be adequately trained on how the negotiated procedure may be

effectively managed in a transparent and equitable manner, thereby decreasing the risk of controversy or allegation with which this particular tendering process was afflicted.

2. ROLES, FUNCTIONS AND RESPONSIBILITIES OF THE DEPARTMENT OF CONTRACTS AND OF THE GENERAL CONTRACTS COMMITTEE

According to the Department of Contracts, its functions and responsibilities essentially do not extend beyond monitoring that the adjudication process is carried out by the contracting authority in a transparent, fair and non-discriminatory manner, and if so to approve it. On the basis of present procurement regulations, the NAO questions this position.

For this reason, this Office cannot concur, as explained further below, with DoC's contentions that:

- *"tender documents were, through long established agreements, never vetted by Department of Contracts;*
- *to ignore a written request for adopting the negotiated procedure can only be interpreted as disapproving it; or*
- *shifting the negotiated procedure, midstream, to the three-package system automatically converts the procedure to a competitive dialogue".*

The DoCs' and GCC's roles and functions, as expounded in the relative regulations *(see Appendices 5 and 6 respectively)*, imply - even if they do not explicitly express - much more than is being admitted to by DoC. In its role as regulator, the Department of Contracts is obliged by law to execute a fundamental function in the whole tendering process, from pre-tendering to the conclusion, award and signing of the contract. These monitoring and regulatory functions in NAO's opinion go beyond a passive supervisory role. Obviously, adopting such a proactive approach necessitates that the Department of Contracts should be well resourced, especially both in terms of quantity as well as quality of human resources, including the engagement of *ad hoc* experts if deemed necessary, to execute its functions and responsibilities, including but not limited to:

a. Pre-tender vetting of the tender documents or dossier starting from the contract notices presented for publication in the Official Journal of the European Union (EU), as well as contract clauses, terms and conditions. Such vetting should proceed from three distinct aspects each of which may impinge on various functions and decisions, discretionary powers, and direction of the DoC, namely (i) the legal, (ii) the technical, and (iii) the financial perspective.

b. Effective communication in being able to address in a timely manner all queries submitted to the DoC by contracting authorities, particularly regarding the procurement method to follow in accordance with procedures established by prevailing EU and local rules and regulations; attentively responding to complaints and/or objections or appeals lodged by tenderers that may come to the Department's attention; as well as ensuring prompt and timely communication of decisions to all tenderers involved in a particular process.

c. Keeping good oversight and constant monitoring of the process by liaising with contracting authorities and attending key meetings the latter may have, whether with bidders or not, and ensuring that proper minutes and other audit trails of relevant proceedings and developments are duly kept and filed for future reference.

d. Ensuring that prerogatives, rights and actions reserved or implied by regulations as an exercise of its proper official functions are safeguarded throughout the process and remain intact afterwards, that is over the life of the contract awarded.

e. On rectifying matters that may impinge on a correct interpretation and application of selection or award criteria and their implications in guiding Procurement Boards and GCC in their deliberations.

Coming back to the question of the negotiated procedure, it results to the NAO that EMC had communicated in writing in advance to the DoC their intention of proceeding in that direction, and had even asked for guidance and/or approval. With the benefit of hindsight, the NAO feels that rather than leaving that correspondence unanswered, it would have been more appropriate for the DoC to request the Corporation to submit valid reasons for proposing such a choice, and then considering if those motivations were in line with the regulation's requirements for allowing that procedure.

In view of the above, the NAO fails to understand how the DoC seems to have given little or no priority to the following considerations:

a. the complex nature of the project; and/or

b. the necessity to seek approval from the Prime Minister to appoint Special Contract and Adjudication Committees including additional members whose technical expertise measured up to the task, as provided by legislation.

Throughout this process, for reasons never disclosed to the NAO, DoC opted against applying or executing any of its functions under the regulation to suspend, cancel and restart procedures in at least two instances:

a. When in August 2008 the negotiated procedure had been under way for almost two years, the DoC came to the conclusion that the procedure needed to be changed. The consequential decision by the DoC to incorporate the three package system characteristics of open procurement with the negotiated procedure at practically the concluding stage of negotiations, when a preferred bidder had already been identified by EMC, cannot be endorsed by the NAO. Considering everything, it is felt that for transparency's sake it would have been more appropriate to cancel proceedings and re-issue the tender. This could have avoided so much controversy and allegations with which this tender has been shrouded and which could possibly dent in an extremely harmful manner the necessary trust in the public procurement process.

b. After the issue of Legal Notice 2/2008 amending the principal regulations to the Environment Protection Act (LN 329/2002) concerning emission levels on diesel engines, it had become apparent that the tender's specifications were effectively being changed. In the interest of transparency, it is felt that the process should have been restarted, if anything, once again, avoiding most of the controversy related to such change in specifications.

It results to the NAO that in various instances, concessionary arrangements were concluded bilaterally in negotiations between the contracting authority and the successful tenderer without any participation or input whatsoever on the part of the DoC. This notwithstanding the fact that the DoC is defined as the "chief purchasing body" in the regulations and it is felt that such responsibility is applicable also at the final negotiating stage culminating in the actual signing of the agreement. Thus, DoC is bound by law to review the contract before this was signed. This could have brought to its attention the fact that EMC was conceding ground - as shown through a comparison of the relevant contract conditions as included in the tender and those eventually included in the contract signed - to the successful bidder as has been amply demonstrated in Chapter One dealing with Enemalta Corporation.

Value for Money: In adjudicating offers submitted for public tenders, the responsibility of the General Contracts Committee is not restricted to evaluating the most economical and advantageous offer but is also to ensure that value for money is obtained. This is clearly stated in Legal Notice 177/2005, Part X, Regulation 80(b) (*Appendix 6*) which stipulates that "the Contracts Committee shall evaluate reports and recommendations submitted by contracting authorities and make definite recommendations for the award of contracts ensuring that the best value for money at lowest possible cost is attained". Value for money essentially means that prices being quoted are in line not only with competing bids but also in relation to prevailing market prices. Such safeguard, which is applied by various contract departments/agencies in other countries, is obviously meant to ensure that public funds are used in the best manner possible. Incidentally, it has come to the knowledge of the NAO that various bids for a

power station in Burkina Faso (including one by BWSC itself) were recently all refuted since prices being quoted were deemed "to be between 30 and 50 per cent above world market prices, an assessment based on a World Bank study of price levels for diesel power stations" and thus not constituting adequate value for money *(Development Today - 25 September 2007 - Appendix 7)*.

Appointment of a Special Contracts Committee: The functions of Contracts Committees are defined in Part X of the Public Procurement Regulations. *Inter alia* Contracts Committees shall *"advise on all matters relating to public contracts"* and *"evaluate reports and recommendations submitted by contracting authorities and make definite recommendations for the award of contracts …"*. However, Regulation 9(1) of Legal Notice 177 of 2005 states that *"where the Prime Minister determines that the adjudication of tenders for the award of any particular contract requires special expertise, skills or other specialist knowledge, he may appoint a Special Contracts Committee for the award of that public contract"*. Given the complexity and high degree of technical element involved in the power station tender, this Office questions whether the General Contracts Committee evaluating this tender had the necessary technical/financial expertise to reach an informed decision on the award of the tender. One is justified in asking, especially considering the complex technical, financial and environmental issues involved, whether the presentation given by Enemalta officials to the GCC was sufficient for the Committee to come to a meaningful decision on a tender which is set to cost the taxpayer around 200 million Euro. NAO fails to understand why experts in the areas involved were not engaged to assist the GCC, as in the case of other major public contracts where such expertise was deemed extremely important.

Complaints Lodged: In May 2008, Bateman Litwin's legal adviser wrote to Enemalta alleging that his principals had information that their bid was no longer being considered and that, in fact, *"Enemalta may have initiated or are about to initiate direct negotiations with our two competitors"*. Moreover, *"not having received any communication from yourselves or from the Director of Contracts that my principals' bid is no longer being considered - indeed not having received any communication whatsoever over the past several weeks - they are eager to ascertain what the situation is with regard to their offer …"*. The letter was copied to the Minister for Infrastructure, Transport and Communications and the Director General (Contracts). When questioned as to whether any remedial action should have been taken by the Department of Contracts at this stage, the DoC stated that *"requests for pre-contractual remedies must be addressed to the Director of Contracts and to nobody else. Furthermore, appellants must specify what s/he is expecting"*. No investigations regarding the allegation made by Bateman Litwin were, in fact, carried out by the Department of Contracts. This Office feels that for the sake of transparency the Department of Contracts should give due consideration to all allegations of irregularities - whatever the source, at whatever stage of the tendering process or whether referred to the Department directly or otherwise.

3. SELECTION AND AWARD CRITERIA

Our understanding of contracts selection criteria is that the financial factor is a deciding one all other things (*viz.* the technical and environmental aspects) being equal.

In the case under review, the fact that the bidders were requested to submit fresh financial offers at the moment when the negotiated process was diverted to a process more akin to the "open" procedure resulted in a hybrid process which, strictly speaking, not being entirely in line with current procurement regulations, may have led to considerable uncertainty as regard correct application of procedures.

As already stated, the NAO is not fully satisfied that GCC could have been in an adequate position to endorse or otherwise a project of this magnitude and complexity simply on the basis of a Power Point presentation.

CONCLUSION

Our findings have identified a number of administrative shortcomings throughout the procurement process most of which, admittedly with the benefit of hindsight, could have been averted had both DoC and EMC been adequately prepared and fully resourced for such a challenging task.

During the course of the inquiry this Office also noted the apparent lack of experience and expertise on the part of the DoC in connection with certain forms of procurement, such as the negotiated procedure. Moreover, the new legislative requirements emanating from Malta's membership to the EU have put the DoC on a steep learning curve. The NAO hopes that the lessons learnt during this inquiry will be found useful, especially by the DoC itself, in future procurement cases, thus ensuring a fair and equitable procurement process avoiding, as far as possible, similar controversies and allegations. Amongst other negative consequences, such allegations eradicate in no small measure the necessary trust and confidence which all public procurement entities need to enjoy.

As already stated, the NAO makes its observations with the usual benefit of hindsight on its side and in full awareness of the fact that various changes in the legislative framework, particularly those related to EU membership, had been carried out just prior to the issue of the tender in question. Moreover, it is undeniable that the three-month vacancy in the Headship position at the Department of Contracts, which occurred soon after the commencement of this particular tender, somehow complicated matters even further. Together, all these factors contributed in no small measure to the observed shortcomings which were further exacerbated through the apparent lack of coordination, particularly at crucial stages during the tendering process, between DoC and EMC.

RECOMMENDATIONS

To ensure a smoother operation and avoid similar shortcomings, the Department would be well advised to ensure that:

- more effective lines of communication are established between the Department and respective contracting authority to ensure ongoing collaboration and coordination;

- external technical expertise is sought and/or *ad hoc* boards are set up whenever projects of this magnitude and complexity are involved;

- the selected bid constitutes value for money in an absolute manner and not just in respect of tenders submitted;

- the statement on Excluding Circumstances in terms of Regulation 49 of the Public Contracts Regulations is invariably requested and vetted;

- an across-the-board approach to informing all bidders, whether successful or not, of the outcome of tenders is strictly followed;

- whenever changes are made to the original tender specifications, that procurement process is aborted and new tender is re-issued in due course; and

- due consideration is promptly given to allegations of irregularity, whatever the source and whether referred to the DoC directly or received through other channels.

Finally, it is also recommended that EU Directive 2007/66/EC, whose principal objective is to improve the effectiveness of review procedures concerning the award of public tenders, is immediately adopted in Maltese legislation thus ensuring a more transparent and equitable procurement process in line with EU requirements. This would constitute a big step in the right direction to ensure a more equitable, fair and transparent procurement system in Malta.

CHAPTER THREE: IRREGULARITY ALLEGATIONS MADE BY THE PARLIAMENTARY OPPOSITION

During the course of this inquiry the Opposition made several allegations of irregularities committed by various stakeholders in the tendering process of the Delimara Power Station tender. These allegations, mostly reproduced in the local media, were brought to the attention of the National Audit Office during the various meetings held between Opposition leading officials, including the Leader of the Opposition, and senior management at the NAO. Documentation to substantiate these allegations, as available, was also forwarded to this Office.

The main allegations made included:

1. the involvement of BWSC in bribery and corrupt practices in other countries;
2. the involvement of Lahmeyer International in corrupt practices overseas and subsequent ban by the World Bank;
3. the involvement of Mr Joseph Mizzi with both BWSC and Lahmeyer International;
4. trading in influence, political interference and criminal offences;
5. insider information; and
6. contacts at the Department of Contracts.

The National Audit Office duly considered all allegations made particularly through various meetings with persons who could provide information on such matters and a review of all documentation made available by the Opposition. The Office obtained legal advice where deemed necessary, particularly to item (4).

1. The involvement of BWSC in bribery and corrupt practices in other countries

The Opposition presented several newspaper articles that had originally appeared in the Danish press alleging that BWSC was involved in several cases of bribery and other corrupt practices in which a number of the company's senior officials were involved. It was alleged that bribes, amounting to millions of dollars, were made by BWSC to secure contracts in the Philippines, Sri Lanka and the Bahamas. BWSC's Japanese proprietors Mitsui were also involved in several cases of bribery in Malaysia, Korea, Jordan, Qatar, Russia, China and Mongolia. On its part, according to these articles, BWSC stated that "there are presumptions but no proof of bribery".

The Opposition further alleged that no legal recourse could at the time be taken inside Denmark against BWSC as acts of bribery committed outside the country were, at the time, not actionable by law. In 2000, pertinent changes were made in the Danish legislation making all kinds of bribery, even if committed outside Danish territory, illegal.

The only evidence furnished by the Opposition of BWSC's corrupt practices was the newspaper articles. This Office tried to corroborate these allegations with other sources, including the World Bank, to no avail. Given the lack of definite proof of corrupt practices and the fact that BWSC's actions were, at the time, not actionable by law, it is doubtful whether Enemalta could have disqualified BWSC.

2. The involvement of Lahmeyer International in corrupt practices and subsequent ban by the World Bank

Allegations were made by the Opposition that Lahmeyer International, the company engaged by Enemalta Corporation to carry out a study on the plausibility of the flue gas emissions abatement equipment tendered for the Delimara power station, had been involved in a number of controversial international projects. The company had engaged in corrupt practices and had been, in 2003, convicted in Lesotho for paying bribes through an intermediary. In 2006, the World Bank blacklisted LI for seven years following its conviction of corrupt activities in Lesotho. The Opposition presented various documents in connection with the case.

The main concern raised by the Opposition was that it was unlikely that EMC had engaged LI without any knowledge of its corruption scandals because, prior to engagement, all companies are required to make declarations regarding their performance records.

From enquiries made by this Office it transpired that, in April 2008, Lahmeyer International contacted Enemalta Corporation and offered to assist EMC in the technical and financial evaluation of the bids for the Delimara power plant. At that time EMC declined the unsolicited offer. In May 2008, however, the Corporation directly engaged LI to carry out a study on the emissions abatement equipment tendered for the Delimara power plant.

EMC engaged LI by means of a direct order and failed to ensure that LI had no convictions of grave professional misconduct. EMC justified this by stating that it *"did not request Lahmeyer to make any declaration on the matter since Lahmeyer had been working for MRA on the study of Energy Interconnectors for Malta. Accordingly, it was deemed unnecessary"*. Enemalta senior officials declared under oath that they were not aware that Lahmeyer was blacklisted by the World Bank for the period 2006-2013. This Office was not convinced of the explanations given.

The Corporation should have ensured that its selected business partners held ethical credentials better than those of LI. Such assurance could have solely been attained had EMC insisted that the consulting firm duly fill the Statement on Excluding Circumstances of Regulation 49 of the Public Contracts Regulations, 2005 - a statement that the Corporation had included in the main DPS tender. NAO opines

that resort to such assurance should have been made even when the commission was made through a direct order.

3. The involvement of Mr Joseph Mizzi with both BWSC and Lahmeyer International

The Opposition raised serious concerns over the fact that Mr Joseph Mizzi, BWSC's local agent, had represented Lahmeyer International on consultancy services for the Malta Resources Authority. Lahmeyer International was the company engaged by Enemalta Corporation to evaluate the technical bids submitted for the Delimara power plant tender, including that by BWSC.

Serious doubts were also raised by the Opposition as to the connections between Mr Mizzi, BWSC and LI. The Opposition was unconvinced that Mr Mizzi could not have influenced LI's evaluation of the power station bids since he had already collaborated with them on a previous occasion. More concern was raised since BWSC and LI had jointly collaborated on at least another project carried out overseas.

Questioned under oath on the matter, Mr Mizzi denied ever discussing the power station tender with Lahmeyer. He stated that he had represented LI only on one other occasion and that he had no ties with the company after 2007.

EMC senior management stated under oath that *"Enemalta was not aware of the fact as to whether Mr Mizzi was involved with Lahmeyer at the time. … When Lahmeyer were engaged by Enemalta in May 2008 to analyse the proposed flue gas abatement technology, it was under a signed confidentiality agreement. Enemalta contacted Lahmeyer directly and there was no involvement with Mr Mizzi"*.

For record's sake, it should be stated that it resulted to NAO that MRA had granted an extension to Lahmeyer International through a direct order dated 28 September 2009 in connection with additional work to complement the study "Energy Interconnection Malta-Europe". However, as stated above, Mr Mizzi reiterated under oath that he had no ties with LI after 2007.

4. Trading in influence, political interference and criminal offences

During a meeting with the Opposition it was alleged that there seems to be enough 'circumstantial evidence' to reasonably conclude that *"the actions of a number of people involved in the adjudication process"* breached the conditions of Articles 121 and 121A of the Criminal Code (Chapter 9 of the Laws of Malta). According to these Articles, any public officer or employee with a governmental authority or public corporation - or even in a private body corporate - who promises, gives or offers, directly or indirectly, any undue advantage to any other person who asserts

or confirms that he is able to exert an improper influence over the decision making in order to induce such other person to exercise such influence, whether such undue advantage is for such person or anyone else, shall on conviction be liable to the punishment of imprisonment for a term of three to eighteen months.

Although the Opposition made several contentions of potential offences that could be actionable under these Articles, the principal source which prompted allegations of trading in influence was an email submitted by Mr Mizzi to BWSC on 10 May 2005. In the email BWSC's local agent stated *"we need to tap another source higher in the political hierarchy …"*. The Opposition construed this as sufficient evidence that the agent sought to influence in his or his principal's favour the direction of the award of tender through political intervention.

The NAO attempted to corroborate the Opposition's allegations that Mr Mizzi had approached members in the political class to garner favour for his principals. Mr Mizzi was asked several times, under oath, to clarify the message conveyed in this email. On his part Mr Mizzi declared that the email was sent on the instructions of his then employer Associated Supplies Ltd, specifically Mr Joseph Rizzo, and that he did not know to whom the email referred to. During a meeting held at the NAO Messrs Mizzi and Rizzo were confronted on the matter. Mr Mizzi maintained his original stand on the issue. On his part Mr Rizzo said that Mr Mizzi is "a bluffer". Neither provided any evidence as to the intended "higher source". When copies of the email surfaced in the media, the Minister then responsible for Enemalta requested a meeting with the Auditor General and subsequently submitted a statement where he declared that *"it is my personal practice that as a politician I do NOT IN ANYWAY whatsoever, ever interfere in a tender process. This non interference means … absolutely refusing to discuss the tender process with any tenderer or agent or even refusing to accept requests for meetings with tenderer even of a courtesy nature …"*. Minister Gatt emphasised that he had never been approached by Mr Mizzi regarding the tender.

Legal advice obtained by the NAO indicates that, despite the fact that the email does raise certain doubts as to the intent of its content, influencing someone's opinion does not necessarily qualify as trading in influence. The principal element that determines whether such soliciting is illegal - and therefore actionable by law - is whether illicit means were resorted to influence someone's opinion. In fact, the Article clearly lays emphasis on "improper" influence.

Without other corroborative evidence, on its own the statement "tapping higher sources in the political hierarchy" is not considered sufficient evidence of trading in influence. Other than this email, no conclusive evidence was found to substantiate this allegation. Although this Office made extensive queries with BWSC's local agent, his former employer and with the Opposition as to the identity of the "higher sources" referred to in the email, no particular individual or individuals to whom the email referred to was or were identified.

5. Insider Information

The Opposition made several allegations that "inside information" has been leaked by Enemalta employees to BWSC's local agent which gave BWSC "a strategic advantage over other bidders". To substantiate these claims the Opposition produced a number of emails which, the Opposition maintained, clearly revealed that BWSC's local agent had good contacts within Enemalta. In particular, a Corporation's technical officer was named who, according to the Opposition, was Mizzi's main source of information.

The emails handed over by the Opposition indicated that Mr Joseph Mizzi did, in fact, have good contacts within Enemalta - even in view of the considerable years of employment within the Corporation - and that he may have been privy to certain information which was not always available to other interested parties. Mr Mizzi had, for example, known in advance of technical specifications required, of schedules of meetings that Enemalta was holding with other bidders and of an invitation extended to Enemalta's Head of Electricity to visit a power plant in Guernsey. It is to be stated, however, that from our inquiry it transpired that the Engineer involved was not invited by another bidder, as erroneously stated by Mr Mizzi himself in one of the e-mails, but was actually asked to visit the plant in Guernsey by its management board. As one may appreciate, it is practically impossible to establish with a certain degree of certainty whether Mr Mizzi made such statements simply to impress his principals or whether it is true that he had access to such confidential information.

The NAO questioned Mr Mizzi several times on the matter. He claimed that he had never approached any Enemalta officials to obtain information other than that which was publicly divulged by the Corporation. Confronted with a schedule of meetings that he had had at Enemalta, Mr Mizzi stated that these were regular meetings that bidders and their agents ordinarily attend when bids for tenders - especially complex tenders - were made, or meetings which were in connection with other tenders that his principals may have bid for. It is to be stated that an analysis of the information available at EMC regarding persons visiting the Corporation's premises clearly showed that such records are incomplete and unreliable. This raises concern since, considering the security aspect involved, complete and reliable records need to be duly kept of all visitors to EMC without exception or fail.

This Office also questioned on two different occasions the Enemalta technical officer who was identified as Mr Mizzi's main source of information. He categorically denied, under oath, that he had ever divulged any information - other than that openly available - to anyone.

In view of these allegations, the NAO informed Chairman EMC that, in such circumstances, it was deemed appropriate for EMC to conduct those investigations deemed necessary to confirm or otherwise whether any such leakages had actually

taken place. As a result, Chairman EMC subsequently informed NAO *(Appendix 8)* that according to an internal investigation which had been carried out, no evidence of such leakages could be traced.

Despite the considerable effort made by this Office, it was impossible to unequivocally identify the source or sources of such information.

6. Contacts at the Department of Contracts

Allegations were made by the Opposition that Mr Joseph Mizzi was a frequent visitor at the Department of Contracts, especially at a time when a change in the local legislation specifying emission levels would have benefited BWSC's bid in making it more easily compliant with the limits specified therein. The Opposition also named an officer who, it was alleged, was often "pestered" by Mr Mizzi on progress regarding the issue.

When queried by this Office Mr Mizzi categorically denied ever putting pressure on officials at the Department of Contracts to expedite the change in legislation or that he had incessantly harassed any official on the matter.

The NAO also questioned the officer - a former high-ranking Contracts officer - indicated by the Opposition on the matter. He declared that *"… I recall that Mr Mizzi, on one particular visit to my Office, among others he requested, referred me to an Invitation to Tender issued by Enemalta Corporation that, in his opinion, was drawn up to exclude his principals from bidding. I remember that I discussed with Mr Mizzi the Public Contracts Regulations with particular reference to the Articles ensuring non-discrimination and equal opportunity to be afforded to all prospective bidders. In view of his complaint, I subsequently contacted Enemalta Corporation and formally requested that, within the parameters of related legislation, published tender documentation was to reflect such principles. I cannot state with any amount of certainty that the complaint was in respect of the Enemalta Corporation published Invitation to Tender for 'Local Generating Capacity', the subject matter about which I am making this declaration …"*.

In view of this evidence, the NAO could not pursue the matter any further.

CONCLUSION

Having scrupulously analysed all information acquired in connection with these allegations, the overall conclusion reached by the National Audit Office was that no hard evidence is available to substantiate these allegations. This does not mean that the content of some of the emails sent by Mr Joseph Mizzi is not cause for concern, especially in so far as the way how certain restricted information seems to have been obtained from EMC. However, all available emails were made prior to the tendering

process under investigation - no evidence of similar correspondence after the commencement of the process is available. Moreover, NAO maintains that these allegations raise serious doubts and concerns, more so in those cases where insufficient explanations were given during the course of the inquiry which could dispel such concerns. Indeed, it was felt that the evidence given by certain stakeholders, especially Mr Joseph Mizzi who was summoned by the NAO on three separate occasions, tended to be somewhat evasive, sometimes bordering on non-collaboration, very often citing lack of memory when confronted with certain direct questions.

CHAPTER FOUR: CONTENTIONS MADE BY BATEMAN LITWIN

Ido Hutny Projekt A.S. and Bateman Energies B.V. (later becoming Bateman Litwin) was one of the six original bidders who had submitted a proposal in response to EMC's call for tender in February 2007.

On 13 May 2009, Bateman Litwin's local legal representative contacted the Chairman of the Public Accounts Committee formulating a number of complaints and assertions and claiming that the decision to opt for diesel engine combined cycle fuelled by heavy fuel oil was not in the national interest. The communication also expressed doubts on the regularity of the tendering process.

This communication was one in a series of claims made to various authorities and in various forms by Bateman Litwin, their local legal representative and other agents of the company. At the same time it is to be noted that Bateman never submitted any formal appeal to the Department of Contracts either throughout or after the adjudication process, or followed up its judicial protest with legal action to seek redress.

The outcome of the communication addressed to the Chairman Public Accounts Committee was essentially a PAC sitting, held on 26 May 2009, during which various aspects of the tendering process were explained by officials from Enemalta Corporation, the Ministry responsible for Finance and the Department of Contracts. Relative minutes of aforesaid PAC meeting are shown at Appendix 9.

Following the discussion that ensued, the Committee unanimously instructed the Auditor General to investigate the tendering process. On 26 May 2009, the AG confirmed that the NAO would be carrying out an inquiry with the scope of determining "whether the tendering process has been regular and whether financial regulations have been adhered to". A copy of this communication features as Appendix 2.

This section of the Report deals with the interactions between the various key players and Bateman Litwin throughout the tendering process, and includes communications exchanged between, and a meeting held with, NAO officials during the course of the inquiry.

The following is a chronological representation listing the more salient of these interactions.

Year	Date	Interaction
2008	31 May	Bateman's legal advisers write to EMC, copying DoC and MITC, protesting that EMC has left Bateman out of its negotiations
	2 June	EMC replies to Bateman stating that no offer has been excluded

2008 (cont)	16 July	Bateman-commissioned representative meets officials at the Malta Permanent Representation in Brussels
	16 July	Allegations of a non-equitable tendering process and a lack of transparency
	22 July	Malta Permanent Representation, Brussels conveys 16 July meeting message to MITC and MFEI
	23 July	MITC emails DoC - advices that DoC is the owner of the tendering process and as such should take action as necessary
	23 July	DoC replies to MITC - decides that no action is to be taken on the basis of the 16 July allegations
	16 December	BWSC, MAN and Bateman are to be invited to submit financial bid
	17 December	GCC publishes notice as per 16 December decision
	22 December	Successful faxing of notice by DoC to Bateman's local legal representative
	23 December	Expiry of the appeals lodgement period as per GCC notice of 17 December
2009	2 March	Bateman's legal adviser writes to OPM complaining of possible resort by EMC for a DECC running on HFO
	3 April	Publishing of Contract Award Notice (CAN)
	28 April	Bateman writes to EMC enquiring about progress of tendering process
	4 May	EMC replies to Bateman informing them of the CAN, and that the appeals period had expired
	4 May	Bateman's legal adviser complains to EMC - claims the right of appeal was prejudiced when they had not been informed of the award in time
	5 May	EMC refers Bateman to the Appeals Procedure as published in the ITT; stress that DoC and EMC have abided by legal requirements
	11 May	Bateman's legal adviser writes to EMC - negates EMC's claim of 5 May; refers to non-compliance with Article 1.19 of the ITT
	18 May	EMC reiterates that the process is considered concluded
	25 May	Legal protest by Bateman - complaining that EMC had chosen BWSC as preferred bidder
	15 June	Legal counter protest by DoC, EMC, MFEI and MITC - Bateman's proposal would have resulted in higher tariffs
	3 July	NAO requests Bateman to furnish submissions pertinent to the inquiry
	31 July	Bateman sends NAO a list of three main claims relating to alleged inequity in the tendering process
	17 August	Bateman visits NAO and presents a list of five claims, elaborating on the three claims described in the 31 July communication

2009 (cont)	13 October	NAO requests Bateman to substantiate claim that financial calculations favoured DECC technologies
	25 October	Bateman provides workings and explains assumptions made to substantiate the claim that EMC workings favoured DECC technologies
	24 November	Bateman sends NAO new workings based on operation on liquid fuels only
	27 November	NAO writes to Bateman requesting supporting workings for the firm's claims of 24 November
	3 December	Bateman provides workings of its 24 November claim to NAO
2010	1 February	NAO replies to Bateman's claims in connection with financial calculations made by Bateman
	9 February	Bateman replies to NAO's communication of 1 February
	12 February	NAO informs Bateman that all points raised by Bateman will be considered by NAO in its report

Table 6: Chronological representation of Bateman Litwin's interactions

As may be noted from the above table, throughout the period 2008-2010, Bateman raised various issues, diverse in nature. These issues are listed hereunder, each issue accompanied by relevant NAO findings, comments and opinion as necessary. It is pertinent to note that, in arriving at its position, NAO resorted to the services of professionals in legal and in technical matters. In analysing Bateman's claims, NAO was guided by, and adhered to, the established terms of reference, namely to focus solely and exclusively on assessing the regularity of the tendering process and to determine whether financial regulations had been adhered to.

31 May 2008 - Letter from Bateman's local legal adviser to EMC, copied to Minister MITC and DoC

This letter lodged a complaint, based on information received by Bateman Litwin, that EMC had initiated or was about to initiate direct negotiations with two of the three bidders, leaving out Bateman.

2 June 2008 - Letter from EMC to Bateman's local legal adviser, copied to Minister MITC and DoC

EMC informed Bateman that none of the three bidders had, in fact, been excluded.

As this complaint was eventually addressed to NAO by Bateman in the latter's communication of 17 August 2009, NAO's findings and opinion on the matter feature below, accompanying the pertinent extract from Bateman's letter to this Office.

16 July 2008 - Meeting held between a Bateman agent and Attachés from the Maltese Permanent Representation Brussels

This meeting was a message of protest, on behalf of Bateman, and covered various issues related to the tendering process. The more salient are:

- the 2008 changes in legislation, on the basis of which emissions for diesel engines (solely) was changed, followed by an allegation that such a change skewed the tender in favour of companies offering diesel technology;
- an allegation that EMC had already taken a decision to opt for diesel technology;
- queries regarding whether such a choice, triggered by the option to go for cheapest, was sensible in view of "the strong potential of long-term negative effects on the environment with related pollution and health costs";
- the suspicion that any action taken henceforth by EMC would be simply "window dressing"; and
- the lack of an Environment Impact Assessment (EIA) prior to the start of the tendering procedure was potentially in conflict with EU legislation.

22 July 2008 - Email from Permanent Representative Brussels to Minister MITC, copied to various officials including PM Head of Secretariat, PS MFEI and PS MITC

Conveyed the messages delivered as per 16 July 2008 meeting (above) and advised that all issues were to be clarified with EMC before the process moved onto the subsequent phase.

23 July 2008 - Email from Minister MITC to DoC, copied to EMC Chairman, Minister MFEI, PM Head of Secretariat, PS MITC and various officials in the MITC Secretariat

Copied the 22 July 2008 email and advised DoC to "treat as deemed fit" given that owner of the process was the Department of Contracts.

23 July 2008 - Email from DoC to Minister MITC, copied to EMC Chairman, Minister MFEI, PM Head of Secretariat, PS MITC, various officials in the MITC Secretariat, Malta Representative Brussels and PS MFEI

DoC describes the process, at this stage, as a competitive dialogue. The Department also makes reference to the three package tendering model, stating that in accordance with Public Contracts Regulations, the tender in question "will qualify as a three package tender".

DoC continues by advising EMC not to be influenced by the opinion of any of the bidders, each of which had the right to "request pre-contractual remedies from the DoC" should they feel aggrieved after any decision stage.

The Department concludes that, "given the stage reached in this procurement process", no action would be taken on the claims made through the Brussels Permanent Representation.

It has already been established that while a clause in the tender permitted EMC to make the necessary legal amendments according to prevailing EU regulations, another clause expressly forbade EMC from changing technical specifications after the closing of the preliminary bid on 2 October 2007. The changes to specifications came into effect in January 2008. NAO has already expressed its opinion that, by way of best practice, EMC should have stopped the tendering process and re-issued a new call for tenders. Present legislation enables the DoC, as 'supervisor' of the tendering process, to ensure complete transparency and a level playing field by directing EMC to re-issue the tender.

NAO also remarks that Permanent Representative's advice to Minister MITC to clarify the issues in question was referred by the latter to DoC since the Department was the owner of the tendering process.

Without going into the merit of the seriousness and even of the veracity of the allegations, NAO fails to understand the decision of the DoC not to take any action on the communication. Even though, it should be emphasised once again, Bateman never submitted any formal notice of appeal to the DoC as, after all, was its right according to law.

It is also enigmatic to notice that, despite the fact that the structure of the tendering process had been defined since August 2007, with the publication of the ITT, and despite the fact that - quoting *verbatim* - "the stage reached in this procurement process", DoC had only started considering imposing adoption of the three package tendering model at such a late stage.

It is pertinent to note that, while as per the original ITT, it had been determined that negotiations with bidders would be held (and were in fact held) on even the financial offers, the three package tendering model does not allow for such financial negotiations to be held.

16 December 2008 - General Contracts Committee (GCC) decision approving as technically compliant the bids of BWSC, MAN Diesel SE and Bateman.

16 December 2008 - Approval on a technical basis of the three bidders implied that all three were to be invited to (re)submit a financial bid.

17 December 2008 - Publication on DoC notice board and website of the 16 December 2008 GCC decision.

NAO notes that it was the practice at the time for DoC to inform the bidders individually whenever a milestone was reached in the procurement process. Even in this instance, evidence exists that DoC made various attempts to contact Bateman. However, it is evident that for some reason or other contact could not be made, despite the fact that DoC attempted faxing Bateman on five different occasions.

Eventually, DoC faxed a copy of the decision to Bateman's local legal representatives at 15:08 hours on 22 December 2008. It is pertinent to note that the appeals lodgement period for this phase of the tendering process was set to expire at 12:00 hours on 23 December 2008.

While Bateman (or at least their local representative) was in fact contacted before expiry of the appeals lodgement period, and as such it was still technically possible for the firm to lodge a complaint, NAO notes that Bateman's right of complaint was prejudiced, being curtailed from a theoretical four working days (20 and 21 December were Saturday and Sunday) to a mere six working hours.

NAO strongly feels that DoC could have tried to make recourse to other channels of communication to ensure that the tenderer in question was informed in time. Once alternative methods of communicating the decision to Bateman existed (eg email addresses of Bateman officials) and in view of the fact that, before this time, Bateman had made complaints on the tendering process, NAO is of the opinion that DoC should have ensured that all bidders, including Bateman, were afforded the right as contemplated by law to be allowed the full period during which to formulate and present an appeal.

2 March 2009 - Letter from Bateman's legal advisers to the PM, alleging that EMC was favouring DECC technology over CCGT

The letter claims that CCGT technology is cheaper than DECC where capital cost is concerned. It also alleges that, although natural gas was originally intended to be available by 2015, EMC was showing a preference for DECC technologies.

Bateman's legal adviser also complains that, of the financial evaluation period, the years 2008 - 2013 are superfluous and only serve to skew the workings in favour of the DECCs, while after 2015 the use of HFO will not be permissible. The letter further refers to a disregard of environmental policies, stating that these support the change-over to natural gas.

Space-related problems are also addressed, with a particular reference to footprint of the DECCs and the lack of space these would leave for the third phase of the DPS. The letter complains of the lack of an Environmental Impact Assessment determining the feasibility of the proposals prior to contract award.

Excess emissions of DECCs when compared to CCGTs are referred to, as is the fact that the combination of DECC and abatement systems being proposed has never been tested in power plants of a similar capacity. The letter also complains of the changes in emission limits for DECC technologies midway through the tendering process, and urged the PM to look into the matter and to take action as deemed appropriate.

NAO notes that this communication was received at the DoC on 14 May 2009, that is at a time when the tender had been awarded (3 April 2009) but the contract had not yet been signed (26 May 2009). As most of the complaints contained in the letter were eventually referred by Bateman in its correspondence with the NAO, these are analysed and commented upon by the NAO in the appropriate sections below. However, it is pertinent to note that DoC, as in the case of the July 2008 Bateman complaints lodged at the Malta Representative in Brussels, decided to ignore all claims.

3 April 2009 - Contract Award Notice published on DoC website and notice board

NAO notes that, despite Section CC.1.19 in the tender document which stipulated that both the successful and the unsuccessful bidders would be informed simultaneously in writing by EMC, no such notification was sent to the unsuccessful bidders. This issue is deemed relevant for inclusion in this section given that Bateman themselves complained, on a number of occasions, of the fact that they were not notified of the tender award and that such omission prejudiced their right of redress. In this regard, for the record, it should be stated that in their counter-reply to the judicial protest presented by Bateman, EMC and DoC state that the latter's website, on which the tender award notice was posted, recorded more than 2,900 hits during the period during which appeals could be lodged. These hits originated from twenty-six different countries including amongst others Israel, Italy, India, Germany, Hungary, Ivory Coast, Malta and the United Kingdom. Obviously, this fact in no way exonerates EMC of their responsibility to notify all tenderers in writing on an individual basis as clearly established in the ITT.

28 April 2009 - Bateman writes to EMC Procurement and asks for an update on the tender process

4 May 2009 - EMC Procurement Department answers Bateman

EMC's Procurement Department informs Bateman that the GCC recommendation to DG Contracts had been published on 3 April 2009 and that such publication had specified a 10 calendar-day appeals period. This information was posted on the DoC notice-board and website. As no such appeal had been received by the DoC by 13 April 2009, the process had been declared closed *(copy of this communication at Appendix 10)*.

This communication contrasts sharply with EMC's position assumed later. In interviews EMC management had with the NAO, the former expressed an opinion that Bateman's

right to appeal was not prejudiced either when they were not informed on the outcome of the tender process, or by EMC's reply as per above.

EMC bases its argument on Article CC.19.2 which allows any unsuccessful bidder ten calendar days from the date of notification to challenge the award decision, implying that, in effect (and contrary to EMC's own stand of 4 May 2009) Bateman had up to 14 May 2009 during which to submit an appeal.

NAO cannot support this argument for two reasons. Firstly, it was EMC itself, with the 4 May 2009 letter, that assumed an official stand that the ten calendar days appeals lodgement period was to commence as of the date of publication of the (official) tender award notice (namely 3 to 13 April 2009).

Secondly, assuming that individual correspondence with bidders (as was the case with Bateman) triggers a new appeals period, this would be specific to that particular bidder only, and to the exclusion of any other unsuccessful bidder(s) who would not have submitted a similar request during the same period. This, in itself, would disrupt the level playing field that is so fundamental an element of public procurement. Indeed, it would render the tendering period quite chaotic since different duration of appeal periods could apply.

NAO is of the opinion that such an interpretation of the appeals period timing is unorthodox and is neither practical nor impartial. NAO notes with satisfaction that following this incident, this procedure has been revised and all bidders are now being individually informed of such decisions.

4 May 2009 - Bateman's legal adviser replies EMC's email of 4 May

Bateman's legal adviser complains that the process was concluded without Bateman having been advised of the outcome at the appropriate time. Adds that individual notification was called for, keeping in view the resources bidders had invested in the tendering process over the preceding three-year period and were reserving the right to make further representations.

5 May 2009 - EMC answers the 4 May 2009 email

EMC Legal Office refers Bateman's legal adviser to Article CC.1.23 wherein the Appeals Procedure to be followed in case of grievances was described.

EMC states that both DoC and the Corporation had abided with prevailing legislation where publication and the award of contract were concerned, claiming that all allegations put forward by Bateman were unfounded.

11 May 2009 - Bateman's legal adviser rebuts EMC's claims of 5 May

Bateman's legal adviser rebuts EMC's claim that both the Corporation and the DoC had abided with prevailing legislation. Refers to Article 1.19 and related sub-articles of the ITT and to the fact that neither DoC nor EMC adhered to the conditions stipulating that all bidders were to be notified in writing of the tender award.

18 May 2009 - EMC Legal Office replies to the 11 May 2009 communication

EMC Legal Office reiterates its position that EMC and DoC had abided with legislation and that the process was being considered concluded and all due notifications had been issued.

NAO's opinion on this matter has been clearly expressed previously, both in this section (above) and in other sections of this Report. While prevailing legislation was respected, in that the relative decision was posted on the DoC notice-board and website, it surely cannot be stated likewise with respect to the commitment made by EMC in the ITT, through Article CC.1.19 and relevant sub-articles. Hence, the fact that conditions established in CC.1.19 were not met cannot be disputed.

25 May 2009 - Bateman lodge a legal protest citing DoC, EMC, Ministers MFEI and MITC

Bateman claims its offer was the least expensive and was the cleanest environmentally as it used diesel (gas oil) and not HFO. In addition, the plant could use natural gas without extra cost. The protest also claims that such changeover to natural gas was assumed, even in the tender document, to come into effect as of 2015.

EMC and DoC were, however, seemingly about to award the tender to BWSC, a proposal that incurred higher capital costs and extra costs to switch over to natural gas.

Complains that the financial workings as done by EMC are incorrect as these do not take into account the changeover to gas, and compare operation between liquid fuels only.

Refers to the critical lack of space that would result if EMC accepted BWSC's proposal.

Complains that the chosen date of 2008 as start of the financial evaluation period did not make sense as the plant would not be operational by then. Stipulates that such evaluation period should have reflected the 25-30 years' plant expected lifetime, of which only 2-3 years would have been based on liquid fuels, given the anticipated changeover to natural gas; claims that such a model would have shown the Bateman proposal to be the cheapest in cost per kWh.

Speaks of the environmental impact on the south of the Island, and of waste disposal problems which will be encountered with acceptance of the BWSC offer.

Refers to Article 1.19 of the ITT and the various related correspondence and occurrences (covered previously in this section).

Complains of irregularities in the tendering process, wherein at a point in time when the three bids were still valid, EMC had decided to open negotiations solely with the two DECC bidders and states that such a decision was only reversed when Bateman had protested.

Urges EMC, DoC and Ministers MFEI and MITC not to sign the contract and holds them responsible for all damages incurred by Bateman. Requests a revision of the financial analysis to arrive at a decision whereby the Bateman proposal is chosen, given its advantages.

NAO notes the diverse arguments and claims made in the Bateman May 2009 legal protest and which were eventually repeated and expounded upon in communications exchanged between Bateman and the NAO. These have already been analysed and commented upon in the section regarding Enemalta Corporation.

In a more general context, NAO notes that EMC forged ahead with concluding the tendering process by having the relevant contract signed on 26 May 2009, just one day after Bateman lodged its legal protest. One questions the reasons for such undue haste in signing this contract involving a project of this complexity and magnitude.

EMC, DoC and Ministers MFEI and MITC eventually lodged a counter-protest on 15 June 2009, as per below. However Bateman, for reasons known only to itself, decided not to follow up its original judicial protest through further legal action.

15 June 2009 - Legal counter-protest by DoC, EMC and Ministers MFEI and MITC

On 15 June 2009, DoC, EMC and Ministers MFEI and MITC lodged a counter-protest. The following are the more salient counter-arguments raised:

- Ministers MFEI and MITC were not involved in the tendering process.
- Bateman's claims were unfounded.
- Bateman should have opted to resort to default remedies offered by the Public Contracts Regulations in a three package tender.
- The conditions and evaluation criteria had been declared in the original ITT, with which Bateman had been familiar.
- When all costs were taken into account, Bateman's offer was the most expensive, and hence could not be preferred.
- Tender award had been advertised as contemplated by legislation, and the stipulated appeal period allowed with no appeal being lodged.

- The proposed BWSC plant would still leave ample space for the next phase at DPS.
- Waste disposal issues had been catered for.

As in the case of the Bateman 25 May 2009 legal protest, in order to avoid repetition NAO will refrain from commenting on the arguments raised in this counter-protest. All such arguments feature elsewhere in this section and in the section of the Report dealing with Enemalta Corporation.

3 July 2009 - NAO requests Bateman to furnish submissions pertinent to the inquiry

31 July 2009 - Bateman sends NAO a list of three main claims relating to alleged inequity in the tendering process

Through this letter, Bateman initiated a series of exchanges with the NAO, in which the firm was able to put forward its claims and allegations, enabling the NAO to analyse each in the course of its inquiry.

The three claims deal with:

- alleged disruption to the equity of the tendering process brought about by the January 2008 legislative changes in emission limits for diesel engine fired plants;
- EMC's and DoC's failure to inform unsuccessful bidders of the tender award; and
- the limited time available to Bateman to submit an objection following the December 2008 decision to let the CCGT and the two DECC proposals qualify for the next phase.

As all claims are again referred to, and in greater detail, in subsequent documents submitted to the NAO by Bateman, and are described further below in this Report, corresponding analysis and NAO opinion likewise feature below, accompanying the respective claims.

17 August 2009 - Bateman senior officials meet the NAO investigating team and submit a list of five claims together with supporting documentation

Bateman had solicited such a meeting with the NAO. This Office, with a view of ensuring that all reasonable claims - regardless of source as long as strictly related to the Terms of Reference - are duly investigated, agreed to the meeting.

During the meeting, Bateman, accompanied by their local legal adviser, made a verbal presentation of the more salient points and furnished the NAO with a dossier covering five major claims as follows:

(a) Flaws in compliance with bid procedures and change of bid requirement during the bid period:

- Section CC.1.19 and EMC's/DoC's non-abidance with this and related sub clauses, with the consequence that Bateman was negated their right to appeal;

The pertinent sections of the Conditions of Contract state:

(CC.1.19.1) When the full procurement is complete, the Purchaser will notify the successful Bidder in writing that his bid has been successful as well as simultaneously in writing inform the unsuccessful bidders.

(CC.1.19.2) The notification to the successful Bidder implies that the validity of his bid is extended for a period of 60 days from the date of notification of award of contract. Unless there is challenge of the award decision by any of the unsuccessful Bidders within Ten (10) calendar days from the date of notification, the Contracting Authority will send the contract to the Bidder for signature.

Legal requirements were abided with in that the tender award notice was duly placed on the DoC notice board and posted on the Department's website, and that ten calendar days appeals period was allowed.

However it is clear that, through the inclusion of CC1.19.1 and CC.1.19.2 clauses in the ITT, EMC imposed upon itself more onerous responsibilities - namely that of contacting unsuccessful bidders individually, quite apart from the public notifications contemplated by legislation.

It is as clear that through the lack of compliance with the tender provisions in question, a situation could have developed, and Bateman claim it did, whereby a bidder, if unsuccessful, would have missed the publication of the award notice, and would therefore have had his right of appeal negated.

The lack on the part of either EMC or the DoC to contact unsuccessful bidders on tender award seems to have been an administrative oversight on their part. This oversight is all the more perplexing in view of the fact that according to available information it was normal practice for DoC to inform participating bidders individually of progress achieved during the tendering process at each phase, as happened, for example, in the case of the decision following evaluation and adjudication of the technical submissions in December 2008.

It is also considered best practice by the NAO, and is expected by bidders, that once a firm would have invested resources over a considerable period of time (in this instance a number of years) in order to bid and to furnish the contracting authority and/or DoC with the required information and material during the entire bidding period, then such bidders would be individually informed of the outcome on tender award.

- Notification of the technical evaluation stage received by Bateman (24 December 2008) after the appeals period had closed (23 December 2008);

This issue has been addressed previously in this section (under the events of 16 and 17 December 2008). However, in view of Bateman's complaint on the matter, further NAO comments follow:

Bateman's claim that they were notified only after the appeals period had expired is, strictly speaking, incorrect. As indicated previously, DoC had commenced attempts to contact Bateman on 17 December 2008 at 14:37 hours. Following another three unsuccessful attempts on the same day and the following, DoC finally contacted Bateman's local legal representative (who had been authorised as a contact point by Bateman) on 22 December 2008 at 15:08 hours. The Appeals expiry period was 23 December 2008, 12:00 hours.

It is correct to state that, through DoC's failure to inform - in one manner or another - Bateman (or their representative) earlier, the time allowed for Bateman to appeal was extensively curtailed. However, in this instance, such a right was not, as Bateman claim, negated outright.

This point is crucial in view of the fact that this was the one occasion wherein Bateman could have submitted a regular complaint, as contemplated by the Procurement Regulations, basing on their allegations that the January 2008 legislative changes skewed the tender in favour of their competitors and of the many other related allegations.

- Prior to the January 2008 amendments related to emissions for diesel engine fired plants, only CCGT technology could have complied and DECCs should have been disqualified - the changes were only effected to create unfair competition. Furthermore, such a change occurred only two months prior to the Final Bid submission, making it too late for Bateman, who had based their offer only on CCGT, to change to a DECC solution;

Given the technical nature of this complaint, NAO had referred the matter to its technical expert. The opinion expressed follows:

"The offers submitted at the Preliminary Bid stage (October 2007) did not include emission information, hence at this stage EMC could not, on the basis of the tender documents, exclude any offer on the grounds that it did not meet the emission standard."

"The Final Detailed Bid (of March 2008) required the submission of information regarding emissions, but by this time the limits for diesel engines had been reduced."

In addition to the above, EMC claims that:

"The emission limits were changed to those prevalent throughout Europe and not those resulting from an incorrect transposition of the LPCD into Maltese legislation. Had LN

329 not been amended, the bidders proposing Diesel engines could still have attained compliance through the use of more efficient abatement equipment and/or the use of better quality fuel such as grades of marine diesel fuel."

The above proves that, contrary to Bateman's claim that the January 2008 legislative changes were effected only to create unfair competition, such amendments were in fact effected to make Maltese legislation identical to the EU Directive it was transposing. For record's sake it should be stated that EMC had been trying to have the original position corrected since 2005.

Additionally, Bateman's claim that, had LN 329 prevailed, DECCs would not have complied is, as per above, not agreed to by EMC.

Given the 2008 changes, such an argument is rendered academic. Notwithstanding, NAO sought the opinion of its technical adviser:

"Operating DECCs on gasoil (diesel) would have met the limits of LN 329 as far as SO_2 *and dust are concerned, but it seems only just possible that they would have been able to meet them for NOx. Given that EMC found companies that claimed they could supply DeSOx equipment with efficiencies in the range of 95-98%, which might have been sufficient for DECCs with such emission control equipment to meet the LN329 limits, EMC was not in a position to disqualify any of the bidders until the Corporation was supplied with the bidders' data regarding emissions and costs."*

"Of course, the use of diesel instead of HFO in the DECC proposals would have impacted the overall economics of the project, with the end result being a higher cost per kilowatt hour than that for CCGTs running diesel."

In concluding on this particular complaint, it is pertinent to note that Bateman had opted to submit a sole proposal based on CCGT technologies, on the assumption (never made by EMC during the tendering process) that the Corporation would be changing over to natural gas. In not submitting secondary offers based on less expensive options, Bateman disregarded EMC's consistent referral to its objective of obtaining a power plant that, while being technically compliant with prevailing emission-limiting legislation, would supply electricity at the least cost per unit.

- During the bid stage, EMC had decided to continue the process only with DECC bidders and only after protest was Bateman re-considered.

Bateman are referring to the occurrences commencing May 2008 during which EMC had decided *"to hold meetings with the first two ranked bidders, to negotiate their bids (technical and financial) and conclude this process"*.

It is pertinent to note that the original tender structure, based on the negotiated procedure, allowed for a Preliminary Bid and a Final and Detailed Bid to be submitted. The second

submission would contain both technical and financial information and bids submitted would be used by the contracting authority as the basis for negotiation.

Such a process was effectively followed during this tendering process, with the Final and Detailed Bid, containing a technical and financial offer, being submitted by four bidders on 4 March 2008.

On the basis of the offers, EMC must have carried out an evaluative process (of which NAO found no evidence in the pertinent Corporation files) and identified two bidders, namely BWSC and MAN Diesel, as the preferred two bidders basing on the published (technical and financial) evaluation criteria.

EMC states that negotiations with the other two bidders would have only been held had the first set (with BWSC and MAN Diesel) failed.

Bateman, through their local legal representative, had then complained, on 31 May 2008, and DoC had responded on 2 June 2008 stating that none of the bidders had been excluded. Bateman had subsequently raised a complaint, through an agent, with the Malta Permanent Representative in Brussels. In turn, this triggered an internal debate between the key players - DoC, EMC and MITC.

The outcome was that DoC, mid-way through the process - and after the Technical and Final Bid (including the financial offer) had been submitted, and EMC had commenced negotiations with the bidders - insisted that the three package tendering model be adopted. On the basis of this decision, despite the fact that, by 1 October 2008, the EMC Adjudication Committee had, through negotiations, already identified a single preferred bidder, the remainder of the process as contemplated under the structure of the original tender schedule was shelved. DoC's continued insistence on adherence to the three package model resulted in the EMC 1 October 2008 report identifying a single preferred bidder being replaced by a Technical Evaluation (only) report dated 22 October 2008. This report was submitted to the General Contracts Committee and, on the basis of its contents, three bidders (with Bateman ranking first) were deemed suitable to qualify for the next round during which a financial bid would be (re)submitted.

(b) Bid structured in such a manner as to favour diesel engine technologies:

- Until the change in emission limit legislation, Bateman were convinced that the evaluation formula would be irrelevant as DECCs would have been disqualified. However, with the change in legislation, concern arose as to the equity of the formula in that it:

  i. disregards change-over to natural gas, and allows DECCs operating on HFO a clear advantage over CCGTs running on diesel; and
  ii. is modelled on a 25:75 technical:financial ratio.

The allegation that under the LN 329 DECCs should have been disqualified has already been addressed above. Bateman's dependence on such assumption is thus unfounded.

The formula Bateman are referring to pre-supposes a preference - as was always clearly intended by EMC - to that proposal which, while complying with prevailing legislation and with the requested technical specifications, provides electricity at the least cost per unit.

NAO found no evidence that EMC, throughout the entire tendering process, ever stated that a change-over to natural gas would occur. Indeed, bidders' attention was particularly drawn to the fact that the evaluation formula was based on the assumption that for the entire ten-year financial evaluation period, liquid fuel would be used.

This had been accepted by all bidders, including Bateman, and no complaint in this regard was submitted during the tendering process.

In a similar fashion, the modelling of the evaluation criteria on the ratio of 25% (technical) and 75% (financial) is in full and direct support of the established objective of selecting that proposal which, while 100% compliant with specifications, would provide least cost electricity to consumers. These parameters had been likewise declared by EMC in the ITT since the beginning of this process and no bidder had complained up to the tender award.

- Failure by EMC to allocate real costs:

    i. related to waste disposal;
    ii. to account for stoppage during the change-over to gas;
    iii. related to DPS third phase; and
    iv. failure to adjust the time period of the financial evaluation from 2008-2018 when plant operation commencement is scheduled for 2012/2013.

NAO questioned EMC on the issue of waste and its disposal. As at December 2009, EMC's response was that *"the cost of waste disposal was given for the purpose of evaluation as being the same as the cost of disposal of asbestos contaminated waste, which is actually much higher than the current disposal costs of flyash"*.

NAO had, as a separate exercise, requested its technical expert to comment on the validity of the (financial) workings as prepared by EMC, to determine whether all relevant cost items were included at realistic costs. Following are pertinent extracts from the technical expert report:

"The costing exercise is quite comprehensive, and I do not think that any cost has been overlooked, except for perhaps overheads, for which no provision was made. I doubt that this would have made much of a difference to the outcome."

"It seems to me that the exercise was based on realistic figures obtained, as far as I can tell, from real data, including figures submitted by the bidders themselves and to which they were prepared to bind themselves."

NAO likewise questioned EMC on the issue of stoppage to change over to gas. While such a stoppage was indeed required, EMC explained how this would have been scheduled to take place during the 3,000 hours per year during which each machine would have been idle (the evaluation was based on a 5,000 hour operation per engine per annum). EMC claims that conversion to natural gas would take less than two months per engine - equivalent to 1,500 hours - and could thus be easily accommodated within the idle period without affecting plant operation. EMC also claims that there is no need to stop all the plant for such a conversion.

The question of footprint and the space left for the third phase at DPS was also duly analysed by NAO. Questions were made to EMC and technical expertise was sought on the matter. EMC response indicates that:

- the area occupied by BWSC is 4,940m^2 and 1,330m^2 adjacent to the main site, with a further 2,160m^2 of auxiliary area;
- the auxiliary area is reclaimed, and is generally used for ancillary plant, tanks, etc;
- this reclaimed land is not suitable for heavy rotating or reciprocating plant or plant comprising large motor drives;
- installation of BWSC's plant will still leave 6,700m^2 of plant designated area available for future expansion; and
- costs of additional land use were included in the financial analysis.

NAO technical expertise corroborated that the tender evaluation procedure included suitable rewards for smaller footprints, which were spelled out clearly when the ITT was published; commenting that, while these may have been insufficient to tilt the balance in Bateman's favour, the footprint was not the only criterion on which this tender was based.

EMC, through the ITT, had fixed the financial evaluation period for the years 2008-2019. Bateman's contention that this should have been eventually adjusted to commence on 2012/2013 (according to the actual date when the plant would have become operational) would have made no difference, as none of the figures are dependent on the start date of the project.

The only difference this could have possibly made was on the cost of fuel which, given its volatility, may affect the price differential (between HFO and diesel) in either way, without any real predictability.

In addition it is pertinent to note, and Bateman in voicing their complaint seem to find difficulty accepting, that the process with which the contract was awarded was a tendering process, with clearly and previously defined rules and parameters. One such

parameter which was fixed from the start was that, for the purpose of its financial evaluation, the years 2008 to 2019 would be considered by Enemalta. In view of this, NAO considers Bateman's claim in this regard to be unfounded.

- Financial evaluation run by Bateman:

  i. assuming CCGT plant is run on gas as of 2015, Bateman cost per kWh is less than DECC over a life cycle of 25/35 years;

This financial evaluation run, as computed by Bateman, is based on the erroneous assumption (given defined tender conditions) that natural gas would be available in 2015. In addition, it has already been amply explained that, when compiling the tender document EMC opted for a 10-year financial evaluation period, rather than one covering the 25-35 year plant life. On the basis of these, NAO cannot consider the financial evaluation as computed by Bateman as being in line with tender parameters.

(c) Failure to disqualify bids as per prevailing regulations:

- DECC with proposed cleaning systems lacked proven experience:

  i. lack of international references for the proposed combination of De-SO_x and De-NO_x cleaning technologies added to a diesel plant of the requested capacity;

On the basis of technical advice received in connection with this matter, NAO's position is as follows:

EMC was seeking to procure plant that was proven technology, even due to the fact that the Corporation has been operating solely on steam and gas turbine technology for the past twenty years. The introduction of diesel engines plus emission abatement equipment represents new technology for EMC. This notwithstanding, in a tendering process the critical parameters are those set in the tender document specifications. In this instance, the parameters for diesel engines featured in Section MD of the specifications, particularly:

(MD.1.0) Also, details of reference plants working in similar conditions shall preferably be also submitted.

(MD.1.1.2) Evidence of reliability and availability capability shall be submitted by the bidder showing that existing plants are and have been successfully utilising the same engines and their components proposed, together with the exhaust treatment equipment, to meet this specification, using similar fuel and in similar service.

Furthermore, Addendum B of the tender included the following clauses:

Candidates must provide reference data of plant similar to the type proposed for this project. The reference list must include:

iv. Technical description of solution offered including type and configuration of plant and emission abatement techniques; …
vii. Emission limit values achieved during normal operation.

The tender articles reproduced above demonstrate that EMC did request references that were very specific in nature. Both BWSC and MAN submitted a list of references for the proposed DECC-based systems. However, none of the references submitted by either indicate a complete system of engine, De-NO_x, De-SO_x and dust removal equipment. This means that, effectively, neither BWSC nor MAN satisfied this request of the tender document.

This shortcoming needs to be considered in the light of the following tender article:

CC.1.1 Preparation of Bid

CC.1.1.1 The Bidder shall examine all instructions, schedules, forms, terms and specifications in the Technical Specification documents. Failure to furnish all information required by the Technical Specification Documents or submission of the Detailed and Final Bid not being substantially responsive to the Technical Specification Documents in every respect will be at the Bidder's risk and his Bid may be rejected.

EMC's position on the matter was that *"Individually each component of the plant is well proven and established technology. The combination is a prototype, however in their report Lahmeyer confirmed 'compliance with applicable emission limits, through the plausibility checks based on data given by the bidders'. There was no justification to reject the (DECC) bids."*

NAO questions EMC's position on this issue. Indeed, whether the two tenderers should have been disqualified by EMC, even though such requirement was not mandatory, is a moot point. This issue also features in the section dealing with Enemalta Corporation.

- DECC does not meet EMC's requirement of being a feasible option and that similar plant is already in successful commercial dual fuel operation as of August 2007;

The GI.5 Section of the ITT specified that:

"Future operation of generation equipment on natural gas is a long-term consideration for the Purchaser and natural gas is expected to be available on site during the lifetime of the plant …. Therefore, the plant offered shall be capable of being converted to natural

gas firing in the future. The Bidder shall demonstrate that such an option is feasible and that similar plant as the one offered is already in successful commercial dual fuel operation using natural gas and the recommended liquid fuel."

Research by NAO's technical expert revealed that, in the case of the BWSC proposal, the conversion involves altering the engines from model V46 to model V50DF. The manufacturer, Wartsila, confirms that the V50DF *"applies the sophisticated tri-fuel technology incorporated in the reliable and well tried Wartsila 46 HFO engine. It can be run on natural gas, LFO or HFO. The engine can smoothly switch between fuels during engine operation and is designed to give the same output regardless of the fuel".*

In view of the above, NAO technical expert confirms that BWSC complied with the dual fuel operation.

- Both DECC offers should have been disqualified due to their footprint and the lack of space they would leave for the 3rd phase.

The issue of footprint has already been adequately addressed by NAO previously in this section. It was demonstrated (basing on data produced by EMC) that Bateman's claim in this regard is unfounded and that the DECC footprint, for plant and ancillary equipment, will not jeopardise the installation of the DPS third phase. In addition, the financial formula had built-in penalties for increased footprints.

(d) Insider information and unlawful assistance to BWSC by EMC; and

- Reports in the media indicate BWSC received unlawful assistance and insider information.

All allegations that have appeared in the media have been investigated thoroughly by the NAO. Relevant findings, comments, and NAO opinions may be perused in the appropriate section of this Report, particularly that referring to allegations presented by the Parliamentary Opposition.

It results that, without exception, such reports were based on information of events that occurred prior to February 2006, the formal commencement of the tendering process. In fact, such an information trail ended abruptly in October 2005, at a time when EMC was still in the pre-tendering/market exploratory phase.

Thus, no conclusive evidence is available to NAO to substantiate Bateman's claim that BWSC received "unlawful assistance and insider information". However, NAO would like to highlight the fact that confidentiality is to be guaranteed, by law, only during the tendering process proper - in fact, exchanges of information between the (prospective) buyer and (interested) contractors are considered good business practice especially in this instance where EMC opted to go for an open technology tender.

(e) Inconsistencies in electricity generation - Official position versus DPS tender.

- **EMC Electricity Generation Plan 2006-2015**: states that the only configuration that meets emission criteria and is also the most cost effective is CCGT.

- **National Strategy for Policy and Abatement Measures relating to the Reduction of Greenhouse Gas Emissions - Recommendation 21:** states that as a national strategic abatement initiative, natural gas should replace fuel oil for power generation plants.

- **A Proposal for an Energy Policy for Malta - April 2009:** states that the best option for immediate increase in generation capacity is a DECC running on HFO, with further expansion being based on CCGT running on natural gas.

NAO's terms of reference were very specific - whether the tendering process was regular and whether financial regulations had been adhered to. Consideration of the above, of the introduction of natural gas in general, and of the tender in this context is outside the scope of these terms of reference.

13 October 2009 - NAO requests Bateman to substantiate their claim that financial calculations (as worked out by EMC) favoured DECC technologies

25 October 2009 - Bateman provides workings and explains assumptions made to substantiate the claim that EMC workings favoured DECC technologies

- Attempt to recreate the workings as calculated by EMC resulted in obtaining figures that varied by a factor of 1.66;

- A modified set of workings were created, basing on the following assumptions:

  i. change of the evaluation period to 2010-2021 (as against 2008-2019);
  ii. introduction of natural gas as of 2015;
  iii. use of September 2009 CIF prices for HFO and diesel, with the application of price escalation formulae as per tender;
  iv. price of natural gas set at 110% that of HFO; and
  v. reduction in use of reagents and environmental related consumables and an improvement in fuel utilisation due to the usage of natural gas.

- Basing on the assumptions made by Bateman, BWSC and Bateman workings were recalculated - unit costs were established at: 15.29 euro cent (Bateman) and 15.51 euro cent (BWSC). The costs include the 1.66 conversion factor.

- Apart from the financial advantage of the Bateman offer (as per above), the CCGT offer is superior to the DECC one in all respects, including environmental.

One questions Bateman's assumption that natural gas would be introduced by 2015. This incorrect supposition compromised the entire set of workings, not being in line with the parameters established in the tender document and during the tendering process.

In addition, it is pertinent to note that shifting of the evaluation period was similarly not in line with the tender-specified parameters. Similarly, use of September 2009 prices cannot be resorted to. Once EMC carried out its financial evaluation in February 2009, it was impossible for the Corporation to base its calculations on the September (2009) prices.

In effect, EMC based its workings, as had been specified in the tender document, on the prices prevailing in January 2007, with an escalation process plus a correction in the price of HFO to take into account the better-quality fuel.

On the basis of the above, and especially with Bateman's wrong assumption of the introduction of natural gas in 2015, NAO can only declare these calculations as being non-conformant with the parameters specified in the tender document and as such irrelevant for the purposes of the NAO inquiry.

24 November 2009 - Bateman sends NAO new workings based on operation on liquid fuels only

- Reference to the October 2009 evaluation and the assumption of the introduction of natural gas;

- Modification to the Bateman evaluation, based on the following assumptions:

  i. operation on liquid fuels only;
  ii. use of the September 2009 prices as baseline for the evaluation;
  iii. 2012 to 2021 taken as the evaluation period;
  iv. maintenance costs as quoted by MAN used in computing BWSC (maintenance) costs; and
  v. 12 million Euro per annum as waste disposal costs;

- Ratio of Bateman to BWSC cost per unit: 11.95:12.03.

27 November 2009 - NAO writes to Bateman, requesting supporting workings for the firm's claims of 24 November

3 December 2009 - Bateman provides workings of the 24 November claim to NAO

1 February 2010 - NAO replies to Bateman's claims in connection with financial calculations as performed by Bateman

The National Audit Office:

- commented on the non-validity of Bateman's assumptions contained in the 25 October 2009 claim (as per above);
- re-ran the model with Bateman-assumed maintenance costs and new disposal costs. Outcome: BWSC - 14.022 Euro cents versus Bateman 16.823 Euro cents;
- commented on the non-validity of Bateman's assumptions when applying extra costs;
- concluded that, basing on the workings as performed by EMC and the assumptions therein, and adjusting these figures for maintenance and waste disposal costs, still left the BWSC proposal a cheaper one financially when compared to Bateman; and
- opined that the workings as performed by EMC were more within the tender parameters than those of Bateman.

9 February 2010 - Bateman answers NAO communication of 1 February

Bateman put forward a number of complaints, claiming that:

- NAO had only commented on Bateman's claims related to the financial evaluation exercise, and had failed to comment on the other claims;

- the set evaluation period (2008-2019) was unsuitable, and suggested instead a more realistic period starting from 2010 and possibly covering 20 years;

- EMC had not followed the methodology described in the EV Section of the ITT when working the final cost/kWh;

- Bateman was not in possession of all formulae used by EMC to establish Bateman's and BWSC's unit cost prices;

- the financial evaluation was based on historic prices (January 2007). At the time, HFO price was 48% that of Diesel. A better reflection of reality would have been the use of September 2009 prices, when HFO price was 75% that of Diesel. Bateman added this was the reason why, in their calculations of 1 February, extra fuel costs for BWSC were taken as being higher than those for Bateman;

- the footprint issue was not given due consideration by EMC; and

- in order to be in line with EU regulations, an Environmental Impact Assessment should be conducted prior to furtherance of works.

NAO had already, in its communication of 27 November 2009, advised Bateman that this Office could not comment on Bateman's claims in correspondence, but eventually reply to the House of Representatives on the basis of its own independent investigation.
The workings of the financial evaluation were considered, however, as an exception, as the NAO desired to obtain an insight into the methodology supporting Bateman's claims with respect to project financial costs.

The issues of the commencement and span of the financial evaluation period had been previously raised by Bateman. The firm seemingly fails to understand that when dealing with a tendering process, the parameters to be utilised are solely those established within the tender document itself.

NAO investigated the claim that EMC had not adhered to the methodology described in the EV Section of the ITT when computing unit cost/kWh based on the bidders' proposals. The claim is substantiated in that in its calculations EMC discounted the projected revenue while such an operation was not included in the original methodology as detailed in the tender. However, cost calculations run by NAO's technical expert resulted that the same ranking (with Bateman placing third) would be obtained, regardless of whether revenue was discounted or not.

It is considered inappropriate for the NAO to furnish Bateman, or any other third party for that matter, with any formulae as utilised by EMC in arriving at its ranking decision. NAO's terms of reference mandated the Office to evaluate the workings. Such evaluations were carried out and it has already been commented that this Office is of the opinion that, where the financial evaluation is concerned, EMC's model is completely in line with the parameters as specified in the tender. In addition, in instances where Bateman made claims that seemed plausible, NAO took on the extra costs (as proposed by Bateman) and re-ran the model but still ended up with the same ranking (BWSC placing first) as EMC.

The issue of reference fuel prices that should have been taken by EMC when carrying out the financial evaluation has likewise been addressed previously. It has already been explained that given the price volatility of fuels and of the differential between the prices of the different types of fuels (in this case HFO and diesel), shifting of the reference date of fuel prices is bound to give varying outcomes to the financial evaluation exercise. In addition, it has likewise been explained that in a tendering process, the parameters applicable are solely those established in the tender document itself, unless clause(s) specifying updates/changes are included. In the case of fuel oil prices for the purposes of the financial evaluation exercise, this particular tender contained no such option to update or otherwise review the reference prices. This dismisses Bateman's claim.

Bateman's complaint regarding the space occupied by the proposed DECC plant, together with abatement systems and ancillary equipment, has already been addressed. It has been demonstrated that while EMC is negating the claim that installing a DECC as proposed will not leave sufficient space for the third phase extension, the issue of the footprint was one of a number of criteria considered in the evaluation formula.

It is to be noted that MEPA has, up to end March 2010, only issued an Outline Development Permit for the DPS extension. Effectively, this equates to permission by the Authority for usage of the land in question for the construction of a power generating plant.

Reference to MEPA's operating procedures as featuring on the Authority's website reveals that:

- The result of the EIA study informs the decision on a development proposal.

- An EIS, also known as a full EIA, is prepared for larger development projects falling under Category I of Schedule IA of the EIA Regulations. Once the EIS is complete and certified by MEPA, following a process of review, a public hearing is organised. Since the results of the EIS may affect the project's design, there must be a close working contact between the project's architects/designers and the Environmental Assessment Unit.

- An EIS identifies, describes and assesses the:

  i. proposed development project;
  ii. alternatives to the proposed development project (including alternative sites and technologies);
  iii. site and surrounding of the proposed development;
  iv. potential impacts to be generated by the development;
  v. mitigation measures that prevent, minimise or offset any environmental impacts; and
  vi. proposals to monitor the actual effects, should the development take place.

This effectively shows that Bateman's suggestion to have an EIA conducted *"prior to any further development and/or decision with respect to the implementation of the EPC project"* is, in effect, standard practice.

12 February 2010 - NAO informs Bateman that all points as raised by Bateman will be considered by NAO in its report

Given that no new arguments and claims were being raised by Bateman, and that the firm was simply repeating previously raised claims, NAO decided that the best way to proceed would be to take into account all Bateman's claims and to continue investigating them.

NAO informed Bateman of this decision and gave its assurance that the issues raised would be addressed and commented upon in the inquiry Report that would be presented to the House of Representatives.

CONCLUSION

Throughout the period May 2008 to February 2010, Bateman raised various complaints with different institutions and authorities. However, as highlighted above, the firm never availed itself of its rights as accorded to it under the Public Contracts Regulations and decided not to lodge a formal appeal as stipulated by law. Nor did it follow up the judicial process it initiated through further legal action.

In this section of the Report NAO has considered all complaints raised by Bateman. The methods with which these complaints were processed were two:

- in the case of complaints addressed to the various authorities/institutions, NAO limited itself to commenting on the action(s) taken, if any, by these authorities/institutions.

- however, in the case of complaints forwarded by Bateman to NAO, following this Office's formal request (in July 2009) to Bateman for a list of such complaints, as part of the inquiry, these were meticulously analysed, with resort to external technical and legal expertise in support of in-house resources where such support was deemed necessary.

The Office ensured that all such complaints have been addressed and commented upon in this chapter of the Report.

For the record, it should also be stated that NAO is reliably informed that representations were made on behalf of Bateman, through diplomatic channels, with the Maltese authorities.

By way of summarising the outcomes of all complaints addressed to the NAO by Bateman, NAO found justification in one instance - that Bateman were not directly notified in writing as established in Article CC.1.19 of the Invitation to Tender.

CHAPTER FIVE: THE ROLE OF LAHMEYER INTERNATIONAL

In July 2008, Lahmeyer International presented EMC a final report entitled "Emission Assessment of Diesel Generator Units and Combined Cycle Gas Turbines".

The report's Executive Summary stated that:

- LI had executed plausibility checks of the pollutant emission data stated by the bidders, and used these to check for confirmation of emission data stated by the bidders, comparing same with applicable emission limits;

- emission control of DGUs were a combination of SCR, Spray Absorption and Bag Filtration. In the case of CCGTs, the sole emission control necessary was water injection into the burner systems;

- emission control technologies offered by all bidders were considered state of the art, except for MAN's dust removal efficiency. Compliance with emission limits was confirmed through plausibility checks based on bidder-supplied data;

- NOx removal efficiencies as stated by BWSC and MAN were considered extremely high. A suggestion was included to have these confirmed by the bidders, with the provision of reference sites;

- since no international references had been submitted by the DECC bidders for the proposed combination, EMC should include liquidated damages in the contract to be associated with non-compliance with emission limits. LI also recommended that EMC opt for a long-term maintenance and service agreement; and

- fuel analyses available did not include fuel-bound nitrogen. As this could have resulted in exceeded NOx limits during operation, LI recommended that EMC clarify the maximum nitrogen fuel content with the fuel supplier and forward this information to the Bidders for consideration.

Divergences in this report, when compared with the EMC 22 October technical report, and NAO's opinions thereon, feature extensively in the chapter dealing with Enemalta Corporation, as do the actions taken by Enemalta on the basis of LI's consultancy.

This chapter, on the other hand, deals mostly with the business relationship as developed between EMC and LI, together with various related points of interest that became apparent during the course of the inquiry and which was the source of so much controversy that was eventually raised in the local media.

Examination of documentation revealed that LI had sent EMC an unsolicited email, on 16 April 2008, in which the firm had shown interest in the DPS Extension. LI had made an

offer of technical and commercial evaluation assistance to EMC. It is to be noted that this offer came at a time when, as part of its internal process EMC was in a position to analyse the Detailed and Final Bids as submitted by bidders on 4 March 2008, and may have noted that, in the case of DECCs, the proposed bids were lacking the requested complete international references of sites running systems similar to those being proposed. Such information was, at the time, classified confidential as the tendering process was ongoing. Within this scenario, one is more than justified to question whether LI came to know of EMC's need for a consultancy.

EMC initially answered LI on 18 April 2008, by stating that the Corporation would keep the firm's offer for future reference.

Eventually, on 22 May 2008, EMC contacted an LI official who, at the time, was engaged on official business with the MRA, and asked whether it was possible for LI to accept a commission to carry out an evaluation on DECC bids submitted for the DPS Extension[15]. EMC claimed urgency. LI answered by submitting an outline proposal on 26 May 2008. This proposal was accepted in principle on the same day by EMC.

On 27 May 2008, EMC sent a formal acceptance of the proposal and gave LI instructions to commence on the commission. On the following day, EMC issued a formal Letter of Acceptance, HO 30/08 - Consultancy on Emissions. The terms of reference:

"Advisory services for the assessment of emissions diesel generators installed at DPS. The overall objective of the services consist in the performance of plausibility checks in reference to the technical proposals for new power generating facilities, for a total amount of Euro 6,700."

This agreement was eventually extended to cover the proposed CCGTs. A second Letter of Acceptance dated 14 July 2008 engaged LI's services, for a (further) sum of 8,714 Euro, to include an evaluation of the CCGT plants with regard to emissions assessment.

Documentation submitted by EMC does not shed much light on the authorisation process for the engagement of LI. It transpired, through questions asked by NAO, that the EMC Tenders Sub-Committee was responsible for the engagement, which was established by direct order.

Documents supporting the commission, as supplied by EMC, consisted of:

- LI Technical and Financial Proposal for the Emission Assessment of DGUs, dated 27 May 2008;
- EMC Letter of Acceptance dated 28 May 2008;
- LI-EMC Confidentiality Agreement dated 30 May 2008;

[15] It is pertinent to note that, at this stage, EMC was opting to commission the evaluation consultancy only for the two DECC bids.

- LI Invoice amounting to 6,700 Euro dated 17 June 2008;
- EMC (second) Letter of Acceptance dated 14 July 2008[16]; and
- LI (second) Invoice amounting to 8,714 Euro dated 10 July 2008.

NAO noted that at no stage during the engagement process, prior to the issuing of the Letter of Acceptance, did EMC request LI to furnish any statement regarding any incidents in which the firm may have been found guilty of unprofessional conduct, a statement which is commonly requested of suppliers in public procurement.

Had such a statement been requested, it would have transpired that, for a period of time, commencing February 2007, the European Bank for Reconstruction and Development (EBRD) had declared LI ineligible from being awarded EBRD financed contracts. Such debarment was eventually lifted when LI complied with EBRD's recommendation and submitted compliance monitoring reports to the Bank in 2008 and 2009.

In addition, LI was at the time, and still is at present, debarred by the World Bank. This decision had come into effect as of November 2006, extends up to November 2013 and is the result of LI's having been found guilty of corrupt practices. It is further interesting to note that the World Bank had offered LI the possibility to have the period of ineligibility reduced by four years to November 2009, had LI complied with the Bank's advice to implement "an acceptable corporate compliance and ethics program" that cooperated "fully with the Bank in disclosing any past sanctionable misconduct, including through a review of its Bank-financed contracts". According to available information, such offer has, to date, not been taken up by LI.

The NAO questioned EMC regarding the LI engagement. Excerpts from EMC's response to these questions, followed by NAO opinion thereon, follow:

EMC's comments regarding the manner with which the EMC-LI business relationship had commenced (with LI soliciting business, rather than EMC requesting LI's services), were that the relationship had *"indirectly commenced at the time when EMC had cooperated with the MRA in the energy interconnections study carried out by Lahmeyer for the MRA".*

On this matter, it is pertinent to point out that, at the time of the above cooperation between MRA and EMC, Lahmeyer was making use of the services of Mr Joseph Mizzi as a sub-agent for the MRA Interconnector tender[17]. According to Mr Mizzi, his agreement with LI terminated in December 2007, while on its part, EMC states that *"In the latter part of 2007 Lahmeyer accompanied by officials from MRA, gave a presentation to EMC of their capabilities and services they could offer".*

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[16] In error, although LI was evaluating CCGT proposals' emissions, the second Letter of Acceptance again stated that the advisory services being offered were for the assessment of emissions of diesel generators at DPS.
[17] The MRA Interconnector Tender had been awarded to LI in 2006.

On this issue, EMC's comment is that *"Despite EMC's cooperation with the MRA, EMC was not involved in the MRA tender process. EMC was not aware of the fact as to whether Mr Mizzi was involved with Lahmeyer at the time".*

Mr Joseph Mizzi likewise stated, on a number of occasions and also under oath, that in his dealings with LI concerning the MRA tender sub-contract work, at no instance was the EMC DPS tender ever discussed between him and LI personnel.

NAO notes that, notwithstanding EMC's and Mr Mizzi's declarations, there was a period during which EMC had contacts, albeit indirectly, with LI, when the firm's local sub-contractor was the same person who was locally representing BWSC's interests in the DPS Extension tender. It is further pertinent to note that in his role as LI sub-contractor on the MRA (Interconnector) tender, Mr Mizzi was working closely with a particular LI official who was the same official assigned to deal with EMC's request for the emission assessment in the DPS Extension tender.

On the issue of LI's professional misconduct cases, NAO posed the following question to EMC: *"Had EMC requested LI to make a declaration similar to that included as default in public procurement processes, asking bidders to make a declaration stating whether they had been declared guilty of grave professional misconduct?"*

EMC's response: *"EMC did not request LI to make any declarations on the matter since LI had been working for MRA on the study of Energy Interconnections for Malta. Accordingly, it was deemed unnecessary."*

NAO takes a dim view of this approach, and opines that such complacency may lead, as it did in this case, to unnecessary and futile controversy and complications, especially (but not only) in cases where the cost of the project under evaluation is considerable.

NAO also asked EMC whether the Corporation was aware, at the time of the engagement of LI as consultant, that the firm was blacklisted by the World Bank for the period 2006-2013. EMC replied in the negative, an answer that implies that the Corporation needs to intensify its monitoring of events that have (or may have) a direct impact on its operations and projects.

On 13 January 2010, LI sent a communication to the Malta Resources Authority commenting on the "negative statements in the Maltese press regarding service provided by Lahmeyer International GmbH". In their letter, LI:

- gave their version of the events leading to their engagement by EMC and to the eventual submission of the July 2008 Emission Assessment Report;
- commented that in this report BWSC had been ranked third;
- pointed out that BWSC achieved top position only through the financial evaluation, a process in which LI was not involved;

- stated that there was no period of time during which LI had any simultaneous contractual agreements with Typeset[18] and EMC;
- referred to the Confidentiality Agreement signed with EMC and declared that LI had adhered strictly to its terms;
- stated that LI's services were independent;
- negated press statements that LI had received a payment of 100,000 Euro for its services to EMC;
- commented that the World Bank's decision to declare LI ineligible to be awarded Bank-financed projects was based on events that had occurred "some 15 years ago" and that "LI management and the lead staff responsible for the projects are for years no longer employed by LI";
- stated that LI had initiated Compliance Guidelines since several years and had made headway with the EBRD as the latter had fully acknowledged the program; and
- commented that, since the World Bank debarment, LI had contracted successfully internationally a large number of new and important projects.

MITC, in a Press Release on 12 December 2009, likewise commented that:

"Il-kumpanija Lahmeyer kienet biss involuta biss (sic) biex tivverifika jekk dak li qalu l-erba' offerenti fil-proposti tagħhom dwar l-exhaust gas cleaning kienx realistiku jew le. Dan ma jfissirx li l-kumpanija Lahmeyer kellha xi deċiżjoni finali fil-proċess ta' l-għażla." [19]

On this matter, NAO would like to comment as follows:

It is true that LI's advice concerned only technical issues related to the emission assessment of the proposed solutions, and that through the evaluation, BWSC ranked third. This notwithstanding, no one can deny that LI's comments were instrumental in EMC's reaching a decision whereby the Corporation accepted to consider bidders that had quoted prototype combinations rather than complying with the original tender clauses. These had stipulated the requirement for tried and tested solutions that were backed up by references to international sites operating the same equipment (including combinations of generation and abatement systems) as those being proposed.

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[18] Typeset is a company in which Mr Joseph Mizzi holds the post of Director.

[19] This translates to: *LI was only involved in verifying whether what was declared by the four bidders in their proposals regarding exhaust gas cleaning was realistic or not. This does not mean that LI had any say in the final award process.* (NAO translation of Press Release 2150 which was issued only in Maltese).

Evidence of this are the various pertinent tender clauses and the relevant extracts from the LI report, both quoted in Chapter One of this Report, and through EMC's own admission:

"It should be noted that Lahmeyer's terms of reference was to confirm or otherwise the plausibility of the technical flue gas abatement technology proposed …".

Had the bidders supplied international references of the same equipment as that being proposed (as was requested in the Tender Specifications), EMC would have had no need to resort to, as stated in the LI report, *"plausibility checks based on the data given by the bidders"*, thus replacing brick and mortar evidence by theoretical assumptions.

In addition, it is interesting to note that when EMC had drawn up the very detailed 'Evaluation and Adjudication Process' internal document, in February 2007, while the document established the entire tendering process up to Contract Award in a very comprehensive manner, reference to external expertise was restricted to the Legal and Financial advisory fields. The document established that a three-tier system would handle the tender evaluation/adjudication, without recourse to any external technical expertise.

The three-tier system was to comprise the:

a. Short Listing Team;
b. Technical Evaluation Team; and
c. Negotiating and Adjudication Team.

The decision to call in external technical consultancy was taken by EMC, as indicated earlier in this section of the report, on an apparently ad-hoc basis only after the submission and opening of the Detailed and Final bids.

CONCLUSION

In concluding:

- the deliverable of EMC's commission to LI was the July 2008 technical assessment of the four proposed bids with respect to emissions;

- the EMC-LI relationship had been triggered by an unsolicited offer on the part of LI to EMC;

- the engagement was made, on an *ad hoc* basis, via direct order;

- while a confidentiality agreement was signed, EMC failed to run checks on LI's professional reputation and engaged LI's services at a time when the firm was blacklisted by the World Bank for professional misconduct;

- EMC had contacts with LI at a time when the firm's local sub-contractor was the same entity as BWSC's local agent. EMC and this entity both negate that this occurrence impinged in any way on the DPS tender proceedings;

- LI's "plausibility checks based on the data given by the bidders" were accepted by EMC in lieu of the tender-requested international references of sites that were running equipment identical to that being proposed in the tender; and

- NAO opines that for transparency's sake Lahmeyer, engaged as an independent evaluator, should have informed EMC of the fact that it had, between July and December 2000, worked on a project with BWSC which was one of the tenderers being evaluated.

CHAPTER SIX: ADDITIONAL REQUEST BY THE PUBLIC ACCOUNTS COMMITTEE

During a Public Accounts Committee meeting held on the 22 March 2010, the National Audit Office was commissioned to investigate allegations appearing in the Sunday newspaper *It-Torca* of the 14 March 2010 entitled "The 'Missing Link' in the BWSC scandal".

For this purpose the NAO interviewed, under oath, Mr Aleks Farrugia, editor of *It-Torca,* Mr David Spiteri Gingell, Mr Reuben Portanier and Mr Wayne Valentine.

Allegations in *It-Torca*

The main allegations carried in *It-Torca* were the following:

Mr Valentine, in his role as officer responsible for information technology (IT) at Enemalta Corporation, was - as is alleged in the article - in a position to access information pertinent to the tender for eventual transmission to Mr Reuben Portanier, who was described to be on a very friendly terms with Mr Valentine.

Mr Valentine, in his capacity as MITA (Malta Information Technology Agency) official, was seconded to the Lotteries and Gaming Authority (LGA) on the request of Mr Portanier.

The article also alleged that members of Mr Valentine's family carried out works following a direct order issued by LGA.

Interviews by the NAO

With regard to the three main allegations, the NAO asked Mr Farrugia, author of the *It-Torca* article, whether he was in possession of any evidence that could corroborate and substantiate what was alleged in the article. Mr Farrugia replied that he was no longer in a position to furnish such evidence.

When questioned by the NAO, Mr Spiteri Gingell declared that he had requested Mr Valentine's transfer from MITA when he was appointed CEO at EMC as he was lacking resources at the Corporation.

Mr Spiteri Gingell also stated that Mr Valentine had no access to the Delimara power station tender related data and files.

Mr Valentine confirmed Mr Spiteri Gingell's statement that he had no access to any EMC data on DPS. Mr Valentine also confirmed Mr Portanier's statement that he had no relatives who carried out any works at LGA, and that he was paid on a personal basis for extra work at LGA, which work - as declared by Mr Portanier himself - could not be carried out by MITA personnel.

Mr Portanier declared that, although he knew Mr Valentine quite well and that he had known of Mr Valentine's secondment with EMC, he had never discussed any issue related to Mr Valentine's work at the Corporation or to the DPS tender with him. As such, he (Mr Portanier) was not in a position to pass any information related to the tender to his father-in-law, Mr Joseph Mizzi, BWSC's local agent.

CONCLUSION

No evidence was produced to NAO to substantiate these allegations.

APPENDICES

Appendix 1

NAO 56/2009

.incat Anna at HOR

From:	Charles Mangion [cmangion@keyworld.net]
Sent:	13 May 2009 18:03
To:	Brincat Anna at HOR
Subject:	Fw: Delimara Power Station - 100MW plus
Importance:	High
Attachments:	scan20090513134523.pdf

----- Original Message -----
From: Kenneth Grima
To: cmangion@keyworld.net ; ann.brincat@gov.mt ; anne.brincat@gov.mt ; c.mangion@keyworld.net
Cc: Amir Yanai ; Shaul Morgenstern
Sent: Wednesday, May 13, 2009 2:37 PM
Subject: Delimara Power Station - 100MW plus

Dear Carmel,

Further to our telephone conversation of a few minutes ago, I attach herewith for your perusal a copy of the letter I had sent the Prime Minister on the 2nd March, 2009 on behalf of my clients Bateman Hutny which letter is detailed and self explanatory.

Also enclosed are a number of documents which indicate at least to my mind and prima facie an attidude by Enemalta/Director of Contracts which is not in partial and seems to suggest that the whole tender may have been prepared in such a way as to give unlawful advantage to one or more of the biders.

You are no doubt aware that the new Power Station both publically and indeed also in the tender dosier was intended to be fueled by gas come to 2014/2015 and until that date to be fueled by liquid fuel which could be either heavy fuel oil which is cheap but full of pollutants or diesel which is expensive but clean.

It is now apparent that Enemalta and the Director of Contracts are going against their original decision to have the new power station fuelled on gas as of 2014/2015 and in lieu have indicated as the preferred bidder a diesel engine power plant fuelled by heavy fuel oil which takes us back to the fuel presently used by the Marsa power station which is over fifty (50) years old and considered a dinosaur of a power station and the second most polluting power station in Europe.

The preferred bidder's plant occupies a space which is some three to four times larger than that occupied by my clients combined cycle plant making it impossible to "fit" the third stage power station which must be set up when the Marsa power station is closed in 2015.

This would therefore mean that Malta would have to find an alternative site to place the third power station, something this will cause a halla baloo wherever its intended siting is considered. My clients' plant leaves more than enough space even for a possible fourth plant.

Worse, the preferred bidder's power station creates toxic waste of some fifty tons per day besides a further thirty tons of waste which is not toxic but which will still have to be removed from the site with the intended costs involved. The toxic waste, some 18,250 tons per year will have to be sealed and enclosed in special containers and shipped out of Malta to be received by countries who would probably be countries of the third world who may at any time refuse to received future shipments of this toxic waste. Alternatively, this toxic waste would have to be buried in Malta in some dumping site, something which is certainly not in the interest of Malta and its inhabitants.

In the circumstances, I would kindly ask you to go through the material herewith attached and do what you deem appropriate in the circumstances.

Kind Regards,

Yours sincerely,

13/05/2009

218133

Fenech & Fenech
ADVOCATES

2nd March, 2009

The Honourable Prime Minister,
Auberge de Castille,
Castille Square,
Valletta

Dear Dr. Gonzi,

Re Tender for a 100MW Power Generating Plant at Delimara.

I write in my capacity both as legal adviser to Hutny-Bateman, one of the three short listed bidders of the tender under consideration.

Reference is made to the tender in caption which has now practically reached the award stage, at least insofar as our principles are aware, so that, if our information is correct, once the financial offer (Third Envelope Stage) has been officially made and publicized, all the bids have now been sent to the Director of Contracts who will, after looking into the Adjudication Board's recommendations, choose the preferred bidder.

The published financial offers indicate our principals as the cheapest bidders, not only because they are in fact cheaper by some Million Euro 16 in the case of BWSC and by some Million Euros 41 in the case of MAN. In the case of Bateman's bid, since their offer was for a Combin^d Cycle Gas Turbine (CCGT), to BWSC's and MAN's Diesel Engine Combined Cycle (DECC), no further capital expenditure is required to change from gasoil to gas, while in the case of BWSC, for their plant to be converted to gas, an additional Million Euro 27.5 is required, while in the case of MAN, an additional Million Euro 10.220 will necessarily have to be spent. In addition the changes for BWSC and MAN require a long period of time that will impact on the plant capacity.

It is a fact that the original terms of reference for the initial invitation to tender and the subsequent tender was for the supply of a 100 plus MW combined cycle plant which, by not later than 2015, and hopefully earlier, would have to be fuelled by gas and this both because of EU Regulations concerning emissions and also because a gas turbine emits far less CO2, ammonia and sulphur than a /Heavy Fuel Oil (HFO)Oil plant.

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Legal Procurators: • Rowena Grima • Sacha Guillaumier • Katrina Zammit Cuomo External Consultant EU Affairs • Mariosa Vella Cardona

It is also a fact that natural gas costs less than HFO to buy on the market and this to the tune of 3 is to 3.5, while diesel is much more expensive than both HFO and gas and this to the tune of 6.5 to HFO's 3.5 and 6.5 to 3 for gas.

It is furthermore acknowledged in the industry that the dirtiest power station in existence is one which is fuelled on HFO while the cleanest and most efficient power stations in existence, not being nuclear fuelled are those which operate on gas.

This notwithstanding it would appear that the Adjudication Board made up of persons appointed by Enemalta Corporation seem to have preferred going for the 'old type of technology viz. the DECC in lieu of the best available, cleanest, cheapest and cost-effective technology offered by the CCGT, and this on the premise that the cost of purchasing HFO (used in the DECC plant) for the period 2008 up to 2018 will be considerable cheaper than the purchase of diesel/gasoil which is the only fuel, besides gas, that the CCGT system can use until converted to use on natural gas.

The reasoning behind this calculation is completely flawed and should be dismissed out of hand for the following reasons:

1. The New Power Station will certainly not be functioning whether on HFO, diesel/gasoil or natural gas, as on the 1.1.2008, but certainly not before the end of 2012 at best and more reasonable the middle/end of 2013. No fuel will be bought by Enemalta, whether such fuel is Heavy Fuel Oil, Diesel/gasoil or Natural Gas until the plant's start up so that any calculations which may have been made by the Adjudication Board between 2018 and 2013 are both superfluous, irrelevant and indicative only of an attempt to unfairly inflate the costs of operating the CCGT plant on diesel as against the much cheaper but much dirtier HFO until the year 2015 when HFO will no longer be admissible. It is obvious for all to see, except perhaps for the members of the Adjudication committee, that if one has to buy gas oil at more than double the price of HFO from 2008/2010 up to 2015, instead of purchasing same for the period 2012/2013 up to 2015, by which period Malta is supposed to be changing to gas, will very negatively affect the end fuel price analysis when compared to the hefty increase in capital expenditure for both DECC systems to change to gas, something which carries no extra cost when the CCGT starts operating on natural gas. You will recall that the capital costs in the BWSC offer are of an additional 27.5 Million Euro and in the case of MAN, an additional 10.22 Million Euro.

2. The whole adjudication process seems to have completely discarded Malta's and indeed the EU's Environment policy, viz. that by not later than 2015, we are to change to gas and no longer use heavy fuel. Even diesel oil, which is much cleaner than HFO will no longer be looked at favourably to meet environmental targets which will surely and this, is a given, have to be further reduced in the not so distant future, particularly in the light of both International Conventions and EU laws on accepted emission levels. How is it possible to analyze fairly, equitable and in the interest of the Government and people of Malta the contending choice between the CCGT system and the DECC when the CCGT system works at its best and cleanest efficiency on gas, without ever analyzing, evaluating or even considering giving a thought to whether this system is cheaper to operate than the DECC systems. To our knowledge, the Adjudication team never ever carried out a comparative cost study between the CCGT plant operated on gas and the DECC operating on HFO. Without this analysis, one cannot possibly decide on which system is cheaper, more advantageous, better in the long run and environmentally acceptable and preferable and this certainly not until 2018 but way beyond in that our Power Stations are certainly not intended for a life cycle of six or seven years but for well over twenty five years or so. Certainly the Marsa Power Station has been in operation for well over 40 years, while the present Delimara Power Station has been constantly in operation for some 20 years and we are all quite sure that there is no intention to scrap this plant in the very near future. This arguments goes further to indict the decision arrived at by the Adjudication Board, if that is indeed their decision, that because between 2008 and 2018 or 2010, there will be an apparent saving of hundreds of Million of Euros when comparing the price of HFO to be purchased by Enemalta and used in the new plant compared to the much larger (possible double or so) price to be spent on Diesel oil which is the only fuel, besides natural gas, that the CCGT uses, then Enemalta has no other choice but to go for the cheaper fuel (HFO) in lieu of Diesel. As explained, this argument is fallacious in that it is not based on reality nor does it reflect the natural gas alternative which has not even been considered by the Board.

3. The unfairness and unreasonableness of the Board's recommendations, if what we are hearing is indeed true, is further compounded by the fact that the CCGT system needs only a footprint of some 4400 square metres and fits easily in the intended area proposed in Enemalta's proposal as contained in both the Invitation to Tender and the actual Tender, as against what is necessarily demanded by the DECC systems, which must

necessarily take up a much larger area/footprint, not only because there are multiple diesel engines in both DECC offers but also because in order to decrease the enormous amounts of toxic emissions these diesel engines produce, it was necessary to include a number of ancillary machinery equipment which equipment will take an even larger footprint to accommodate; additionally, an added considerable area is further required to house the enormous quantities of sludge and other toxic waste generated by these diesels engines which my clients estimate to be of between 40 and 60 tons daily. It is anticipated that the area required to house the DECC system is some three to four times 270% larger than that required by the CCGT system, an area which is certainly not available to Enemalta, as long as this country still envisages the erection and commissioning of a third plant at Delimara once the Marsa Power Station is decommissioned not later than 2015. Can the country afford to start looking for a new area to site the power station which is to be installed and operational by 2015 in the knowledge that there is no local council that will accept the housing of an additional new power station within the precincts of their particular town or village, still less are our environmental NGOs, Nature Trust, Heritage Malta, Bird Life, the Ramblers Society, etc. etc. going to leave any stone unturned to scupper any attempt on Government's part to house a new power station in a site not already committed for that scope, as is Delimara It could be argued that Government may choose to install this additional new power station on the Marsa site however this area has already been earmarked for development in accordance with the Harbour Plan.

4. The situation is further compounded in that to date, no Environment Impact Assessment has been made on the feasible of installing the DECC plant when the area to be occupied by same is many times larger than that originally required by Enemalta in its Invitation to Tender and the actual tender itself, so that it would, to my mind be foolhardy for Government to award the tender to that tenderer who requires an area some 400% larger than that required by the CCGT plant, which area must necessary accommodate daily amount of noxious waste of some 40 – 60 tons, which waste must necessarily be kept for some time on the site until shipped overseas, with the intendant risks that this would cause not only to the persons working with Enemalta, but also, and perhaps principally to the residents of B'Bugia and M'Xlokk, besides the thousands of tourists who daily visit our only fishing village. What will happen, one may ask, if the tender is duly awarded to one of the DECC offers and the result of the EIA concludes that either of these plants do not pass the EIA? Would

Government not be liable in damages, besides losing face both locally and internationally if, after having decided on awarding the tender to one of the DECC systems, no go ahead is given from the competent authorities? Again, where would such a choice leave Government and Enemalta knowing that the most toxic and environmentally degraded choice in lieu of the cleanest, most modern and efficient technology, was made when : a) it is a fact that statistically, Malta ranks highest in the EU when it comes to asthma in children and adults; b) that the only reason why the choice for the dirtiest option was taken was solely based on the lower cost of fuel considered only short-sightedly and in the very short term; and c) when Malta has over the past several years embarked on and succeeded in defining itself internationally as a country seeking only the best and having managed to do this in the telecommunications field, the I.T. sphere, Malta International Airport, Smart City, Mater Dei, Cruise Liner Destination; as an island nation accepting nothing but the best available state-of-the-art technology? Would this choice not appear to be completely incongruous with Malta's declared aims and aspirations at excellence, particularly in the field of energy, without which none of the above can continue to operate? Would Malta continue to be considered as an area of excellence and a state of the art nation when our energy production is based on "old" technology?

6 It has also been mooted that in the event the award is made to one of the DECC contenders, it would be necessary to extend the height of the present stack by an additional thirty to fifty metres, possibly more, from the present 65 metres, which extension will surely impede on the safe approach by airliners to the runway, something this which will surely bring a chorus of objections not only from the local competent authorities, but also from foreign sources.

7 As already mentioned, the emissions given out by the DECC systems produce a CO2 content appreciably higher than that produced by the CCGT plant, while producing a considerable amount of sludge and other noxious matter. If CCGT will be implemented Malta stands to gain by receiving EU funds for having emissions which would be far less than the EU average instead of possibly being penalized and fined for excess emissions, once these are lowered as they will certainly be in the near future.

8. In addition to what was stated in 7 supra, Malta stands further to gain by having the least possible emissions which are only possible in the CCGT system, by selling (emission trading) this surplus to other EU countries who, without this emission trading, would be

fined and penalized by the EU for having emission levels exceeding the ceiling stipulated. There is therefore a double effect here so that while gaining from the EU for being cleaner, Malta can 'sell' its surplus cleanliness to other for a price. This extra benefit will surely not only nullify any possible higher fuel cost envisaged in the years between, 2012/2013 and 2015/ or even up to 2018, but should enable the island to continue receiving extra funds for much, much longer. Again, these arguments were not only not analyzed or at least considered by the Board, to our knowledge, but completely ignored indicating that the only matter of importance to the Board's collective mind was the cost of liquid fuel. This approach, to my clients' mind is not only short-sighted but irresponsible and short of both business acumen and knowledge of the trade, besides also taking into account the social and political impact of such a decision.

9. Finally, from intensive searches carried out by my principles, it is a fact that the systems offered by both DECC contenders are prototype systems never before used in Europe or elsewhere in a power station of 100MW and over, and therefore previously untested. Certainly in a matter of such vital importance to the future requirements of the country in the energy sphere, it would perhaps not be in the interest of the common good were we, as a country, to accept being treated as the proverbial guinea-pigs and experimented upon.

10. Finally one cannot but reiterate what has already been put forward to the Honorable Minister responsible for Energy Dr. Austin Gatt, the Director General – Departments of Contracts and to the Head of Procurement at Enemalta Corporation – Mr. Francis Darmanin that the Maltese Law on emissions was "strangely" amended midway during the tendering process and therefore after all the technical bids were opened, discussed and evaluated, so that the maximum level of emissions which "a new power station" was to comply with, were inexplicably increased in the event the "new power station" used the "stack" of an "old power station" in which event the "new power station" would no longer be considered a "new power station" and therefore subject to low emissions but would be considered as "an old power station" which has an acceptable maximum emissions level, much higher than that of a new power station. This amendment seems to have been enacted with the only scope of strengthening the bid of the dirtier DECC Power Stations which would otherwise have had to be disqualified as non compliant with the maximum emission terms of the tender requirements.

These amendments and to quote chapter and verse, legal notice no. 2 of 2008 – Chapter 435 of the Laws of Malta (copy herewith enclosed) discriminated unashamedly in favour of a DECC unit operating on heavy fuel oil, so that the maximum emission levels instead of remaining what they were before the amendment, were upped only in the case of heavy fuel oil powered diesel engines from 200 mg/NM^3 to 300 mg/NM^3 in the case of SO^2 (an increase of 175%); from 200 mg/NM^3 to 400 mg/NM^3 in the case of NO_x (an increase of 200%); and from 30 mg/NM^3 to 135 mg/NM^3 in the case of Dust (an increase of nearly 500%). If these amendments were not passed, the tenderers offering the DECC system would have been disqualified. This cannot but be regarded as a change of the proverbial goal post and runs counter to both local and EU Law particularly the directive 2001/80/EC of the European Parliament and of the Council of the 23rd October, 2001, on the limitation of emissions and certain pollutants into the air from large combustion plants.

In the circumstance, I would kindly request you to look into the matter in order to verify the truth veracity or otherwise of what my principals have been led to believe, and to take any action that you may deem appropriate in this regard in the better interest of our island nation, Maltese and European Law and the principals of fair play and contractual responsibility.

My clients and I will naturally be available to meet any person you may indicate in order to give any further details that may be required to be substantiated on their part.

With Regards.

Yours sincerely.

Kenneth Grima

Appendix

Synopsis of the Advantages of a CCGT System as against a DECC System.

- The real and correct maintenance costs for CCGT is cheaper than the similar costs for the DECC. If correct values are applied the difference in maintenance costs is of the order of magnitude of some Euro 140 million, over 20 years of operation and maintenance. This amount of saving could be used for building the next power plant in Malta.

- The Tender Documents, as issued by Enemalta, were prepared in a strange way, not to use a stronger adjective. While describing the availability of natural gas for 2015 or earlier the criteria for bid analyses seem to have been somewhat "prepared not to say pre-prepared" to support the selection of an old technology, non environmental friendly power plant based on Diesel Engines with their obvious and acknowledged disadvantages such as: lower efficiency, larger foot print, much higher level of emissions, non-conformance with the EU environmental regulations, substantial higher costs for maintenance, additional funds and non-operational time for conversion to use of natural gas, larger team needed for operation, need for additional costly FGD-Flue Gas Desulphurisation units.

- The current terms of reference of the adjudication committee, as published in the Tender Documents, contradict the Enemalta's own Electricity Generation Plan for 2006-2015 as published by Enemalta. This document is clearly recommending the CCGT as the best and most efficient solution for the new power plant in Malta.

- The tricky terms of reference used by the adjudication committee have prevented Enemalta to receive valuable proposals for CCGT configuration from many of the reputable OEM-Original Equipment Manufacturers. Bateman has continued their participation to the bidding process being convinced that the final award will be made in line with Enemalta own Electricity Generation Plan, common sense, sensitivity of the national interests of Malta and concerns for the health and well-being of the Maltese population.

- My principals have been informed by some of the OEM that they had decided to decline and not participate in the bidding process due to the unilateral and strange definitions of the terms of reference which in fact were indicating a so-called "pre-selected" configuration. My

principals believe that such approach is against the interests of Malta and do not conform with the EU regulations for open bidding processes.

Bateman
218133.

AMENDMENT AND CLARIFICATIONS TO THE TECHNICAL SPECIFICATIONS DOCUMENT FOR LOCAL GENERATION CAPACITY FOR ENEMALTA CORPORATION GN/DPS/8/2006

SECTION EP

Emissions for Diesel Engine Fired Plant

Due to amendments in the Maltese legislation, the following clarification to the specification is being issued to all Bidders to the tender for Local Generating Plant GN/DPS/8/2006.

Legal Notice L.N. 329 of 2002 has been amended by L.N.2 of 2008. This amendment can be seen at http://www.doi.gov.mt/EN/legalnotices/2008/01/LN%202.pdf

Therefore the emission limits as listed in section EP.2.1 of the specification shall not apply to diesel engine fired plants.

As a result, emission limits for all plants powered by diesel engines and running on liquid fuels, as listed in section EP.2.1 shall now operate to the following emission limits as shown in table EP.2.101 below.

These emission limits are listed in table EP.2.101 without prejudice to any other emission limits applicable to diesel engine plant as listed elsewhere in the specification.

Pollutant	Emission limit Value	Remarks
SO_2	300 mg/Nm^3 (O_2 content 5%)	
NOx measured as NO_2	400 mg/Nm^3 (O_2 content 5%)	
Dust	81mg/Nm^3 (O_2 content 5%)	Unit operating on Gasoil with specification as per clause GI.1.1.1
	135 mg/Nm^3 (O_2 content 5%)	Unit operating on HFO with specification as per clause GI.1.1.2

Table EP.2.101.

It is to be noted that this amendment does not affect the emissions by gas turbine powered and other combustion plant. Therefore for plants powered by gas turbines, or other combustion plant, the emission limits as listed in section EP.2.1 of the specification, are still valid.

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Tender documentation changes

In 2006 ENEMALTA, the Malta state company, issued a tender documentation called Specification GN/DPS/8/2006 inviting Bidders to participate in the competition procedure concerning the construction of New Power Generating Plant to be installed at existing Delimara Power Plant.

The issued tender documentation considered in principle two alternatives of technical solution of proposed Plant:

1) application of Diesel engines

2) application of gas turbines in the system of Combined Cycle.

The main criteria decisive for the alternative selection concern the emissions into the atmosphere/water and price of produced electricity. For the fuelling of the new Plant ENEMALTA proposed two types of fuel:

1) Gas oil – distillate fuel with 0,2 % sulphur (for CC)

2) Heavy fuel oil – heavy fuel with 1 % sulphur (for diesel)

Combined Cycle system with gas turbine represents sophisticated progressive technology environmentally very friendly having a disadvantage in higher price of produced electricity. The application of diesel engines is characterized by the simplicity of primary technology and low price of produced electricity but requires complicated technologies for the treatment of flue gases with the production of very unpleasantly disposable wastes. More to this, the strict criteria of tender documentation limiting the emissions into the atmosphere made the application of diesel engines practically impossible to realize. The main problem makes the emission of healthy poisoning ammonia (2 ppm) in combination with NO_x limit 200 mg/Nm^3.

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Due to these reasons, irrespectively to the advantages represented by excellent diesel engine flexibility and low price based on the low price of Heavy fuel oil (cca 45 % of gas oil price required for the fuelling of gas turbines) all Bidders except MAN (the diesel engines producers decided to propose the alternative with gas turbines.

At the very beginning of 2008 ENEMALTA issued an Amendment to the Tender documentation which principally changed the limits of emissions from diesel engines as follows

		Tender / 3% O_2	Amendment / 5% O_2	% of Tender
SO_2	→	200 mg/Nm^3	300 mg/Nm^3	175
NO_x	→	200 mg/Nm^3	400 mg/Nm^3	225
Dust	→	30 mg/Nm^3	135 mg/Nm^3	500

The limits of emissions for gas turbines were not changed.

New limits for diesel engines make this alternative realistic preserving all its advantages in such a way that the alternative with gas turbines has only negligible chance for success in the bidding procedure.

B 3

Suppliment tal-Gazzetta tal-Gvern ta' Malta, Nru. 18,170, 4 ta' Jannar, 2008
Taqsima B

A.L. 2 ta' l-2008

ATT DWAR IL-ĦARSIEN TA' L-AMBJENT (KAP. 435)

Regolamenti ta' l-2008 li jemendaw ir-Regolamenti dwar il-Limitazzjonijiet ta' Ħrug fl-Arja ta' xi Sustanzi li Jniġġsu minn Impjanti Kbar tal-Kombustjoni

BIS-SAĦĦA tas-setgħat mogħtija bl-artikoli 9 u 10 ta' l-Att dwar il-Ħarsien ta' l-Ambjent, il-Ministru għall-Affarijiet Rurali u l-Ambjent għamel dawn ir-regolamenti li ġejjin:-

Titolu.

1. It-titolu ta' dawn ir-regolamenti huwa r-Regolamenti ta' l-2008 li jemendaw ir-Regolamenti dwar il-Limitazzjonijiet ta' Ħruġ fl-Arja ta' xi Sustanzi li Jniġġsu minn Impjanti Kbar tal-Kombustjoni u għandhom jinqraw u jinftiehmu ħaġa waħda mar-Regolamenti ta' l-2002 dwar il-Limitazzjonijiet ta' Ħruġ fl-Arja ta' xi Sustanzi li Jniġġsu minn Impjanti Kbar tal-Kombustjoni, hawnhekk iżjed 'il quddiem imsejjħa "ir-regolamenti prinċipali".

A.L. 329 ta' l-2002.

Jemenda r-regolament 3 tar-regolamenti prinċipali.

2. Ir-regolament 3 tar-regolamenti prinċipali għandu jiġi emendat kif ġej:-

(a) minflok is-subregolament (2), għandu jidħol dan li ġej:

"(2) Impjanti li joperaw permezz ta' makni tat-tip *diesel*, petrol u gass irrispettivament mill-karburanti użat, m'humiex koperti minn dawn ir-regolamenti."; u

(b) minnufih wara s-subregolament (2) għandu jidħol dan is-subregolament ġdid li ġej:–

"(3) Meta żewġ impjanti ġodda separati, jew aktar, huma installati b'tali mod li, filwaqt li jittieħdu in konsiderazzjoni fatturi tekniċi u ekonomiċi, il-gassijiet mormija minnhom jistgħu, skond ma jkun jidher lill-awtoritajiet kompetenti, jinharġu minn ċumnija komuni, il-kombinazzjoni ffurmata minn dawk l-impjanti għandha tkun meqjusa bħala apparat uniku."

Appendix 2

NAO 56/2009 (8)

National Audit Office
Notre Dame Ravelin
Floriana VLT2000

Phone: (+356) 22055555
Fax (+356) 21220708
E-mail nao.malta@gov.mt
Website www.nao.gov.mt

Auditor General

Our Ref: NAO 56/2009
Your Ref:

26th May, 2009

Hon. Dr. Charles Mangion, LL.D., MP
Chairman
Public Accounts Committee
House of Representatives
The Palace
Valletta

Enemalta Tender for Power Generating Plant at Delimara

Reference is made to the subject in caption, and specifically to copies of correspondence passed to this Office by the Secretary, Public Accounts Committee during the meeting of 13 May, 2009.

It is relevant to point out that the tender in question had in effect, been awarded, as per Department of Contracts Notice dated 3 April, 2009.

The inquiry is still at a very preliminary stage, and although the Office has seen the main documentation held by the Contracts Department, it still needs to make further inquiries and to hold meetings with the players concerned before it will be able to report.

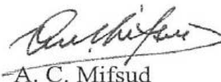
For this reason, this Office at this early stage cannot express an opinion, and has first to conduct more detailed enquiries on various related and more complex issues, replies to which need to be obtained.

It is, in the meantime, felt relevant to point out that, while the function of the Auditor General, in this instance, is to verify the regularity of the tendering process, in particular with a view to safeguard public finance, it is not the function of the NAO to substitute that of the Public Contracts Appeals Board, or for that matter, the Courts of Justice.

Companies/Persons who feel aggrieved by tender awards should proceed to appeal and any enquiry made by this Office is not an alternative route to the established appeals process, both administrative as well as judicial.

The NAO has become aware, through the media, of a judicial protest filed by Bateman against Director General (Contracts), Chairman Enemalta, Minister of Finance, the Economy and Investment, and Minister for Infrastructure, Transport and Communications. This naturally puts constraints on the Office as it should not pre-empt the functions of the Courts, if judicial proceedings are filed, in adjudicating on the matter.

In the prevailing circumstances, the Terms of Reference to be followed in carrying out this inquiry will be to assess whether the tendering process has been regular and whether financial regulations have been adhered to.



A. C. Mifsud

Appendix 3

SCHEDULE 2
Contracting Authorities falling within the competence of the Department of Contracts

MINISTRY FOR INFORMATION TECHNOLOGY AND INVESTMENTS PROMOTION	Permanent Secretary's Office / Department of Corporate Services
	WATER SERVICES CORPORATION
	ENEMALTA CORPORATION
	MALTA NATIONAL LABORATORY
	DATA PROTECTION COMMISSION
	MITTS
	INDUSTRIAL PROJECTS AND SERVICES LTD.
	PRIVATISATION UNIT
	COLLECTIVE BARGAINING UNIT
	MALTA ENTERPRISE
	MALTA INDUSTRIAL PARKS
	GOZO CHANNEL CO LTD

Appendix 4

Enemalta Corporation Specification GN/DPS/8/2006, Schedules CC

CC CONDITIONS of CONTRACT SCHEDULES

CC.1 Statement on Excluding Circumstances of Regulation 49 of Public Contracts Regulations 2005

This declaration, duly completed must be submitted by all Bidders and each member of a Consortium/Joint Venture and returned with the Detailed and Final Bid Submission

Name of Bidder ____

Postal Address ____

____

____

____

Please tick Yes or No as appropriate to the following statements relating to the current status of your organisation. Relevant Documentation is to be included in the offer.

1. The Bidder is bankrupt or is being wound up; or whose affairs are being administered by the court, who has entered into arrangement with creditors or who has suspended business activities or who is any analogous situation arising form a similar procedure under national law and regulations either in Malta or the country in which he is established.

[YES] [NO]

2. The Bidder is subject to proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court for an arrangement with creditors or of any similar proceedings under national laws or regulations either in Malta or in the country in which he is established.

[YES] [NO]

3. The Bidder has been convicted of an offence concerning professional conduct by a judgement which had the force of res judicata in accordance with the laws of Malta or the country in which he is established.

[YES] [NO]

4. The Bidder has been declared guilty of grave professional misconduct proven by any means which the Contracting Authorities can demonstrate.

[YES] [NO]

5. The Bidder has not fulfilled the obligations relating to the payment of social security contributions in accordance with the laws of Malta or the country in which he is established

[YES] [NO]

6. The Bidder has not fulfilled obligations relating to the payment of taxes in accordance with the legal provisions of Malta or the country in which he is established.

[YES] [NO]

7. The Bidder is guilty of serious misrepresentation in supplying the information required under these regulations or has not supplied such information.

[YES] [NO]

8. The Bidder is the subject of conviction by final judgement for one or more reasons listed below:

  a. Participation in a criminal organisation as defined in article 2 (1) of Council Joint Action 98/733/JHA

  b. Corruption, as defined in Article 3 of the Council Act of 26 May 1997 and Article 3(1) of council Joint Action 98/742/JHA respectively

  c. Fraud within the meaning of Article 1 of the Convention to the protection of the financial interests of the European Communities

  d. Money laundering, as defined in article 1 of Council Directive 91/308/EEC of 10 June 1991 on the Prevention of the Use of the Financial System for the Purpose of Money Laundering

[YES] [NO]

I certify that the information provided above is accurate and complete to the best of my knowledge and belief. I understand that the provision of inaccurate or misleading information in this declaration may lead to my organisation being excluded from participation in future bids.

Bidders who have been guilty of making false declarations will incur financial penalties representing 10% of the total value of the contract being awarded. The rate may increase to 20% in the event of a repeat offence within five years of the first infringement

SIGNATURE:______________________________

NAME & SURNAME__________________________

DATE______________________________________

TELEPHONE NUMBER_______________________

CC.2 Non-Collusive Bidding Declaration Certificate

This declaration, duly completed must be submitted by all Bidders and each member of a Consortium/Joint Venture and returned with the Detailed and Final Bid Submission.

I certify that this is a bona fide Bid and that we have not fixed or adjusted the amount of the Bid or under or in accordance with any agreement submitting a bid for this procurement process.

I also certify that we have not done and we undertake not to do anytime before the hour and date specified for the before the hour and the date specified for the closing of this Detailed and Final Bid any of the following acts:

Communication to a person other than the person calling for those Detailed and Final Bids the amount or approximate amount of the proposed Detailed and Final Bid, except where the disclosure, in confidence, of this approximate amount of the Detailed and Final Bid was necessary to obtain insurance premium quotations required for the preparation of the Detailed and Final Bid.

Enter into any agreement or arrangement with any person that he shall refrain from bidding or as the amount of any Detailed and Final Bid to be submitted.

Offer to pay or give or agree to pay or give, any sum of money or valuables considering directly or indirectly to any person for doing or having done in relation to any other Bid or proposed Bid for the said work any act or thing of the sort described above.

In this Certificate, the word 'person' includes any person, any legal entity and "any agreement or arrangement" includes any such transactions, formal or informal and whether legally binding or not.

SIGNATURE:_______________________________

FOR AND ON BEHALF OF:

____

____

____

DATE_____________________________________

Enemalta Corporation Specification GN/DPS/8/2006, Schedules CC

CC.3 Occupational Health and Safety Waiver and Indemnity Form

Whereas the Director of Contracts and Enemalta Corporation have invited Bids for the above captioned works, and whereas we ______________________ (name of Bidder) are submitting a Bid in accordance with such invitation, I ______________ _________________ (managing director of the Bidding company) confirm that if we are awarded this contract,

- For all intents and purposes at law, we will be responsible to ensure the health and safety obligations in respect of our employees and any third party accessing the site are in full and at all times including the use of machinery and equipment;
- We shall assume full responsibility and accountability regarding the health and safety of our employees and/or our subcontractors including any third parties involved in the execution of this contract
- We shall be bound to conform and comply with Chapter 424 of the laws of Malta (Occupational Health and Safety Act) as well as any other national legislation, regulations, standards, and/or codes of practice of an amendment thereto in effect during the execution of the contract:
- We hereby undertake to indemnify the Purchaser against any liability including judicial and extra judicial costs that may be incurred as a result of any failure on our part to ensure the health and safety requirements as above stated and undertake to effect payment to the Purchaser on simple demand in respect of any such liability.

Signature of Bidder ______________________________

Date____

Enemalta Corporation Specification GN/DPS/8/2006, Schedules CC

CC.4 Insurance Declaration Form

Whereas the Director of Contracts and Enemalta Corporation has invited Bids for the above captioned works and whereas ____________________ (name of Bidder) herein referred to as the Bidder is submitting a bid in accordance with such invitation, we __________________________ (name of insurance agency) confirm that we have examined all the Clauses of this Contract and that should the Bidder be awarded the Contract, we will be issuing the relevant Insurance Policies accordingly.

Furthermore we confirm that such policies will be valid during the course of the works and only released with the issue of the Taking Over Certificate by the Purchaser.

Name of Insurance Agency____

Address____

____

____

Contact Details of Insurance Agent

Name and Surname ____

Telephone Number _________________ Fax Number _______________________

Mobile Number___________________ e-mail address_______________________

Signature of Insurance Agent___________________________

Date______________________________

CC.5 Responsibility Declaration

Please attach here the Declaration of Responsibility. For members of Joint Ventures and Consortia, each member is to provide a separate Declaration of Joint and Several Liability.

Signature ___________________________________

Date____

CC.6 Power of Attorney

Please attach here the power of attorney empowering the signatory of the Detailed and Final Bid and all related documentation.

Signature ___________________________________

Date____

Appendix 5

Extract from LN 177/2005 (174.04)
PUBLIC CONTRACTS REGULATIONS

5. (1) There shall be a Director of Contracts who shall be responsible for the running of the Department of Contracts and generally for the administration of the procurement procedures as laid down in these regulations.

(2) Unless otherwise provided for in these regulations, it shall be the function of the Director of Contracts -

(a) to establish and, or to approve the general conditions of tender documents;

(b) to authorise deviations from standard conditions in accordance with the regulations set out herein and which may be included in tender documents;

(c) to ensure that tender conditions and specifications do not give an undue advantage or disadvantage to any particular tenderer and any person having or having had an interest in obtaining a particular public contract;

(d) to order that a tendering period of any call for tenders referred to in these regulations be extended if he considers such an extension justified by the circumstances of the case;

(e) to vet and approve, with or without modification, tender documents before the same are issued and published;

(f) to ensure that these regulations are observed by all parties involved;

(g) to establish and regulate the procedure to be followed during meetings of the Contracts Committee and Departmental Adjudication Boards, and during the issue and publication of calls for tenders, receipt of offers, opening of bids, adjudication of tenders and award of contracts in accordance with the rules herein set out;

(h) to obtain information from the authorities listed in Schedule 1 to which these regulations apply on the award of contracts whose value is less than €47,000 including but not limited to variation orders, penalties, imposed or remitted, and generally as he may deem necessary in order to enable him to ensure conformity with these regulations;

(i) to approve, where appropriate, as provided in Part VIII, variations which affect the original values of contracts by more than 5 per cent;

(j) to approve extensions in the duration of contracts awarded by him if he considers that circumstances so warrant in the public interest;

(k) to identify and implement appropriate means to enable him to monitor the proper execution of contracts awarded by him and, on the advice of the General Contracts Committee, to impose or remit, as appropriate, penalties and damages due on such contracts;

(l) to institute and to defend any judicial or arbitral proceedings that may be necessary in relation to any contract awarded by him;

(m) (i) to issue calls for tenders and to award period contracts for the provision of equipment, stores, works or services which are of a common use nature for contracting authorities listed under Schedule 2; and

(ii) to periodically notify Heads of Departments of the prices and conditions applicable for, and the procedure to be followed in, the procurement of such equipment, stores, works or services:

Provided that Heads of Departments shall obtain such equipment, stores, works or services directly from the contractor in accordance with such conditions and procedures notified by the Director as provided herein;

(n) to make regulations to award tenders in the name and on behalf of the Government of Malta in relation to contracting authorities listed in Schedule 2,

Provided that the authorities listed in Schedule 2 shall -
(i) draw up the tender documents;
(ii) effect payment of the awarded tender; and
(iii) shall monitor the implementation of the tender:

(o) to publish in the Gazette a notice of all awards of tenders including variations outside the limit of the tender conditions, within six months of their award.

Appendix 6

Extract from LN 177/2005
PUBLIC CONTRACTS REGULATIONS

PART X Functions of the Contracts Committees

80. The Contracts Committees shall:

(a) advise on all matters relating to public contracts, as well as on public procurement of materials, works and services either on their own initiative or on specific issues relating to its functions which may from time to time be referred to it for its advice;

(b) evaluate reports and recommendations submitted by contracting authorities and make definite recommendations for the award of contracts ensuring that the best value for money at the lowest possible cost is attained. In this regard, due consideration shall be given to -
(i) the final cost including financing costs to the contracting authority, and
(ii) the impact of each offer on the recurrent expenditure of a contracting authority;

(c) report any irregularities that may be brought to its notice or that may be detected in the tendering process and make recommendations thereon to the Minister charged with responsibility for the contracting authority concerned;

(d) deal with matters which, according to the contract, have to be referred to the Contracts Committee, and hear and determine disputes between contracting authorities as the case may be, and contractors, arising out of public contracts; and

(e) formally investigate complaints concerning public contracts and procurements and make recommendations thereon:

Provided that such complaints are not the subject of a separate inquiry or investigation by the Director in the exercise of his functions or else have to be heard and determined by the Appeals Board.

Appendix 7

Development Today
Nordic Outlook on Development Assistance, Business & the Environment
Wednesday, April 07, 2010

DT 4-5 / 2010
News
Business
Editorial
Market Update
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TOPICS:
AMC vaccine deal
Forests and REDD
Nordic aid budgets
World Bank corruption
SEKAB biofuel affair
Danes and CDM
Humanitarian space

Danida calls off tender due to over-pricing

Four Danish companies were invited by Danida to tender for a SONABEL power station in Burkina Faso.

As *DT 13/92* reports, after receiving the bids, **Danida** proclaimed them to be betwe above world market prices. This assessment was based on a **World Bank** study of p power stations.

Following its evaluation, Danida gave the firms three days to lower their prices. How **Electric**, **Intertec**, **BWSC** or **Semco** - was willing to drop its price to Danida's sat

The next step would have been to go to international tender. But in the meantime, it another power station instead. The original tender was therefore called off and a nev

"This proves that Danida does not buy Danish when Danish prices are far above wor **Danida**'s **Ole Bircher-Olsen** declared.

September 25, 2007

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Articles

Nordic exports drop in African aid market
DT 3/92 reported on the dramatic decline in Norwegian exports to African aid marl
Read more >>

Giant Swedish hydro project hangs in balance
Development Today's cover story in January 1992 was about the uncertain fate of tl giant hydropower project in Kashmir, Uri Dam.
Read more >>

Expelled diplomat: aid and corruption in Mozambique
An exclusive interview with Lars Wahlund, the Swedish diplomat who was expelled from Mozambique in December 1991, was on the cover of Development Today in February 1992.
Read more >>

Bilateral debt write-off only solution for poorest
Economists at Sida argue in a report entitled "Debt Trap" that the only solution for poorest countries is total cancellation of bilateral debt. (See DT 4/92)
Read more >>

Copenhagen, UN city

The UN Development Program (UNDP) considers expanding its presence in Copenhagen, UNDP Administrator William H. Draper III said in an interview with Development Today 15 years ago. (See DT 5-6/92)
Read more >>

Denmark risks millions rehabilitating VN projects
In April 1992, Development Today reported that following Vietnam's withdrawal from Cambodia, Danida decided to return to Vietnam, which had been the second largest recipient of Danish aid during the late 1970s.
Read more >>

Drastic cuts in Finnish budget for 1993
Decline was expected, but few anticipated that it would be so drastic.
Read more >>

DKK 1.5 billion in Danish supplies and consultancies
These were good times for Danish companies in the aid market.
Read more >>

Norad chief opens doors for Norwegian energy firms
Vietnam, Laos and Nepal were on the travel agenda of Director General Per Grimstad of Norad for his Asia tour in June 1992. (See DT 11/92) Though not priority recipient countries, the three were of interest to Norwegian hydropower and oil companies.
Read more >>

Criticism by Eritrea of Swedish 'Ethiopian lobby'
Eritrea, about to become a recipient country for Swedish development aid, strongly criticises Sweden's past record in Ethiopia and its current behaviour, DT 12/02 reports in July 1992.
Read more >>

No Norad contract for ABB in Tibet
A Norwegian subsidiary of ABB, Elektrisk Bureau, came under fire for its application to Norad for a mixed credit for deliveries to the Yang Zhou Yong hydropower plant in Tibet. (See DT 14/92)
Read more >>

Another fresh face in 'junior minister' post
In a re-shuffle of the government of Gro Harlem Brundtland, Greta Faremo was promoted from Norwegian Development Minister - widely viewed as a low-status post - to Minister of Justice, DT 16/92 reported.
Read more >>

Finnish NGOs launch 'new percentage movement'
Four major Finnish NGOs - Red Cross, Service Centre for Development Cooperation, Finnish Committee for Unicef and Finnchurchaid - criticised the cuts proposed in the budget proposal for 1993, and launched a campaign to bring Finnish aid back up to the level of 0.7 per cent of GNI by 1996. (See DT 17/02)
Read more >>

Disappointed at passive Nordic role in World Bank
While the Nordic countries are often considered to be in the forefront on environmental issues, they lag far behind in the World Bank, according to American environmentalists.
Read more >>

Reflections on Danida's demise
In May of 1991, the independent Danish aid agency DANIDA ceased to exist. Instead, the Danish Foreign Ministry took over responsibility for Danish development assistance, reducing "Danida" to a name on a letter head.

Read more >>

Denmark aims for 1.5 % of GNP aid level
As part of an agreement supported by seven of the eight parties in Parliament, Denmark's aid is scheduled to reach 1.5 per cent of GNP before the year 2000, DT 22/02 reports. This is part of Denmark's response to the Earth Summit in Rio de Janeiro six months earlier.
Read more >>

Social Democrats take helm in Denmark
DT 2/93 reports that the new Social Democrat coalition government in Denmark strengthens the aid portfolio by reinstating Danida as an automous agency.
Read more >>

Sweden, Japan join forces
In January 1993, Development Today reported that Japan and Sweden decided to collaborate more closely in international aid.
Read more >>

Norad contract to Pakistani weapons, drug transporter
A special report in the February 1993 issue of Development Today reveals that a Norwegian aid-financed contract to ABB Nera will benefit a Pakistan Army-controlled organisation known to be involved in transporting weapons and drugs.
Read more >>

FINNIDA chief suspended from WIDER case
FINNIDA's Director General Benjamin Bassin was accused of bad behaviour during a lunch with a candidate for the job of WIDER Institute Director.
Read more >>

Norwegian aid to India's atomic programme
Foreign Minister Thorvald Stoltenberg writes a letter to the Indian government asking for assistance to recover a shipment of Norwegian heavy water that ended up in the hands of the Bhabha Atomic Research Centre, a key institution in India's nuclear weapons programme. (See DT 6/03)
Read more >>

Alcatel loses contracts due to mixed credit rules
Alcatel Telcom Norway has lost contracts in China worth NOK 200 million as a direct result of OECD's new consensus regulations on mixed credits - the so-called Helsinki Package, DT 7-8/93 reports.
Read more >>

Swedish Social Democrats want more tied aid
A committee headed by former Minister Göran Persson calls for a larger proportion of Swedish development assistance to be conditional on recipients buying Swedish goods and services.
Read more >>

Swedes to finance Chilean hyro dam rejected by Norad
The Swedish business aid agency BITS and Norad have taken opposite stances over a hydropower project in Chile. What seemed to be "no way!" in Norway was "no problem!" in Sweden. (See DT 9/93).
Read more >>

SIDA forces consultants to cut fees
In January 1993, the Swedish International Development Authority (SIDA) cancelled all its framework agreements with consultants in an attempt to lower consultant fees. (See DT 11/93)

Read more >>

Swedes critical as Finns, WB enter Lao forestry
FINNIDA has agreed to provide USD 5.6 million in support for a planned World Bank forestry programme in Laos. SIDA and environmentalists are critical of the approach. (See DT 12/93)
Read more >>

Alarm in Denmark over low rate of return on aid
The Danish govnernment is alarmed over the record low rate of return on bilateral aid, and has mobilised its ministries to find ways of increasing procurement in Denmark. (See DT 13/93)
Read more >>

Statkraft, Vattenfall join forces for Laos hydro
A consortium of Nordic companies has signed an agreement with the government of Laos to build a hydropower plant at an estimated cost of USD 270 million. (See DT 14/93)
Read more >>

Danish support to UNDP. Growing Danish purchases
As the third largest individual donor to UNDP, Denmark provides 10 per cent of the agency's budget. (See DT 15/93)
Read more >>

NORAD: 'fox watching geese' in Lao power dam
Heavy criticism of a Norconsult study of the Nam Theun 1/2 hydropower project in Laos has forced NORAD to concede its mistake in relying on a feasibility study made by a company seeking further contracts in the project. (See DT 17/93)
Read more >>

Nordics demand action on UN reform. Cuts pending
UN agencies must take a stand on Nordic UN reform proposals by November 1993 or face more funding cuts. (See DT 18/93)
Read more >>

Swedish aid keeps Ignalina nuclear plant alive
Sweden is providing development assistance to Lithuania that is helping to keep the Ignalina nuclear reactor alive for the time being.
Read more >>

New trust funds to boost Danish supplies
Denmark is ready to put DKK 135 million into the creation of trust funds administered by international finance institutions. (See DT 1/94)
Read more >>

Danish grain silo aid questioned in report
Multi-millions in Danish aid spent on grain silos - 32 storage and drying projects in 18 different countries - are criticised in an evaluation. (See DT 2/94)
Read more >>

Lennart Båge to oversee reforms of IFAD
Assistant Under Secretary at the Swedish Ministry of Foreign Affairs Lennart Båge will play a central role in the long overdue reform of the International Fund for Agricultural Development (IFAD).
Read more >>

Finland's Elisabeth Rehn aims for UNICEF top job
After just losing the Finnish presidential race, Elisabeth Rehn is aiming for the post of Director General of UNICEF. (See DT 4/94)

Read more >>

Thai food master plan to rescue Finland
In a parody of Finnish forestry aid to Thailand, Thai environmentalist Witoon Charoen proposed a "food master plan" for Finland at a seminar in Helsinki. (See DT 5-6/94)
Read more >>

ABB clear winner in Norwegian business aid
The ABB concern is the undisputed champion of the commercial aid league in Norway. During 1986-1992, ABB companies received 51 per cent of NORAD mixed credit grants and 45 per cent of parallel financing grants. (See DT 7/94)
Read more >>

Untapped potential at ADB for Nordic firms
The Asian Development Bank (ADB) procured goods and consultancy services worth more than USD 3.5 billion in 1993, a large part of this in areas where Nordic firms have technology and expertise.
Read more >>

Danish meat producers pressure Aid Minister
Meat and dairy producers in Denmark are up in arms over a decision to shift food aid to WFP from cheese and meat products to wheat and peas. (See DT 9/94)
Read more >>

Danes defy donor fatigue, top OECD aid list
Denmark reported the highest aid level - 1.03 per cent of GNI - among OECD countries in 1993, while other donors' development assistance fell by an average of 10 per cent. (See DT 10/94)
Read more >>

Pangue Dam hot potato for Norwegian Minister
Approval from the Norwegian Agency for Development Cooperation (NORAD) for mixed credits to Kværner and Norconsult for the Pangue Dam in Chile has been delayed for months.
Read more >>

OECD steps up fight against corruption
The OECD Council of Ministers has agreed on measures aimed at curbing the growing practice by Western companies of bribing public officials in Eastern Europe and developing countries as part of doing business. (See DT 12-13/94)
Read more >>

Nordics support Rehn's bid for Unicef top job
Though some say Elisabeth Rehn is destined to lose the battle for the top job in Unicef "because she is a woman and not an American", the Nordics are standing together behind her candidacy. (See DT 15/94)
Read more >>

Danish aid financing hikes commodity prices
A report to the Danish Ministry of Foreign Affairs reveals overpricing by 30 per cent on aid-financed contracts compared to prices for the same commodities purchased on the world market. (See DT 17/94)
Read more >>

Major cuts in Norwegian aid to Tanzania
The Norwegian aid budget for 1995 indicates further cuts in aid to Tanzania. During 1992-5, aid has been reduced by almost 30 per cent.
Read more >>

OECD battle over aid to Pangue dam in Chile

A Swedish-Norwegian aid financing package for the Pangue hydropower project in Chile violates OECD rules for aid disbursement because the project is commercially viable and could have been financed on market terms. (See DT 19/94)
Read more >>

New Swedish agency 'Fenix' rises from ashes
Too many cooks spoil the broth. That is part of why four Swedish aid agencies are being combined into one super-agency, dubbed "Fenix". (See DT 21/94)
Read more >>

Finland inflates refugee costs to squeeze aid
The powerful Finance Ministry has, once again, inflated the estimates for expenses related to asylum seekers in the aid budget for 1995. The "unused" funds are likely to be taken away from the Foreign Ministry later next year. (See DT 22/94)
Read more >>

Sweden drops aid level to 0.87% of GNI
The Swedish Social Democrat government is cutting the aid budget in the 1995-6 fiscal year to 0.87 per cent of GNI, down from 0.93 per cent. (See DT 1/95)
Read more >>

Calls for new balance of power in aid policy
An expert commission appointed by the Norwegian government recommends sweeping changes in Norway's North-South policy. (See DT 2/95)
Read more >>

Appendix 8

CHAIRMAN'S OFFICE

Central Administration Offices
Church Wharf, Marsa MRS 1000 - Malta
Tel: +356 2122 5822 • Fax: +356 2124 2962
e-mail: chairman.emc@enemalta.com.mt

www.enemalta.com.mt

9th October 2009

Auditor General
National Audit Office
Notre Dame Ravelin
Floriana VLT 2000

Dear Sir

Re: NAO Investigation – Enemalta Delimara Power Plant Extension

Further to our meeting of the 5th October, held at your office, following the various allegations made by the media that confidential information has been leaked by Enemalta Corporation's employees prior to the issue of the tender and during the adjudication phase, I would like to inform you that the Corporation has found no evidence that such allegations are true.

Please do not hesitate to contact me for further information you may require.

Yours faithfully

Alexander J Tranter
Chairman

Appendix 9

MALTA

KAMRA TAD-DEPUTATI

KUMITAT PERMANENTI DWAR IL-KONTIJIET PUBBLIĊI
(Rapport Uffiċjali u Rivedut)

IL-ĦDAX-IL PARLAMENT

Laqgħa Nru. 9

It-Tlieta, 26 ta' Mejju, 2009

Stampat fl-Uffiċċju ta' l-Iskrivan
Kamra tad-Deputati
Malta

IL-ĦDAX-IL PARLAMENT

KUMITAT PERMANENTI DWAR IL-KONTIJIET PUBBLIĊI

Laqgħa Nru. 9

It-Tlieta, 26 ta' Mejju, 2009

Il-Kumitat iltaqa' fil-Palazz, il-Belt Valletta, fis-7:06 p.m.

MINUTI

Il-Minuti tal-Laqgħa Nru. 8 li saret fit-13 ta' Mejju, 2009, ġew konfermati.

KORRISPONDENZA

THE CHAIRMAN (Onor. Charles Mangion): Irċevejna ittra mingħand l-Awditur Ġenerali u nitlob lis-segretarja sabiex taqraha.

SKRIVANA TAL-KUMITAT: L-ittra li hija datata 26 ta' Mejju, 2009 u li hija ndirizzata liċ-*Chairman* tal-Kumitat tgħid hekk:

> ***"Enemalta Tender for Power Generating Plant at Delimara***
>
> *Reference is made to the subject in caption, and specifically to copies of correspondence passed to this Office by the Secretary, Public Accounts Committee during the meeting of 13 May, 2009.*
>
> *It is relevant to point out that the tender in question had in effect, been awarded, as per Department of Contracts Notice dated 3 April, 2009.*
>
> *The inquiry is still at a very preliminary stage, and although the Office has seen the main documentation held by the Contracts Department, it still needs to make further inquiries and to hold meetings with the players concerned before it will be able to report.*
>
> *For this reason, this Office at this early stage cannot express an opinion, and has first to conduct more detailed enquiries on various related and more complex issues, replies to which need to be obtained.*
>
> *It is, in the meantime, felt relevant to point out that, while the function of the Auditor General, in this instance, is to verify the regularity of the tendering process, in particular with a view to safeguard public finance, it is not the function of the NAO to substitute that of the Public Contracts Appeals Board, or for that matter, the Courts of Justice.*
>
> *Companies/persons who feel aggrieved by tender awards should proceed to appeal and any enquiry made by this Office is not an alternative route to the established appeals process, both administrative as well as judicial.*
>
> *The NAO has become aware, through the media, of a judicial protest filed by Bateman against Director General (Contracts), Chairman Enemalta, Minister of Finance, the Economy and Investment and Minister for Infrastructure, Transport and Communications. This naturally puts constraints on the Office as it should not pre-empt the functions of the Courts, if judicial proceedings are filed, in adjudicating on the matter.*
>
> *In the prevailing circumstances, the Terms of Reference to be followed in carrying out this inquiry will be to assess whether the tendering process has been regular and whether financial regulations have been adhered to.*
>
> A.C. Mifsud"

THE CHAIRMAN: L-ewwelnett nitlob lill-Awditur Ġenerali kif ukoll lis-Segretarju Permanenti fil-Ministeru tal-Finanzi, l-

Ekonomija u Investiment sabiex jersqu fuq il-Mejda magħna.

Is-Sur Anthony Mifsud, Awditur Ġenerali u s-Sur Alfred Camilleri, Segretarju Permanenti fil-Ministeru tal-Finanzi, l-Ekonomija u Investiment ħadu posthom madwar il-Mejda.

THE CHAIRMAN: Nixtieq nibda billi nitlob lill-Awditur jagħti spjegazzjoni dwar din l-ittra u jekk iltaqax ma' xi diffikultà dwar dak li kien ġie maqbul unanimament f'dan il-kumitat fl-aħħar seduta rigward l-ittra fuq it-*tender* tal-Enemalta.

IS-SUR ANTHONY MIFSUD (Awditur Ġenerali): Diffikultajiet mil-lat ta' bidu ta' *inquiry* ma kienx hemm. Id-diffikultajiet li hemm huma dwar il-fatt li hemm makkinarju eżistenti għal min ikollu xi ilment fuq *tender,* li mid-dehra ma ntużax. Qed nirriferi għall-*Public Contracts Appeals Board.* Il-bieraħ fil-qorti tressaq proċess ġudizzjarju u dik tkompli tikkomplika ftit l-affarijiet għalina. Aħna xorta se nibqgħu mexjin bl-indaġni tagħna imma jekk dawn il-proċeduri legali ma jilħqux jintemmu sakemm aħna niġu biex nippubblikaw ir-rapport, *we envisage* li jkollna diffikultà biex nippubblikawh.

THE CHAIRMAN: Imma dak li kien iddeċieda dan il-kumitat kien appuntu dawn iż-żewġ punti li qanqalt inti, jiġifieri r-regolarità tat-*tendering process* imma aktar u aktar jekk il-*public finance* ġewx imħarsa. Meta ġie mitlub lilkom *to look into the matter* kien appuntu biex naraw kienx hemm xi irregolarità fil-proċess kollu u kemm effettivament il-finanzi pubbliċi qed ikunu mħarsa. Bl-ebda mod ma kien hemm li dan il-kumitat jew intom tieħdu l-funzjoni tal-qorti jew tal-*Public Contracts Appeals Board.* Naħseb li dwar dan hawn qbil.

IS-SUR ANTHONY MIFSUD: Naħseb li jkun tajjeb li wieħed isemmi li dan il-proċess ilu li nbeda tliet snin u huwa diffiċli li aħna, f'għaxart ijiem, naslu għall-konklużjonijiet. Flus *as such* għadhom ma tħallsux imma t-*tender* ġie *awarded.*

THE CHAIRMAN: Imma fuq dawk iż-żewġ għanijiet li għadek kemm identifikajt bħala l-funzjoni tiegħek tħoss li għandek diffikultà biex tkompli sejjer 'il quddiem?

IS-SUR ANTHONY MIFSUD: Le, m'għandix diffikultà biex nibqgħu għaddejjin fuqha.

THE CHAIRMAN: Taħseb li jkollok diffikultà biex tippubblika r-rapport?

IS-SUR ANTHONY MIFSUD: Jiddependi minn kif se jiżvolġi l-proċess ġudizzjarju.

THE CHAIRMAN: Imma l-proċess ġudizzjarju kif jimpinġi fuq il-funzjonijiet tiegħek?

IS-SUR ANTHONY MIFSUD: Għax jekk dan jiġi *followed* b'kawża se jkun diffiċli għalina li aħna nikkumentaw waqt li jkun hemm il-kawża għaddejja.

THE CHAIRMAN: Imma jien ma nistax nifhem kif il-mansjoni tal-qorti li tiġġudika jekk hemmx skop għal danni, u l-mansjoni tiegħek li tassigura li kien hemm *good governance* jidħlu flimkien. Għaliex waħda teskludi lill-oħra? Il-mansjoni tiegħek, kif joħroġ minn din l-ittra u jien naqbel magħha, huwa li tassigura li kien hemm *good governance,* l-amministrazzjoni kienet tajba u trasparenti u r-regoli ġew rispettati u li tesprimi l-opinjoni tiegħek bħala entità parlamentari u kostituzzjonali. Jien ma nistax nifhem kif il-mansjoni tal-qrati – hawnhekk hawn preżenti wkoll l-Avukat Ġenerali biex jagħti parir lil dan il-kumitat – tista' żżomm lilek milli tibqa' miexi fil-linja tax-xogħol li effettivament diġà bdejt.

IS-SUR ANTHONY MIFSUD: Aħna beħsiebna nibqgħu mexjin fil-linja li diġà bdejna.

2

THE CHAIRMAN: Imma allura għalfejn qed tgħid li qed issibha diffiċli biex tagħmel ir-rapport?

IS-SUR ANTHONY MIFSUD: Għax għadna ma nafux kif se jiżvolġu l-affarijiet fil-qorti.

THE CHAIRMAN: Mhux immaterjali kif jiżvolġu? Jekk il-qorti ma tagħtix raġun lil min jagħmel il-protest ma jfissirx li għandu jimpinġi fuq il-konklużjonijiet tiegħek jew viċeversa.

Il-Ministru Austin Gatt.

ONOR. AUSTIN GATT (Ministru għall-Infrastruttura, Trasport u Kominikazzjoni): Biex forsi ngħin id-diskussjoni. Jien naħseb li d-diffikultà prinċipali hija li l-mod kif inhi miktuba l-ittra - u aħna sempliċement irriferejna għall-ittra – hija fformolata f'termini ħafna aktar vasti milli qed issemmi inti. Kieku kellek tieħu dawk bħala *terms of reference* issib li hemm materji li huma purament ta' qorti u lanqas ta' l-avukat ġenerali. Allura jista' jkun li hemm konflitt bejn dak li jixtieq li jsir il-kumitat u l-ittra. Naħseb li jekk insolvu din il-ħaġa, wieħed ikun jista' jimxi aktar 'il quddiem.

THE CHAIRMAN: Dan il-kumitat li jinteressah huma l-mansjonijiet li stabbilixxa l-awditur hawnhekk li huma r-regolarità tat-*tendering process* u l-ħarsien tal-finanzi pubbliċi.

ONOR. AUSTIN GATT: Imma naħseb li dawk huma differenti minn dak li hemm fl-ittra.

THE CHAIRMAN: L-ittra qed tippreżenta ċerti fatti u konklużjonijiet imma mbagħad l-awditur jista' jidħol f'dawn iż-żewġ oqsma partikolari; l-amministrazzjoni tajba, trasparenti u skont ir-regoli tal-proċess kollu.

ONOR. AUSTIN GATT: Allura biex forsi mmexxu nistgħu ngħidu li l-mansjoni tal-awditur hija limitata li jara li fil-proċess kollu tat-*tendering* kien hemm *good governance*.

THE CHAIRMAN: U li l-finanzi pubbliċi, effettivament, ġew imħarsa f'kull aspett tagħhom.

ONOR. AUSTIN GATT: Jekk allura jillimita ruħu għal hekk ... Forsi l-Profs. Refalo li huwa preżenti jista' jgħidilna jekk jistax isir hekk.

PROF. IAN REFALO (Konsulent tal-Awditur Ġenerali): Illum hemm protest ġudizzjarju u ma nafux x'tip ta' kawża se ssir. Naturalment wieħed irid joqgħod attent għax ma jridx jidher li b'xi mod qed jipprova jinfluwenza lill-imħallef għax dik hi l-kwestjoni kollha. Mill-banda l-oħra nifhmu li l-Awditur Ġenerali għandu mansjoni x'jagħmel u jrid jagħmilha, però irid joqgħod attent li waqt li dan ikun qed jagħmel dik il-mansjoni ma jkunx qed jimpinġi fuq ġudizzju ta' ħaddieħor. Illum il-ġurnata x'tip ta' azzjoni ġudizzjarja se ssir ma nafux. Sakemm wieħed jillimita ruħu għal dawk il-parametri ma naħsibx li għandu jkun hemm diffikultà. Aħna rrilevajna li jista' jkun hemm diffikultà imma j'Alla ma jkunx hemm.

ONOR. AUSTIN GATT: Mr Chairman, nixtieq nagħmel suġġeriment. Dan il-kumitat qiegħed iqabbad lill-Awditur Ġenerali sabiex jeżamina l-proċess tat-*tendering* tat-turbina tal-Enemalta li ngħatat mill-aspett ta' *good governance* tal-proċess u l-użu tajjeb – din mhijiex il-kelma preċiża - ...

THE CHAIRMAN: Li l-aspetti kollha involuti saru u saru tajjeb.

ONOR. AUSTIN GATT: Suġġett għall-opinjonijiet legali li jkollu aktar 'il quddiem. Jekk naqblu hekk, nistgħu nimxu?

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THE CHAIRMAN: Imma mbagħad ma narax għalfejn ir-rapport finali li jagħmel l-awditur ma jiġix imqiegħed fuq il-mejda tal-Kamra.

IS-SUR ANTHONY MIFSUD: Irridu noqogħdu attenti li l-*audit findings* ma jinfluwenzawx lill-qorti.

ONOR. ALFRED SANT: Sur President, jien għadni ma nistax nifhem x'inhu l-punt. Il-qorti hija indipendenti u awtonoma jew le? Jekk ikun hemm l-opinjoni tal-awditur ġenerali, mhux b'mod awtonomu u b'mod indipendenti trid tevalwaha l-opinjoni? Jien ma nistax nifhem x'inhuma l-problemi. Qisna qed nitwerwru li l-Awditur Ġenerali se jinfluwenza lill-qorti. L-Awditur Ġenerali għandu l-funzjoni u l-mansjoni tiegħu li se jeżerċitaha u l-qorti għandha l-funzjoni u l-mansjoni li se teżerċitaha. B'liema mod għax l-Awditur Ġenerali jeżerċita l-funzjoni tiegħu se jkun qiegħed, b'xi mod jew ieħor, jinfluwenza lill-qorti jew viċeversa? Bir-rispett kollu qisna qed nitwerwru milli neżerċitaw dak li għandna neżerċitaw skont il-Kostituzzjoni.

IS-SUR ANTHONY MIFSUD: Jista' jkollna sitwazzjoni fejn l-Uffiċċju tal-Awditur jasal għal deċiżjoni u l-qorti tasal għal oħra.

ONOR. ALFRED SANT: *So what!* Jekk l-Awditur Ġenerali għandu l-mansjoni li jasal għal dik id-deċiżjoni u l-qorti għandha l-mansjoni li tasal għal dik id-deċizjoni, x'hemm ħażin fiha din? Imbagħad nimxu 'l quddiem kulħadd skont ma tgħid il-Kostituzzjoni. Din li noqogħdu nipparalizzaw lil xulxin, qisna mantra min-naħa u mantra min-naħa oħra, "din" ma tiċċaqlaqx u "din" ma tiċċaqlaqx u nipparalizzaw liż-żewġ naħat ... Ejjew inkunu serji!

THE CHAIRMAN: Jien naħseb li hawn qbil li l-Awditur Ġenerali jibqa' għaddej fuq il-funzjonijiet tiegħu. Il-konklużjonijiet tiegħek, Sur Mifsud, ovvjament għandek tagħmilhom b'mod komprensiv għax dak huwa l-interess ta' dan il-kumitat imma għandhom jitlestew fi żmien kemm jista' jkun *expedient* għal kollox, anke għall-opinjoni pubblika u biex it-*taxpayer* iħoss li l-finanzi tiegħu qed ikunu effettivament imħarsin skont il-poteri li għandu dan il-kumitat u fil-mansjoni li għandek inti. Ċertament ladarba jkun hemm il-konklużjoni trid tiġi mqiegħda fuq il-Mejda tal-Kamra. Imbagħad l-imħallef, fl-intelliġenza tiegħu, jagħmel il-ġudizzju tiegħu dwar il-każ li ċertament m'għandux ikun influwenzat minn element jew ieħor. Naqblu fuq dan?

ONOR. AUSTIN GATT: Jien ma nistax inpoġġi ruħi fiż-żarbun tal-Awditur Ġenerali; huwa għandu r-responsabbiltajiet tiegħu li ma nistax niġġudikahom jien. Jien naqbel – naħseb li huwa ovvju – ma' dak li ssuġġerejt jien dwar kif għandu jiġi magħmul ir-rapport. Jien personalment jidhirli li m'għandux ikun hemm problema li r-rapport isir, imma l-Awditur Ġenerali huwa istituzzjoni indipendenti, għandu l-pariri legali tiegħu u jrid jeħodhom hu u jerfa' r-responsabbiltà tagħhom. Għalhekk jien ma nistax inġiegħu jippreżenta r-rapport. Nispera li ma jkunx hemm diffikultà u r-rapport jiġi ppreżentat.

THE CHAIRMAN: Mela qed naqblu li nimxu fuq il-linji indikati minnek f'din l-ittra, Sur Awditur, u meta dan ir-rapport ikun konkluż bir-rakkmandazzjonijiet tiegħek, dan il-kumitat u l-parlament iridu jkunu informati immedjatament.

ONOR. AUSTIN GATT: Jien naħseb li s-Sur Camilleri kellu jagħmel indaġni separata mill-awditur, hux hekk?

THE CHAIRMAN: Is-Sur Camilleri.

IS-SUR ALFRED CAMILLERI (Segretarju Permanenti fil-Ministeru tal-Finanzi, l-Ekonomija u

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Investiment): Jien tkellimt mal-awditur imma għamilt ir-riċerka preliminari tiegħi u ġibt lin-nies hawnhekk li kollha huma ppreparati biex iwieġbu għal kull mistoqsija li tista' ssir. Jiġifieri min-naħa tagħna ma nħossx li hemm diffikultà u safejn nistgħu nirrispondu, nirrispondu.

THE CHAIRMAN: Għalkemm l-impressjoni kienet li kemm l-awditur kif ukoll inti, tagħmlu l-*findings* tagħkom flimkien, jekk inti trid tippreżentalna l-*findings* tiegħek, *by all means* tista' tagħmel dan, imma xorta rridu nħallu lill-Awditur Ġenerali jagħmel ir-rapport tiegħu.

IS-SUR ALFRED CAMILLERI: Jien m'iniex qiegħed hawnhekk biex ninfluwenza lill-Awditur Ġenerali jew lil xi ħaddieħor.

ONOR. ALFRED SANT: Il-*findings* tiegħek huma l-*findings* tiegħek! Mhux ninfluwenzaw lil xulxin qegħdin f'dan il-pajjiż! Kullimkien hekk.

IS-SUR ALFRED CAMILLERI: Jien nixtieq li *at this stage* nitlob l-għajnuna tad-Direttur Ġenerali tal-Kuntratti, taċ-*Chairman* tal-*Evaluation Committee*, u taċ-*Chief Technical Officer* tal-Enemalta għaliex naħseb li għandhom kontribut x'jagħtu u jista' jkun li aktar 'il quddiem għandna xi nies oħrajn li skont kif tiżviluppa d-diskussjoni nkunu nistgħu nitkellmu magħhom.

THE CHAIRMAN: Nitlob sabiex dawn il-persuni li għadu kemm semma s-Sur Camilleri jersqu fuq il-mejda.

Is-Sur Francis Attard, Direttur Ġenerali fid-Dipartiment tal-Kuntratti; is-Sur David Spiteri Gingell fil-kapaċità ta' Chairman tal-Evaluation Committee; is-Sur Peter Grima, Chief Technical Officer fl-Enemalta; u s-Sur Pippo Pandolfino, ex-Chief Financial Officer fl-Enemalta, ħadu posthom madwar il-Mejda.

IS-SUR ALFRED CAMILLERI: Sur President, jien dħalt fl-ittra li waslet għand il-*Public Accounts Committee* (PAC) fid-dettall mhux ħażin u slitt il-punti ewlenin tagħha. Fil-fatt il-punti huma diversi; għandek *issues* li huma ta' natura sostanzjali marbutin mal-mod kif ġie ppreżentat it-*tender*, *issues* ta' natura proċedurali, *issues* ta' natura teknika, jiġifieri t-tip ta' impjant, għaliex "dak" u mhux "l-ieħor", u *issues* oħrajn li huma marbutin mal-aspett finanzjarju. Bażikament li għamilt jien huwa li qbadt dik l-ittra u tlabt kemm ir-reazzjonijiet u l-kummenti tad-Direttur Ġenerali tal-Kuntratti kif ukoll tal-Enemalta. Irrid ngħid ukoll li f'dan il-proċess tlabt xi pariri legali mingħand l-avukat tagħna għaliex kif se ngħid aktar 'il quddiem jista' jkun hemm aspetti legali li rridu nidħlu fihom.

Bażikament hemm ċerti dokumenti li huma marbutin intimament mal-proċess tat-*tender* li huma ta' natura kunfidenzjali u allura hemm ċerta dokumentazzjoni li jien ma nistax naraha. Dawn id-dokumenti huma magħluqin fil-*file* tad-Direttorat tal-Kuntratti u tal-Enemalta u mhumiex miftuħin għalija bħala segretarju permanenti tal-ministeru.

Issa se nislet xi punti ewlenin mis-sottomissjonijiet li għamlu Bateman Hutny permezz tar-rappreżentanti tagħhom lill-Kumitat tal-Kuntratti għall-benefiċċju tal-membri tal-kumitat. Imbagħad marbutin ma' dawn għandi s-sottomissjoni tad-Direttur tal-Kuntratti kif ukoll tal-Enemalta u fl-aħħar hemm xi konklużjonijiet tiegħi.

Dak li qegħdin jallegaw Bateman Hutny huwa li l-attitudni tal-Enemalta kif ukoll tad-Direttur tal-Kuntratti ma kenitx imparzjali.

Qalu wkoll li t-*tender* jista' jkun li ġie ppreparat b'mod u manjiera li jagħti vantaġġ illegali lil wieħed jew aktar minn dawk li tefgħu t-*tenders*.

Punt ieħor huwa li l-*power station* il-ġdida – kif intqal pubblikament u fl-ITT – kellha tibda taħdem bil-gass mill-2014/2015 u mhux kif ġie indikat mill-*preferred bidder* - dan huwa x'qed jgħidu huma fl-ittra - permezz ta' magna *diesel* li tieħu *heavy fuel oil.* Din it-tip ta' magna hija kkonsidrata bħala waħda qadima u t-tieni l-aktar magna li tħammeġ fl-Ewropa. Hawnhekk dejjem qed nikkwota x'qed jgħidu huma fis-sottomissjoni tagħhom.

Komplew jgħidu li l-*power station* il-ġdida mhijiex mistennija li tibda taħdem qabel l-aħħar tas-sena 2012 jew qabel nofs l-aħħar tas-sena 2013. Din hija importanti għax fis-sottomissjonijiet, fil-*workings* u fil-*financials* li daħlu fihom l-Enemalta, Bateman Hutny qed jikkontestaw ċerti kalkoli li saru u qed jattakkawhom permezz ta' dawn id-dati li huma indikati hawnhekk. Dawn qed jgħidu li l-kalkoli li saru mill-*Adjudication Panel* dwar ir-*running costs* tagħha bejn l-2008 u l-2013 huma għalxejn u huma ntiżi biss sabiex jgħollu l-ispejjeż sabiex topera l-magna bid-*diesel* u mhux bil-*heavy fuel oil* li xorta jrid jispiċċa sal-2015.

Punt ieħor li għamlu huwa li l-proċess tal-għażla jidher li njora kompletament il-politika ambjentali Maltija u dik Ewropea li jistipulaw qlib għall-użu tal-gass mill-*heavy fuel oil* sal-2015.

Fis-sitt punt hemm li l-Kumitat tal-Għażla qatt m'għamel studju komparattiv bejn impjant li jaħdem bil-gass u ieħor li jaħdem bil-*heavy fuel oil.* Mingħajr dan it-tip ta' studju wieħed ma jistax jiddeċiedi dwar liema sistema hija l-irħas fuq medda ta' snin u liema waħda hija l-aktar ambjentalment aċċettabbli.

Punt ieħor huwa li l-magna li l-*preferred bidder* offra għandha bżonn tlieta jew erba' darbiet aktar spazju mill-magna offruta mill-klijent ta' min kiteb u għaldaqstant din se tagħmilha impossibbli li 'l quddiem jinbeda t-tielet stadju tal-*power station* meta l-*power station* tal-Marsa tingħalaq fl-2015. Għaldaqstant ikollu jinstab sit ieħor għat-*tielet power station.*

It-tmien punt huwa li l-*environment impact assessment* (EIA) ma sarx. X'jiġri jekk l-għażla li saret ma tgħaddix mill-EIA?

Id-disa' punt huwa li l-impjant tal-*preferred bidder* toħloq madwar 50 tunnellata ta' skart tossiku kuljum apparti 30 tunnellata ta' skart ieħor li jrid jitneħħa mis-sit b'ċertu ammont ta' spejjeż. Dan l-iskart, madwar 18,250 tunnellata fis-sena jrid jiġi esportat lejn pajjiżi oħrajn f'konteNituri apposta u magħluqa jew inkella jintradam f'xi sit f'Malta, xi ħaġa li mhijiex fl-interess ta' Malta u l-abitanti tagħha.

L-aħħar punt huwa dwar l-emenda għal-liġi Maltija dwar l-emissjonijiet waqt li kien għaddej il-proċess tat-*tender.*

Dawn huma l-punti ewlenin li jien slitt mis-sottomissjoni ta' Bateman Hutny. Issa hawnhekk dħalt fil-proċess tat-*tendering* proprju u tlabt l-għajnuna tad-Direttur tal-Kuntratti biex nelenka l-proċess li sar. Marbut ma' dan se nirreleva l-punti meta kien hemm l-opportunità u d-dritt li jintalab appell waqt il-proċess. Dan minbarra xi opportunitajiet oħra legali li jista' jkun hemm fejn wieħed jista' jikkontesta dak li sar.

Il-proċess inbeda fis-17 ta' Novembru 2006 meta l-Enemalta – din hija s-sottomissjoni tad-Dipartiment tal-Kuntratti – ippubblikat sejħa għall-espressjoni ta' interess fi proposta għall-istallazzjoni ta' kapaċità addizzjonali għall-ġenerazzjoni tal-elettriku. Din is-sejħa għalqet fl-20 ta' Frar 2007. Il-proċess sħiħ dam sentejn u erba' xhur, jiġifieri minn din id-data sa meta ġie *awarded* il-kuntratt għaddew kważi sentejn u erba' xhur.
It-tieni punt huwa li l-Kumitat Ġenerali tal-Kuntratti irċeva sitt offerti fil-kaxxa tal-

kuntratti. Dawn ġew mingħand: IDO Hutny Projektas; Socoin Ingeneria/M Construccion Industrial, SLU; BURNMEISTER & WAN SCANDINAVIAN CONTRACTOR – Burmeister & Wain Scandinavian Contractor A/A; Isolux Ingeneria SA – EFACEC Engenerial SA Consortium; METKA – Metal Constructions of Greece SA; MAN Furrostaal Power Industry GMBH.

It-tielet punt huwa li s-sejħa għall-offerti kompliet bl-użu tal-*competitive dialogue* – forsi hawnhekk id-direttur jispjega eżattament x'inhu l-*competitive dialogue* – bl-iskop li jiġu żviluppati diversi alternattivi għall-ħteġijiet tal-Enemalta. Din it-tip ta' proċedura normalment tintuża fil-każ ta' kuntratti kumplessi. F'din il-proċedura l-prinċipji bażiċi ta' ġustizzja, trasparenza u non-diskriminazzjoni bejn l-operaturi ekonomiċi xorta jiġu mħarsa bi skruplu.

Ir-raba' punt. Fil-21 ta' Mejju 2007, wara r-rakkmandazzjoni mill-Enemalta, il-Kumitat Ġenerali tal-Kuntratti approva l-lista ta' dawk li wrew interess f'dan il-proġett u stedinhom sabiex jitfgħu l-offerta tagħhom. Kollha kemm huma, ħlief għall-METKA – Metal Constructions of Greece SA, tefgħu l-offerta. Mela mis-sitta li inizjalment urew interess, kien hemm waħda li ma tefgħetx l-offerta wara l-*competitive dialogue*.

Il-ħames punt. Fis-16 ta' Diċembru 2008, il-Kumitat Ġenerali tal-Kuntratti ddiskuta u approva r-rakkmandazzjoni li l-offerti ta' Bateman/IDO Hutny; Burmeister & Wain Scandinavian Contractor AS; u MAN Diesel SE kienu teknikament konformi fl-offerta tagħhom. Kull kontendent ġie informat b'din id-deċiżjoni u bid-dritt tagħhom għall-appell. F'dan l-istadju ħadd ma appella u dawk li l-offerta tagħhom kienet teknikament konformi ġew mistiedna sabiex jitfgħu l-offerta finanzjarja tagħhom, liema offerti nfetħu fit-3 ta' Frar 2009.

Is-sitt punt. Meta l-evalwazzjoni tal-offerti tlestiet, il-Kumitat ta' Evalwazzjoni tal-Enemalta irrikkmanda li l-aktar offerta ekonomikament vantaġġjuża kienet dik ta' Burmeister & Wain Scandinavian Contractor AS. Din ġiet approvata mill-Kumitat Ġenerali tal-Kuntratti u notifika f'dan is-sens ġiet ippubblikata fuq in-*notice board* u l-*website* tad-Dipartiment tal-Kuntratti. F'dan l-istadju, kull min ħassu aggravat b'din id-deċiżjoni jew inkella kull min kellu xi interess fl-akkwist ta' dan il-kuntratt seta' appella mid-deċiżjoni sat-13 ta' April 2009 iżda d-Dipartiment tal-Kuntratti ma rċeva l-ebda appell fuq dan il-kuntratt.

Is-seba' punt. Ir-rappreżentant ta' Bateman Hutny qiegħed jallega li jista' jkun li t-*tender* ġie ppreparat b'tali mod u manjiera li jagħti vantaġġ illegali lil wieħed jew aktar kontendenti. Skont ir-regolament 6(2)(b) tar-Regolamenti dwar il-Kuntratti Pubbliċi, id-Direttur tal-Kuntratti għandu l-awtorità li jagħti rimedju magħruf bħala l-*pre-contractual measures* għal deċiżjonijiet meħuda illegalment li jinkludu speċifikazzjonijiet diskriminatorji. Dawn ir-rimedji normalment jingħataw qabel id-data tal-għeluq tas-sejħa għall-offerti. Operaturi ekonomiċi ġieli talbu rimedji bħal dawn iżda f'dan il-każ ħadd, inkluż Bateman Hutny, ma talab intervent u rimedji bħal dawn.

It-tmien punt – u dan qiegħed fuq parir legali tal-avukata tagħna – huwa li apparti l-opportunitajiet diversi ta' appell li r-Regolamenti dwar il-Kuntratti Pubbliċi joffru, hemm opportunitajiet u proċeduri legali oħrajn li kull min iħossu aggravat b'dak li sar u bid-deċiżjonijiet li ttieħdu, jista' jirrikorri għalihom. F'dan il-kuntest u fiċ-ċirkostanzi preżenti jien ma nħossx li għandi nikkummenta aktar fuq dan il-punt.

Jien ukoll ingħatajt aċċess – din hija rilevanti ħafna – għall-preżentazzjoni li l-Kumitat tal-Evalwazzjoni tal-Enemalta għamel quddiem il-Kumitat Ġenerali tal-Kuntratti dwar it-tliet offerti li ġew ikkunsidrati. Din il-preżentazzjoni – imbagħad il-kollegi tiegħi li qegħdin hawnhekk ikunu jistgħu jispjegaw aktar dwar dan – saret fit-2 ta' April 2009 u tat kas ta' dawn l-aspetti:

- L-ewwel daħlet fil-ġustifikazzjoni għall-proġett, jiġifieri għaliex hemm bżonn li jsir il-proġett;
- tat deskrizzjoni ġenerali tal-proposti tekniċi li ntefgħu bejn it-tliet kontendenti;
- għamlet paragun komparattiv tal-ispiża kapitali tal-offerti, tal-effiċjenza, tas-soluzzjonijiet offruti, tal-*fuel* li juża l-impjant relattiv kif ukoll taż-żmien propost għat-twettiq tal-proġett minn kull kontendent;
- l-ispazju fiżiku fil-*power station* - li kienet waħda mill-*claims* li tressqet fl-ittra li ġiet ippreżentata quddiem il-PAC - li l-impjant propost minn kull kontendent huwa mistenni li jokkupa;
- il-punti mogħtija lil kull kontendent għall-aspett tekniku skont il-kriterji ppubblikati fid-dokument tat-*tender* - din hija kwestjoni ta' *policy*;
- fid-dokument tat-*tender* intqal li l-għażla se ssir 25% fuq l-aspett tekniku u 75% fuq il-*financials* tal-proġett – u skont l-aspett tekniku il-25% tal-evalwazzjoni, Bateman Hutny akkwistaw l-aktar punti f'dan l-istadju;
- ingħatat ukoll evalwazzjoni finanzjarja tal-proposti li ntefgħu mill-kontendenti li nħadmet bit-teknika tan-*net present value* (NPV) u l-aspett ta' evalwazzjoni ngħata piż ta' 75% fil-formola għall-għażla tal-aħjar offerta li skont din il-parti tal-eżerċizzju rriżulta li l-offerta ta' Burmeister & Wain Scandinavian Contractor AS kienet l-aħjar waħda filwaqt li l-offerta ta' Bateman ġiet it-tielet - minn din il-parti tal-evalwazzjoni ġie stabbilit ukoll li kWh ta' elettriku jiġi jiswa €0.12467 bl-offerta ta' Burmeister & Wain Scandinavian Contractor AS u €0.1683 bl-offerta ta' Bateman, jiġifieri bl-offerta li tpoġġiet it-tielet;
- meta l-punti mogħtija fl-evalwazzjoni teknika u dik finanzjarja ġew magħduda flimkien, l-offerta li ġiet rikkmandata, jiġifieri dik ta' Burmeister & Wain Scandinavian Contractor AS ingħatat 93.82 punti filwaqt li dik ta' Bateman li ġiet impoġġija fit-tielet post ingħatat 80.88 punti u għaldaqstant il-grupp għall-evalwazzjoni tal-Enemalta irrikkmanda li l-kuntratt jiġi mogħti lill-Burmeister & Wain Scandinavian Contractor AS;

Permezz tal-użu tat-teknika tan-NPV l-grupp għall-evalwazzjoni għamel analisi tad-diversi aspetti tal-ispiża għall-ġenerazzjoni tal-elettriku li kienet tinkludi l-ispiża għall-*fuel* u l-ispejjeż għall-operat. Hawnhekk ukoll il-grupp għall-evalwazzjoni tal-offerta tal-Enemalta reġa' rrikkmanda l-għoti tal-kuntratt lil Burmeister & Wain Scandinavian Contractor AS.

Fil-proċess li għaddejt tlabt is-sottomissjonijiet tal-Enemalta għall-punti mqajjma fl-ittra li waslet quddiem il-PAC. U hawnhekk se nerġa' nagħmel kif għamilt fil-każ tas-sottomissjoni oriġinali u se nislet il-punti ewlenin. Jien ipprovajt inkun fidil kemm stajt lejn dak li ngħatali imma jekk hemm xi nuqqas ovvjament hija responsabbiltà tiegħi. Is-sottomissjoni tal-Enemalta hija din.

L-ewwel punt. Fi klawsola G1.5 "*natural gas fuel*" tat-*tender*, l-Enemalta talbet impjant li jista' jopera bil-gass naturali jew li jista' jiġi konvertit għall-gass naturali

aktar tard u għal skop ta' evalwazzjoni talbet li din il-qalba ssir fl-2015. Ma ngħatat l-ebda kelma li l-qalba għall-gass se ssir fl-2015. Jiġifieri hawnhekk l-Enemalta qed jgħidu li huma ndikaw dik il-klawsola biex ipoġġu lil kulħadd fuq *level playing field*, kulħadd irid jassumi li fl-2015 se jaqilbu u allura fl-evalwazzjoni jkunu jistgħu jevalwaw lil kulħadd mill-perspettiva ta' *level playing field.*

It-tieni punt. L-impjant offrut minn Bateman Hutny jokkupa madwar 4,000 metru kwadru filwaqt li l-impjant li ntgħażel jokkupa 4,942 metru kwadru. Spazju għat-tielet fażi hemm għaliex jibqa' 6,600 metru kwadru għal dan il-għan għalkemm hemm punt ieħor li jgħid li mhux se jkun hemm aktar spazju għal aktar espansjoni.

It-tielet punt. L-iskart tossiku li se jiġġenera l-impjant magħżul huwa simili għal dak prodott mill-*boilers* eżistenti. Id-differenza hija li issa se jinġabar u mhux se jintrema fl-arja miċ-ċmieni. Għaldaqstant dan għandu jikkontribwixxi għal titjib fil-kwalità tal-arja. Dan l-iskart se jinġabar u se jintbagħat f'*landfills* jew inkella għar-riċiklaġġ fl-Ewropa. Fl-Italja diġà hemm impjant li jirriċikla materjal bħal dan. L-ispejjeż sabiex isir dan ġew inklużi fl-analisi finanzjarja. Jiġfieri meta ħadmu l-analisi finanzjarja, bl-NPV, ħasbu għal din il-parti tal-ispiża għad-*disposal* ta' dan il-*waste.*

Ir-raba' punt. Għalkemm fl-ittra li ntbagħtet intqal li l-ispiża kapitali għall-impjant offrut minn Bateman Hutny huwa ta' €16 miljun irħas, il-kriterji tal-evalwazzjoni kif ippubblikati fl-ITT indikaw li l-għażla se ssir skont l-aktar offerta ekonomikament vantaġġjuża. Fil-fatt l-għażla kienet ibbażata fuq l-inqas spiża sabiex jiġi prodott kull kWh ta' enerġja, skont *regime* operattiv predeterminat.

Il-ħames punt. Mhux veru li l-gass huwa irħas mill-*heavy fuel oil.* Il-prezz tal-gass mhuwiex statiku u jvarja skont is-suq. Fil-każ tagħna huwa mistenni li l-prezz tal-gass se jkun ftit ogħla mill-prezz tal-*heavy fuel oil.*

Is-sitt punt. L-emissjonijiet mill-*heavy fuel oil* huma ogħla minn tal-gass imma fil-każ ta' dan it-*tender*, dawn l-emissjonijiet se jitnaddfu permezz ta' apparat li jnaqqas l-emissjonijiet, *emissions abatement equipment*. L-ispiża għal dan l-apparat hija nkluża fin-nefqa kapitali filwaqt li l-ispiża għat-tħaddim ta' dan l-apparat hija nkluża fl-evalwazzjoni finanzjarja li nħadmet fuq bażi ta' NPV.

Is-seba' punt. L-użu ta' impjanti *diesel* huwa adattat għall-gżejjer. Franza għadha kemm ordnat 48 impjant simili għall-gżejjer tagħha, inklużi Corsica, filwaqt li Ċipru għadu kemm istalla sitta minnhom.

It-tmien punt. It-tħaddim ta' impjanti *diesel* jibqa' orħos minn dawk ta' turbini li jaħdmu bil-gass anke jekk il-qalba għall-gass issir wara sentejn li l-impjant ikun imwaħħal. Skond il-kondizzjonijiet tat-*tender*, l-NPV għal kull unit ta' elettriku prodott mill-magni tad-*diesel* huwa ta' kważi €0.04 inqas minn dak prodotti minn magni tal-gass. B'dan il-mod it-tariffi għall-konsumatur se jinżammu baxxi.

Id-disa' punt. Il-kuntrattur magħżul iggarantixxa t-tkomplija tal-proġett fi żmien 26 xahar, li jfisser li jekk il-kuntratt se jiġi ffirmat issa, l-impjant se jkun qiegħed jaħdem sa Awissu 2011. L-evalwazzjoni finanzjarja mill-2008 mhijiex ibbażata fuq ix-xiri tal-*fuel* qabel ma l-impjant jibda jaħdem imma fuq in-nefqa kapitali.

L-10 punt. L-evalwazzjoni finanzjarja fuq bażi ta' NPV tat kas l-ispejjeż sabiex l-impjant magħżul jinqaleb għall-gass.

Il-11-il punt. Mhux veru li l-impjanti *diesel* huma ta' teknoloġija antika. Il-magni

magħżula u l-apparat anċillari ta' *Flue Gas Abatement* – dan huwa xi ħaġa teknika – huma meqjusa bħala *state of the art*, li fil-kondizzjonijiet lokali jaħdmu bl-istess jew b'effiċjenza simili għall-proposta ta' *combined cycle gas turbine*.

It-12-il punt. Huwa ħażin li jingħad li ċ-ċmieni eżistenti se jiġu mtawla bi 30 metru. Dawn iċ-ċmieni mhux se jintużaw mill-impjant il-ġdid. Iċ-ċmieni tal-impjant il-ġdid se jkunu ta' 65 metru u huma tal-istess għoli daqs dawk proposti minn Bateman Hutny. Jekk ikun hemm bżonn li jittawwlu, l-ispiża tagħhom hija nkluża fil-prezz tat-*tender*, imma l-indikazzjonijiet inizjali juru li dan mhux se jkun bżonnjuż.

It-13-il punt. L-emissjonijiet CO2 tal-*combined cycle gas turbine* li taħdem bil-*gasoil* u tad-DECC li taħdem bl-*heavy fuel oil* huma kważi l-istess. Għaldaqstant mhux se jkun hemm vantaġġ materjali fl-*Emissions Trading Scheme* fl-għażla ta' magna minn oħra. Minkejja dan, l-ispiża għall-emissjonijiet CO2 ittieħdet fl-evalwazzjoni finanzjarja bil-metodu tal-NPV.

L-14-il punt. L-impjant li jnaqqas l-emissjonijiet huwa *prototype combination*, għalkemm xi ħaġa simili ntużat fil-Korea, filwaqt li dak li l-biċċiet li qegħdin jiġu offruti huma ta' teknoloġija li diġà hija pprovata. Dak li ġie propost ġie evalwat dwar kemm tista' toqgħod fuqu mill-konsulenti internazzjonali Lahmeyer International. Dawn ikkonfermaw li dak li qed jiġi propost huwa plawsibbli. Fuq kollox l-impjant mhux se jittieħed mill-Enemalta jekk ir-rekwiżiti ambjentali mandatorji ma jiġux milħuqa u penalitajiet jiġu applikati jekk l-impjant jitlesta tard.

Il-15-il punt huwa rigward l-emenda li saret għall-avviż legali. L-Avviż Legali dwar l-Emissjonijiet – u hawnhekk ukoll ħadt l-intrigu li nġib lid-Direttur tal-Ambjent tal-MEPA sabiex ikun jista' jispjega aktar dwar dan l-aspett, imma dan li qed nirraporta hawnhekk huwa bażikament ir-rispons li tani hu bil-miktub għall-mistoqsijiet tiegħi - ġie emendat minħabba żball li sar fit-*transposition* tal-*Large Combustion Plant Directive*. Skond id-Direttur tal-Ambjent tal-MEPA, klawsola 2(7) tad-direttiva 2001/80/EC, the *Large Combustion Plants Directive*, ġie eskluż mill-Avviż Legali 329/2002 u għalhekk sal-2008 il-liġi Maltija ma kenitx konformi ma' din id-direttiva. Wara diskussjonijiet fit-tul bejn l-Enemalta u l-MEPA li bdew fl-2005 - id-diskussjonijiet dwar din il-parti tal-avviż legali bdew fl-2005 filwaqt li l-ewwel sejħa għall-offerti ħarġet fis-17 ta' Novembru 2006 - u wara nuqqas ta' qbil bejn l-istess partijiet, il-kwestjoni ġiet riferuta lill-Kummissjoni Ewropea għall-parir tagħha. Fid-19 ta' Novembru 2007 ġie kkonfermat mill-Kummissjoni Ewropea li skond hi, il-magni diesel kienu esklużi mill-iskop ta' din id-direttiva. Għaldaqstant is-segretarju permanenti fil-ministeru tal-Agrikoltura u l-Ambjent ta' dak iż-żmien kien ta struzzjonijiet lill-MEPA sabiex jemendaw il-liġi Maltija ħalli tiġi konformi ma' din id-direttiva. Għalhekk l-Avviż Legali 2/2008 emenda l-Avviż Legali 329/2002 sabiex dan tal-aħħar isir konformi mad-direttiva 2001/80/EC.

Issa hawnhekk jien ġbidt xi konklużjonijiet fuq dak li rajt u fuq dak li tkellimt dwaru mad-Direttur tal-Kuntratturi u anke fuq dak li rċevejt kemm mill-MEPA kif ukoll mill-Enemalta.

L-ewwel punt. Il-proċess tas-sejħa għall-offerti ma sarx b'mod mgħaġġel imma twettaq fuq medda ta' kważi sentejn u erba' xhur, jiġifieri bejn is-17 ta' Novembru 2006 u t-3 ta' April 2009. Għaldaqstant il-proċess kollu twettaq b'ċerta kalma u fi żmien u b'pass tajjeb li jagħti lok għall-evalwazzjonijiet meħtieġa u għat-teħid tal-konsiderazzjonijiet kollha li hemm bżonn fi proġett ta' dan id-daqs u tip.

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It-tieni punt. Matul il-proċess kollu tal-offerta jidher li kien hemm djalogu regolari u san bejn id-Dipartiment tal-Kuntratti u l-Enemalta sabiex jiġu evitati problemi kemm ta' sustanza kif ukoll ta' proċedura fil-ħruġ għas-sejħa għall-offerti u l-għoti ta' dan il-kuntratt.

It-tielet punt. Matul il-proċess kollu jidher li ġew osservati l-provvedimenti kollha dwar ix-xiri pubbliku kif stipulati fir-regolamenti dwar il-kuntratti pubbliċi.

Ir-raba' punt. Minkejja li r-regolamenti dwar il-kuntratti pubbliċi jagħtu lok għal appell matul id-diversi stadji tal-proċess, li f'dan il-każ beda mis-sejħa għat-turija ta' interess segwit minn sejħa għall-offerti u wara segwit mill-għoti tal-kuntratt, l-ebda wieħed minn dawk interessati f'dan il-proġett ma ħassew il-bżonn li jappellaw f'xi fażi tal-proċess jew minn xi deċiżjoni li ttieħdet matul il-proċess kollu.

Il-ħames punt. L-emenda li saret fil-liġi Maltija dwar l-emissjonijiet ma jidhirx li kienet marbuta ma' din is-sejħa għall-offerti. Id-diskussjonijiet dwar din l-emenda jidher li nbdew ferm qabel l-ewwel ħruġ għas-sejħa ta' interess f'dan il-proġett, jiġifieri fl-2005 u ma ġewx konklużi qabel mal-Kummissjoni Ewropea stabbiliet li l-liġi Maltija kienet inkonsistenti mad-direttiva Ewropea.

Is-sitt punt. Il-kumitat għall-evalwazzjoni tal-offerta tal-Enemalta jidher li għamel analisi dettaljata sewwa tal-aspetti tekniċi u finanzjarji tas-sottomissjonijiet li rċieva. M'iniex intiż fl-aspetti tekniċi tal-proġett u għaldaqstant m'iniex se ngħaddi opinjoni fuq dak li sar, imma mill-aspett finanzjarju l-grupp li evalwa s-sottomissjonijiet jidher li uża metodoloġija u teknika li normalment jintużaw f'evalwazzjonijiet ta' din ix-xorta. Għalkemm minħabba n-natura kunfidenzjali tal-proċess ma kienx possibbli li ningħata aċċess għal ċerta dokumentazzjoni, jidher – fuq id-dokumentazzjoni li rajt – li permezz tax-xogħol dettaljat li għamel u li ġie ppreżentat lill-Kumitat Ġenerali tal-Kuntratti, il-membri tal-istess kumitat ħassewhom komdi li jilqgħu r-rakkmandazzjonijiet mogħtija mill-istess grupp ta' evalwazzjoni tal-Enemalta.

Is-seba' punt. Kemm id-Dipartiment tal-Kuntratti kif ukoll l-Enemalta taw l-ispjegi kollha li ntalbu minnhom kif ukoll l-għajnuna kollha li ntalbu jagħtu. Fil-fatt illum qegħdin hawn sabiex jirrispondu għal xi mistoqsijiet li jistgħu jsiru lilhom. Nirringrazzjakom.

THE CHAIRMAN: Grazzi. Ħalli nieqfu ftit biex nirregolaw kif se timxi 'l quddiem id-diskussjoni tal-lejla. L-aħjar huwa li neżawrixxu l-mistoqsijiet li jistgħu jsiru mill-Membri tal-Kumitat dwar dan is-suġġett imbagħad wara nkunu nistgħu ngħaddu għall-*item* li għandna fuq l-aġenda u nibdew bid-Dipartiment tat-Taxxi Nterni u d-Dipartiment tal-VAT. Jiġifieri jekk minn dawk li jinsabu preżenti hawn min m'għandux x'jaqsam ma' dawn id-dipartimenti huwa liberu, jekk jixtieq, li jmur. Ovvjament jekk hawn min irid jibqa' jisma' d-diskussjoni jista' jagħmel dan liberament għaliex id-diskussjoni hija pubblika. Dan qed ngħidu sempliċement biex inkunu nistgħu nirregolaw ftit il-proċedimenti u ma naħlu ħin ta' ħadd. Nirringrazzja lil dawk kollha li ġew.

Domandi? Il-Ministru Gatt.

ONOR. AUSTIN GATT: Sur Camilleri, waqt li kont qiegħed taqra s-sottomissjonijet, inti għamilt il-punt li l-allegazzjoni ta' Bateman Hutny li t-*tender* inkiteb b'mod li jivvantaġġja lil xi parti oħra, setgħet ġiet kontestata billi jintuża r-rimedju tal-*pre-contractual measures*. Xtaqt nikkonferma li apparti li kien hemm żewġ okkażjonijiet fejn seta' sar appell, u ma tteħidx minn Bateman Hutny, lanqas intalbu *pre-contractual measures* biex jagħmlu tajjeb għal din l-allegazzjoni.

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IS-SUR ALFRED CAMILLERI: Fil-fatt fil-konklużjonijiet tiegħi, meta kont qiegħed nagħmel *higlighting* tas-sottomissjonijiet li rċevejt mid-Dipartiment tal-Kuntratti, f'kull stadju ndikajt fejn seta' sar l-appell, inklużi f'dik il-fażi tal-proċess li ndikajt inti. Magħha rbatt waħda mill-konklużjonijiet tiegħi, fejn jiena qed ngħid li fl-ebda stadju fejn seta' sar appell, ma sar l-appell. Jiġifieri hawnhekk, jekk ma jimpurtax, nikkoreġik daqsxejn fis-sens li fil-konklużjoni tiegħi għedt li fl-ebda stadju tal-proċess, kemm fil-fażi inizjali kif ukoll fil-fażijiet l-oħra, ma sar appell. Imma hawnhekk, bil-permess tagħkom, nitlob lid-Direttur tal-Kuntratti sabiex jispjega l-fażijiet kif inhuma u l-parti fejn jiena spjegajt li setgħu jintalbu *pre-contractual measures*.

ONOR. AUSTIN GATT: Jiena fuq dik li tlabt spjegazzjoni.

IS-SUR FRANCIS ATTARD (Direttur Ġenerali, Dipartment tal-Kuntratti): Il-*Public Contracts Regulations* jaħsbu għal sitwazzjonijiet fejn meta tiġi pubblikata *tender*, xi ħadd iħoss li jkun hemm xi speċifikazzjonijiet diskrimintarji li jistgħu jagħtu vantaġġ lil xi operatur ekonomiku jew ieħor. F'dak il-każ kull min iħoss ruħu aggravat mid-dokument li ġie ppublikat għandu d-dritt li jappella mad-Direttur tal-Kuntratti biex din id-diskriminazzjoni li jkun qed jallega tiġi mwarrba. Jiena nikkonferma li f'dan il-każ partikolari, id-Dipartiment tal-Kuntratti qatt ma rċieva xi appell ta' din in-natura.

ONOR. AUSTIN GATT: Biex inkomplu fuq il-*pre-contractual measures*. Bateman qatt oġġezzjonaw, per eżempju, dwar il-fatt li t-*tender* kien indika mill-bidu nett li 25% tal-punti se jmorru fuq it-teknika u 75% se jmorru fuq il-finanzi?

IS-SUR FRANCIS ATTARD: Nikkonferma li qatt m'għamlu appell ta' din in-natura.

ONOR. AUSTIN GATT: Jiġifieri fis-sentejn u sitt xhur li dam għaddej id-djalogu, qatt oġġezzjonaw għal xi klawsola waħda li kien hemm fuq it-*tender*?

IS-SUR FRANCIS ATTARD: Nikkonferma li d-Dipartiment tal-Kuntratti qatt ma rċieva appelli mingħand Bateman Hutny.

ONOR. AUSTIN GATT: Qatt Bateman, miegħek jew mad-dipartiment tiegħek, għamlu l-allegazzjoni li t-*tender* kien inkiteb b'mod li jiffavorixxi lil xi ħaddieħor jew li jippenalizza lilhom?

IS-SUR FRANCIS ATTARD: Qatt ma ntqal mad-Dipartiment tal-Kuntratti li dan it-*tender* inkiteb biex jiġi ffavorit xi ħadd partikolari.

ONOR. AUSTIN GATT: Ħalli nerġa' indur fuq is-Sur Camilleri. Inti għedt li meta ntużat il-metodoloġija finanzjarja aċċettata ta' NPV hemm differenza ta' €0.04 per kWh, ta' Bateman joħroġ €0.16823 kontra €0.12467 tal-ieħor. Qatt intużat il-metodoloġija aċċettata tal-NPV u ddaħħlu - semmejt lista sħiħa - *costs* ta' art, *fuel* eċċ? Mill-esperjenza tiegħek, taħseb li tħalla xi ħaġa barra f'dan il-kalkolu?

IS-SUR ALFRED CAMILLERI: Li nkun definit u tassattiv li ngħid li żgur li ma tħalla xejn naħseb li nkun prużuntuż iż-żejjed imma l-lista li hawn ippreżentata u x-xenarji differenti ... Bażikament din il-preżentazzjoni l-aktar li tmur huwa fuq il-*financials* u hawnhekk hawn diversi xenarji u saru *sensitivity analyses* fuq il-*fuel types* kif ukoll fuq il-varjazzjonijiet fil-prezzijiet li jista' ikun hemm fil-*fuels*, jiġifieri ddaħħlu fl-*equation a very exhaustive list of costs*; kemm *costs* ta' natura kapitali, kemm *costs* bħalma semmejt fil-*presentation* li għamilt hawnhekk tal-eventwalità li tinqaleb għall-gass, kif ukoll *costs* ta' natura rikorrenti.

Jiġifieri dawn daħlu fil-*costings* b'mod dettaljat ħafna. Dan it-tip ta' metodu jintuża fl-analisi ta' dawn it-tip ta' proġetti u allura inti tħares 'il quddiem, tara l-*costs* u ġġibhom kemm jista' jkun fuq l-istess livell. Ovvjament f'dan il-proċess għandek ċerti assunzjonijiet li jridu jittieħdu imma dawn ikunu prattikament l-istess għal kulħadd. Hawnhekk forsi nitlob lis-Sur David Spiteri Gingell u l-*engineer* tal-Enemalta li kienu nvoluti b'mod dettaljat f'dan il-proċess sabiex ikomplu jispjegaw ftit ieħor.

IS-SUR DAVID SPITERI GINGELL (ex-*Chief Executive Officer*, Enemalta): Jiena kont *chief executive officer* tal-Enemalta meta nkiteb u nħareġ it-*tender* bejn Lulju 2007 u Ġunju 2008 u kont ġejt mitlub biex inkun parti mill-kumitat tal-aġġudikazzjoni biex inżomm il-kontinwità fil-proċess meta rriżenjajt mill-Enemalta. Il-proġett kellu tliet miri, il-mira tal-ambjent, il-mira li ngħalqu l-Marsa *vis-à-vis* il-*large combustion plant* u l-mira biex indaħħlu l-effiċjenza fil-produttività tal-ġenerazzjoni tal-elettriku. Aħna ppruvajna nibbilanċjaw dawn it-tliet miri billi noħolqu *total cost of ownership model*, fejn dan in parti kellu l-effiċjenza u l-innovazzjoni teknika, u in parti kellu r-rikonoxximent li s-CO2 u dak li ma jirnexxilnix inneħħu mill-arja għandu *cost associated* miegħu, u ovvjament il-fundamentali tal-Enemalta li kemm jista' ikun niġġeneraw elettriku bl-aktar mod irħis possibbli.

Għaldaqstant fid-diskussjonijiet li kellna biex nippreparaw l-*assessment* tal-NPV, ippruvajna niddisinjaw dan il-*cost of ownership model* li jirrifletti dawn il-bilanċi bejn il-25% li huma t-teknika u l-75% li huma l-finanzi. Ippruvajna nkunu oġġettivi u ppruvajna wkoll naslu għall-konklużjonijiet li jiddeterminaw l-impatt tal-ambjent bis-CO2, fejn kif diġà qal is-segretarju permanenti, ikkummissjonajna bħala kumitat lil Lahmeyer biex jagħmlulna *assessment* fuq it-tliet partijiet li aħna fl-aħħar konna identifikajna, jiġifieri Bateman Hutny, BURNMEISTER & WAN SCANDINAVIAN CONTRACTOR – Burmeister & Wain Scandinavian Contractor A/A, u MAN Furrostaal Power Industry GMBH. Il-konklużjoni tal-Lahmeyer kienet li t-tlieta li huma kellhom *best available technology vis-à-vis emissions abatement measures*.

IS-SUR PETER GRIMA (*Chief Technical Officer*, Enemalta): Kif spjega s-Sur Spiteri Gingell, aħna qsamna l-evalwazzjoni f'żewġ partijiet, il-parti teknika u l-parti finanzjarja. Għal dak li jirrigwarda l-parti teknika kien hemm sistema spjegata minn qabel u elenkata fl-*invitation to tender* kif se nagħtu *points* għal kull aspett tekniku tad-diversi teknoloġiji, filwaqt li għal dak li jirrigwarda l-parti finanzjarja ħadna kemm il-*capital costs plus* kull *operational cost* li seta' kien hemm. Mal-*capital cost* żidna l-*cost* tal-art u fejn wieħed kellu *footprint* akbar mill-ieħor żidna dik id-differenza mal-*costings* tiegħu. L-operat tal-impjant, kemm l-operat personali, bħal nies u *maintenance*, kif ukoll l-operat min-naħa tal-*fuel*, *consumables* u *waste disposal*, dan kollu ħadna l-*costings* tiegħu bil-prezzijiet li kienu definiti fl-*invitation to tender*. Jiġifieri aħna ma ppruvajniex, wara li rċevejna l-offerti, nibnu prezzijiet biex niffavorixxu wieħed jew l-ieħor imma ħadna *market value*, ħadna *escalations* li konna naħsbu li kienu jirriflettu l-verità u għamilna analisi fuqu.

Bdejna bl-ewwel erba' snin ovvjament il-pagamenti tal-*capital costs* imbagħad sussegwentament il-pagamenti plus l-*operating costs* u ħriġna l-*cost of production per unit* ta' kull tip ta' magna li ġiet offruta. Biex inkunu ċerti li din l-analisi ma kenitx waħda fittizja ħadna diversi *sensitivity analyses*, ħadna anke analisi bbażata fuq prezzijiet reali ta' Jannar li għadda tal-*fuel* biex nikkonfermaw li anke bil-prezz reali, mingħajr ma nidħlu fl-*escalation factors* u

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kollox, l-offerta li aħna rajna li kienet l-aktar vantaġġjuża, attwalment baqgħet vantaġġjuża. Dawn it-*tables* ġew ippreżentati lill-*General Contracts Committee*.

Ippruvajna wkoll analisi bbażata fuq operazzjonijiet differenti milli kien stipulat fit-*tender*. Fit-*tender* kellna *a defined operating regime* u għamilna wkoll analisi fuq *operating regimes* differenti biex naraw li l-*costings* u l-kalkoli kollha jibqgħu bl-istess riżultat.

ONOR. AUSTIN GATT: Issa xtaqt nistaqsi mistoqsija lis-Sur Spiteri Gingell li huwa wkoll *Chairman* tal-*Climate Change Group*. Ir-rapport li ħareġ għall-konsultazzjoni tal-*climate change*, fejn fosthom hemm id-diskors fuq il-gass li qiegħed jiġi kkwotat totalment *out of context* u ħażin, jekk ma ktibtux kollu int, żgur li kellek *mano in pasta* qawwija. Issa allura kif inti, *Chairman* tal-*Climate Change Group*, fejn fir-rapport tal-*climate change* qed tgħid li Malta trid tmur aktar lejn l-użu tal-gass, tkun ukoll il-persuna li skond dak li nkiteb fil-gazzetti, qed tirrikkmanda li nixtru turbina li hija retrograda, li kważi kważi ġejja minn żmien il-gwerra, li hija teknoloġija li hija t-tieni l-agħar li teżisti fl-Ewropa, teknoloġija spiċċuta u li tmur għal kollox kontra dak li inti, bil-kappell l-ieħor, qed tirrikkmanda li pajjiżna jagħmel, jiġifieri li jmur totalment għall-gass?

IS-SUR DAVID SPITERI GINGELL: Ministru, jiddispjaċini ngħid li sfortunatament qiegħed niġi miskwotat jekk nista' nieħu l-*authorship* tar-rapport f'idejja. Bażikament min qara sew ir-rapport li kont responsabbli għalih jiena flimkien mal-membri tal-kumitat dwar il-*climate change*, jinduna li dan jagħmel numru ta' premessi, liema premessi wieħed ma jistax iħares lejhom billi jisseparahom. U jien se nagħmel żewġ premessi importanti; l-ewwel premessa hi li biex innaqqsu l-*emissions* hemm bżonn li tidħol teknoloġija avvanzata mill-aktar fis possibbli. Dan ifisser li mhux fl-2015 imma jekk jista' ikun il-bieraħ u mhux illum. Ifisser ukoll li biex jagħmel dak il-pass u jdaħħal *abatement technology* li għandha x'taqsam ma' CO2 *emissions* li joħorġu *from power generation* li jikkostitwixxi 62% tas-CO2 *emissions* f'Malta, hemm bżonn *power station* ġdida mill-aktar fis possibbli.

It-tieni premessa hi - u hawnhekk fejn qiegħed niġi miskwotat *with intent or otherwise* - li jiena speċifikament ngħid li l-gass għandu jkun ikkunsidrat bħala *strategic national objective with implementation* għal raġuni waħda sempliċi; biex aħna naqilbu għall-gass għandek bżonn l-infrastruttura. Jekk xi ħadd jaħseb li se jibni *power station* u se jdaħħal il-gass bix-*shuttle* biex jiġġenera l-*power*, huwa żbaljat u żbaljat sew. Meta jien kont CEO tal-Enemalta, biex inżomm il-*gass supply* tal-LNG għaċ-ċilindri għal xitwa waħda wkoll kien ikun diffiċli ħafna, aħseb u ara biex tagħmel *supply* għall-*generation* tal-*power station*. Allura aħna x'għedna fil-*climate change report*? Aħna għedna li immedjatament li tidħol *on a conventional technology a generating plant* - u hemmhekk aħna ngħidu li *on a conventional technology*, dik il-*generating plant with immediate effect will have a reduction of CO2 of something equilavent to 200,000 tonnes per year - we also carry out supply infrastructure side as well as demand side economic modelling that show that if we remain on a conventional technology power generation we will reduce our CO2 emissions from the power generation to 20% of the 80% 1990 level. This basically means that with conventional technology we will achieve the responsibilities that Malta has vis-à-vis its energy and climate change package with the European Union. But we also say that moving to natural gas is a strategic objective but we peg this subject to the cost effective assessment that building*

the infrastructure for gas makes every euro of investment in that abatement technology render the return it does. In that regard, assuming that it does, we also estimate what would be the impact if we introduce gas as an energy mechanism for the generation of power from 2016 onwards. And our results show that if we do that from 2016 onwards we will reduce the CO2 emissions to something like – if I recall correctly – 65% of the 80% of the 1990 level. So basically what I recommended in the climate change report and what we have recommended in the adjudication tender are consistent.

ONOR. AUSTIN GATT: Biex ninterpreta dak li qed tgħid inti. Billi kif taf inti - mill-esperjenza tiegħek bħala CEO tal-Enemalta – li l-*power station* tal-Marsa trid tingħalaq żgur sal-2015, *which is the latest date*, il-*climate change report* fir-realtà qed jgħid li l-istallazzjonijiet il-ġodda li aħna għandna bżonn biex nissostitwixxu l-*power station* tal-Marsa, l-għan tal-gvern huwa li nissostitwixxu sal-2012, iridu bilfors jiġu supplimentati minn *conventional power plants*.

IS-SUR DAVID SPITERI GINGELL: Iva.

ONOR. AUSTIN GATT: It-tieni punt. Inti bħala ex CEO naħseb li taf ukoll li l-Enemalta diġà għandha ħames turbini tal-gass.

IS-SUR DAVID SPITERI GINGELL: Din il-mistoqsija naħseb li aħjar tħalliha għas-Sur Grima, però xtaqt inżid ngħid li kien hemm stimulant ieħor għalfejn huwa importanti li l-magni tad-*diesel* li sibna u li aġġudikajna fuqhom għandhom jidħlu qabel l-2012. Issa m'iniex qed nitkellem fuq il-*climate change* imma qed nitkellem mir-*role* tiegħi li kelli bħala ex-CEO. Jiena bħala ex-CEO kelli r-responsabilità *to abide by the Large Combustion Plant Directive*, li bażikament tpoġġi 20,000 siegħa mill-1 ta' Jannar 2008 biex tingħalaq il-*power station* tal-Marsa. *Taking those 20,000 hours round the clock means that we will run out of those hours in April 2012. Basically this would mean that come May 2012 we are infringing the Large Combustion Plant Directive which for me, as CEO of Enemalta at the time, meant that time in deciding and time in building and commissioning the new generating plant was a strategic decision that we could not lose out on.*

ONOR. AUSTIN GATT: Sur Grima, inti tikkonferma li l-Enemalta diġà għandha ħames turbini tal-gass?

IS-SUR PETER GRIMA: Iva, nikkonferma.

ONOR. AUSTIN GATT: Tikkonferma wkoll li sakemm naslu biex nibdew nużaw il-gass, fl-2016, jekk tittieħed dik id-deċiżjoni, it-turbina ta' Bateman kienet se titħaddem bid-*diesel* kontra t-turbina li ntagħżlet li se titħaddem bil-*heavy fuel oil*?

IS-SUR PETER GRIMA: Iva, nikkonferma.

ONOR. AUSTIN GATT: Tikkonferma wkoll li l-prezz tal-*light sulphur fuel oil* li se jintuża fuq din it-turbina sal-bieraħ kien USD356 filwaqt li l-prezz tad-*diesel* li kien se jintuża fuq Bateman – mill-2011 sal-2016 konna se nużaw *diesel* jew *gas oil* għax ma nistgħux inħaddmuh bil-gass - kien ta' USD480, differenza ta' 35%?

IS-SUR PETER GRIMA: Iva.

ONOR. AUSTIN GATT: Kif qal is-Sur Spiteri Gingell l-għan kien li din it-turbina tissostitwixxi parti mill-*power station* tal-Marsa. Malli inti ddaħħal din it-turbina, li mingħalija hija ta' 140 kW, u titfi 140 kW mill-Marsa, kemm tiffranka *metric tonnes* ta' CO2 fis-sena?

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IS-SUR PETER GRIMA: Jekk nitfu 140 MW tal-Marsa u nħaddmu l-impjant il-ġdid, niffrankwaw bejn 300,000 u 400,000 *tonnes of CO2 annually*.

ONOR. AUSTIN GATT: Prattikament id-doppju tat-*target* li għandha l-*Climate Change Committee* li qalu li sal-2002 irridu niffrankaw *200,000 tonnes*. U allura l-aħħar mistoqsija tiegħi lis-Sur Spiteri Gingell hija jekk dan ifissirx li b'dan l-impjant aħna nibqgħu *below the levels* li l-*climate change* qiegħda timmira li nilħqu.

IS-SUR DAVID SPITERI GINGELL: B'dan l-impjant qegħdin nilħqu l-miri li l-*climate change* bħala *building blocks* trid tpoġġi f'xulxin biex tilħaq. Tajjeb li wieħed jgħid li meta nitkellmu fuq *emissions* - u nerġa' ngħid li jien m'iniex skizofreniku, almenu sa meta kont jien involut fid-deċiżjonijiet meta ttieħdet id-deċiżjoni bejn l-effiċjenza ta' Bateman fuq CO2 u l-effiċjenza ta' Burmeister & Wain Scandinavian Contractor fuq CO2 din kienet marġinalissima, jekk niftakar sew Burmeister & Wain Scandinavian Contractor għandu effiċjenza ta' 0.556% *per kWh of CO2* u Bateman għandu 0.562% *which is insignificant* - .... Terġa', jibqa' il-fatt ukoll li m'aħniex qegħdin fi stat li nibnu l-impjant ta' Bateman, lanqas li kieku kien "€x" iżjed minn ta' Burmeister & Wain Scandinavian Contractor, sempliċement għax m'għandniex l-infrastruttura tal-gass.

Meta jiena kont CEO tal-Enemalta, *in tandem* ma' dan it-*tender* – għax aħna konna qegħdin inħarsu *strategically* biex immorru lejn il-gass – konna ħriġna *request for information* biex naraw x'inhuma l-aħjar mekkanżmi biex inġibu l-gass, dejjem bit-tir li dan nilħquh fl-2015. Fil-fatt konna qabbadna kumpannija barranija *and we pinned the options* biex inġibu l-gass fuq tlieta; *pipeline, compressed natural gas* - li hija teknoloġija innovattiva li bażikament tfisser li kieku aħna kellna nikkonsidraw dik it-teknoloġija nkunu verament *leading edge*, bil-problemi li dik iġġib magħha - u *liquid natural gas*. Kemm il-*compressed natural gas* u kemm il-*liquid natural gas* huma *shuttle based*, li jfisser li fil-każ tal-*compressed natural gas* jidħol vapur kull 18-il siegħa filwaqt li fil-każ tal-*liquid natural gas* jidħol vapur fix-xahar u allura trid tibni t-tankijiet tal-i*storage* tal-gass.

ONOR. AUSTIN GATT: L-aħħar domanda għas-Sur Girma. Biex nużaw il-gass irid ikollna l-infrastruttura li ovvjament trid tħallas għaliha u allura jekk irridu naqilbu għall-gass, il-*cost* ta' Bateman kien jogħla wkoll. Inti, Sur Grima, għandek l-aħħar ċifri tal-aħħar offerti li għandna għall-*pipeline*? Kemm tiġi tiswa l-infrastruttura?

IS-SUR PETER GRIMA: Ftit aktar minn €200 miljun.

THE CHAIRMAN: L-Onor. Sant.

ONOR. ALFRED SANT: Sur Camilleri, fir-rapport tiegħek semmejt li kien hemm ċerti affarijiet ta' natura kunfidenzjali li ma stajtx tidħol fihom għax ma kellekx aċċess għalihom. X'tip ta' kunfidenzjalità kienet involuta f'din il-ħaġa?

IS-SUR ALFRED CAMILLERI: Is-sottomissjonijiet tat-*tenders* oriġinali u l-*evaluation reports* ma jkunux *available.* Dawk ikunu fid-Dipartiment tal-Kuntratti u fl-Enemalta u abbażi tal-liġi ma jistgħux jiġu mogħtija lili għalkemm jistgħu jiġu mogħtija lill-awditur. Forsi jista' jispjega ftit aktar id-Direttur tal-Kuntratti.

IS-SUR FRANCIS ATTARD: Il-*Public Contracts Regulations* jistipulaw li l-offerti li jiġu sottomessi mill-*bidders* ikunu kunfidenzjali u ma jkunux aċċessibbli għal terzi.

ONOR. ALFRED SANT: Imma t-terzi f'dan il-każ hu s-segretarju permanenti

tal-ministeru tal-finanzi li *basically* jiġi s-CEO tiegħek.

IS-SUR FRANCIS ATTARD: Suppost li dawn ikunu aċċessibbli biss għad-Direttur tal-Kuntratti u għall-*evaluation committee* li jkun qed jevalwa l-offerti.

ONOR. ALFRED SANT: Imma "suppost" statutorjament jew bħala prattika?

IS-SUR FRANCIS ATTARD: Skont il-liġi.

ONOR. ALFRED SANT: Mela issa tajjeb li nistaqsi kif taħdem l-istruttura tagħkom għax daqqa jissemma l-kumitat tat-*tenders* u daqqa jissemma l-kumitat tal-evalwazzjoni. X'inhi l-istruttura eżattament ta' kif isiru l-affarijiet?

IS-SUR FRANCIS ATTARD: Is-sistema tat-*tendering* hija kif se nispjega. L-ewwel tiġi ppubblikata sejħa għall-offerti …

ONOR. ALFRED SANT: Ħu paċenzja bija, qabel tagħtini l-proċess ta' kif isir it-*tender*, għidli x'inhi l-istruttura li se tmexxi dan il-proċess. Jiġifieri għandek il-kumitat tal-kuntratti. Dan il-kumitat kif jikkostitwixxi ruħu? Il-membri tiegħu biss jew il-kumitat ta' evalwazzjoni … Għax waqt li kellna l-preżentazzjoni beda jissemma kumitat ta' evalwazzjoni tal-Enemalta. Jiġifieri ħu paċenzja u agħtina l-istruttura kif inhi.

IS-SUR FRANCIS ATTARD: Il-Kumitat Ġenerali tal-Kuntratti huwa appuntat mill-prim ministru għal perijodu definit ta' sentejn. Dan jiltaqa' b'regolarità, dejjem nhar ta' Tlieta u nhar ta' Ħamis fid-Dipartiment tal-Kuntratti. Ir-rwol prinċipali tiegħu hu li jiftaħ l-offerti li jinstabu dakinhar li jagħlqu t-*tenders* – it-*tenders* dejjem jagħlqu nhar ta' Tlieta u nhar ta' Ħamis – jagħmel skeda ta' l-offerti li jkunu daħlu għal kull *tender* li immedjatament jiġu ppubblikati fin-*notice board* tad-dipartiment u issa, riċenti, qegħdin nippubblikawhom fil-*website* ukoll fl-istess ġurnata. *Once* li ssir dik…

ONOR. ALFRED SANT: Skużani, se nerġa' nwaqqfek għax diġà qed naqbżu pass. Qed nitkellmu fuq li jidħlu l-offerti għal *tender.* Jien qed nistaqsi kif taħdem l-istruttura biex joħroġ it-*tender in the first place.* Qed tifhem il-punt tiegħi? Jiġifieri intom qegħdin tiltaqgħu darbtejn fil-ġimgħa, imma issa għandna dan it-*tender* tal-Enemalta għal magni ta' ġenerazzjoni. Xi ħadd imbuttah dan il-proċess. Intom kif tidħlu f'din l-imbuttatura inizjali? Jew inkella sempliċement l-Enemalta tiġi għandkom bit-*tender* u toħorġuh intom?

IS-SUR FRANCIS ATTARD: L-inizjattiva biex joħroġ *tender* ġdid trid issir mid-dipartiment li jkun se jixtri, f'dan il-każ huwa l-Enemalta. Huma jagħmlu *drafting* tat-*tender* u jibagħtuh fid-Dipartiment tal-Kuntratti biex jiġi *vetted.* Dan jiġi *vetted* għall-iskop li nassiguraw il-prinċipji bażiċi ta' *public procurement* li huma *fairness, transparency and non-discrimination between economic operators. Once* li jiġi *vetted* imbagħad jiġi ppubblikat.

ONOR. ALFRED SANT: Ħu paċenzja bija, se nerġa' nwaqqfek. Mela bażikament f'dan il-każ tat-*tender* li għandna quddiemna, l-Enemalta bagħtitilkom it-*tender* tagħha bħala *draft through the ministry or whatever,* intom ivvettjajtuh skond il-kriterji li għadek kemm semmejt u ppubblikajtuh.

IS-SUR FRANCIS ATTARD: Hekk hu.

ONOR. ALFRED SANT: Jiġifieri intom ippubblikajtu t-*tender* imbagħad irċevejtu l-offerti.

IS-SUR FRANCIS ATTARD: Hekk hu. Meta jaslu l-offerti l-kaxxa ta' l-offerti tinfetaħ fil-pubbliku mill-Kumitat Ġenerali tal-Kuntratti.

ONOR. ALFRED SANT: Waħdu?

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IS-SUR FRANCIS ATTARD: Iva, waħdu. Issir skeda ta' min kienu l-*bidders*, però f'dan il-każ ma ppubblikajniex il-prezz għax kien fi stadju kmieni u kien fit-tul, ippubblikajna biss l-ismijiet ta' min huma l-*bidders* u immedjatament dik l-iskeda ġiet ippubblikata fuq in-*notice board* tad-dipartiment.

ONOR. ALFRED SANT: Jiġifieri f'dan l-istadju għadhom involuti biss il-membri tal-kumitat tat-*tenders* li jiltaqgħu darbtejn fil-ġimgħa.

IS-SUR FRANCIS ATTARD: Il-Kumitat Ġenerali tal-Kuntratti.

ONOR. ALFRED SANT: Bl-i*staff* amministrattiv.

IS-SUR FRANCIS ATTARD: Hekk hu. Wara li jgħaddi dan l-istadju, l-offerti nfushom, id-dokumentazzjoni bid-dettalji kollha, jiġu mogħtija lill-*evaluation committee* li jappunta d-dipartiment innifsu, f'dan il-każ huwa l-Enemalta, biex issir evalwazzjoni.

ONOR. ALFRED SANT: Mela qabel tiftħu dawk l-offerti tirċievu lista ta' min huma l-membri tal-*evaluation committee* mill-ministeru jew dipartiment jew l-organizzazzjoni konċernata.

IS-SUR FRANCIS ATTARD: Mhux dejjem ikun il-każ. Fil-każ ta' *tenders* iffinanzjati mill-Unjoni Ewropea iva, inkunu nafu bihom.

ONOR. ALFRED SANT: Minn qabel.

IS-SUR FRANCIS ATTARD: Iva, minn qabel u anke jiġu approvati mid-Dipartiment tal-Kuntratti, però fit-*tenders* l-oħrajn id-dipartiment ma jinfurmaniex qabel, jappunta l-kumitat hu, jiġu għall-offerti tagħna u jeħduhom, dejjem bl-obbligu tal-kunfidenzjalità.

ONOR. ALFRED SANT: Jiġifieri qed nifhem tajjeb li f'dan il-każ bħal f'każi oħra, milli qed tgħid int, ikollkom il-lista tal-membri tal-*evaluation committee* wara? Jew inkella sempliċement tibagħtuh lill-Enemalta u l-Enemalta tgħidilkom min huma l-membri tal-*evaluation committee* tagħha? Jew intom tridu tapprovaw il-membri tal-*evaluation committee* qabel tgħaddu l-informazzjoni?

IS-SUR FRANCIS ATTARD: F'dan il-każ partikolari mal-għeluq tat-*tender* aħna ma konniex nafu min kienu l-membri tal-*evaluation committee.*

ONOR. ALFRED SANT: Imbagħad kif sirtu tafu min huma allura?

IS-SUR FRANCIS ATTARD: Insiru nafu min huma meta jiġi r-rapport tal-aġġudikazzjoni.

ONOR. ALFRED SANT: Ħalli nifhem x'qed tgħid. Jiġifieri intom lanqas tkunu tafu min huma l-membri tal-*evaluation committee*, li fuqu tistrieħu intom, waqt li qed jagħmel l-evalwazzjoni. Qed nifhem tajjeb jien?

IS-SUR FRANCIS ATTARD: F'dan il-każ partikolari iva, ma konniex nafu.

ONOR. ALFRED SANT: Ma kontux tafu u sirtu tafu meta bagħtulkom ir-rakkmandazzjoni. Min kienu l-membri tiegħu?

IS-SUR FRANCIS ATTARD: Kien hemm is-Sur David Spiteri Gingell, l-inġinier Peter Grima, is-Sur Dennis Attard, is-Sur Mark Muscat.

ONOR. ALFRED SANT: Jiġifieri dawn taf bihom għax iffirmaw ir-rapport tagħhom.

IS-SUR FRANCIS ATTARD: Iva.

ONOR. ALFRED SANT: Ma jkollok l-ebda kontroll fuq jekk kienx hemm *inputs* oħra fiha l-biċċa xogħol minn nies oħra li ma jiffirmawx ir-rapport.

IS-SUR FRANCIS ATTARD: Ma jkollix kontroll fiha.

ONOR. ALFRED SANT: Ma jidhirlekx li din hija proċedura ftit żlugata, illi inti qed tistrieħ fuq rapport ta' *evaluation committee* li ma tkunx taf min hu ħlief meta qed jissottomettilek ir-rakkmandazzjonijiet finali tiegħu?

IS-SUR FRANCIS ATTARD: Fil-fatt aħna qegħdin nimbuttaw biex din il-proċedura tinbidel. Illum il-ġurnata, bħalma diġà spjegajt, fil-każ ta' *tenders* li huma ffinanzjati mill-Unjoni Ewropea qed jinformawna minn qabel u aħna mhux sempliċement inkunu nafu l-ismijiet, imma qed nitolbu li jissottomettu CV u riċentement anke ħriġna ċirkolari li membri fuq dan il-kumitat bilfors iridu jkunu *civil servants* jew *public sector employees.*

ONOR. ALFRED SANT: Imma *beyond* dak, ma jidhirlekx li f'dak li għandu x'jasqsam ma' kumitat ta' evalwazzjoni, li fuqu qed tibbaża jew se tibbaża d-deċiżjoni tal-kumitat tiegħek, int għandek tkun taf min huma dawn in-nies u tapprovahom qabel dawn jibdew bid-deliberazzjonijiet tagħhom?

IS-SUR FRANCIS ATTARD: Fil-kategorija ta' dawn it-*tenders* hekk qegħdin nagħmlu. Qabel ma tibda l-evalwazzjoni aħna nkunu nafu min huma l-membri tal-kumitat tal-aġġudikazzjoni.

ONOR. ALFRED SANT: Imma fil-każ ta' dan it-*tender* dan ma sarx.

IS-SUR FRANCIS ATTARD: Fil-każ ta' dan it-*tender* le.

ONOR. ALFRED SANT: Apparti minn hekk, *once* li jaslilkom ir-rapport tal-kumitat tal-evalwazzjoni, xi jkun l-*input* tagħkom f'dak l-istadju? Tiddeċiedu iva jew le dak il-ħin stess jew terġgħu titkellmu mal-kumitat ta' evalwazzjoni? F'dan il-każ x'ġara?

IS-SUR FRANCIS ATTARD: F'dan il-każ partikolari aħna min-naħa tagħna rajna r-rapport. Billi dan kien *tender* pjuttost kumpless aħna xtaqna li mhux sempliċement jintbagħat ir-rapport imma almenu jiġu l-membri ta' dan il-kumitat jagħmlu l-preżentazzjoni u jidħlu f'ċerti dettalji u spjegi ta' kif waslu għal dawn il-konklużjonijiet.

ONOR. ALFRED SANT: U hekk ġara?

IS-SUR FRANCIS ATTARD: Iva.

ONOR. ALFRED SANT: Min-naħa tagħkom ħassejtu jew qatt tħossu l-bżonn li jkollkom *expertise* indipendenti minn tal-kumitat ta' evalwazzjoni, fis-sens li jkollkom ir-rakkmandazzjonijiet tal-kumitat ta' evalwazzjoni, ikollkom ir-risposti tagħhom għall-mistoqsijiet tagħkom, imbagħad tmorru għand espert estraneu biex jagħtikom l-*input* tiegħu?

IS-SUR FRANCIS ATTARD: Bħala Dipartiment tal-Kuntratti u b'mod partikolari l-Kumitat Ġenerali tal-Kuntratti, ir-responsabbiltà ewlenija tagħna hi fuq il-*contracting procedure* mhux l-evalwazzjoni nnifisha. Ir-responsabbiltà tal-evalwazzjoni nnifisha, mhux f'dan it-*tender* biss imma fi kwalunkwe *tender*, taqa' fuq il-kumitat ta' evalwazzjoni li suppost ikun kompetenti fin-natura tax-xiri li jkun irid isir.

ONOR. ALFRED SANT: Imma "suppost ikun" u milli qed tgħidli lanqas għandkom kontroll fuq li suppost ikun, fis-sens li *it's out of your hands* min se jkun dan il-kumitat ta' evalwazzjoni; m'għandkom l-ebda *say* fuqha.

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IS-SUR FRANCIS ATTARD: F'ċerti tip ta' *tenders* iva, però f'oħrajn le.

ONOR. ALFRED SANT: L-Unjoni Ewropea għandha l-proċeduri tagħha, imma f'dan il-każ m'aħniex qed insegwu dawk il-proċeduri.

ONOR. TONIO FENECH (Ministru tal-Finanzi, l-Ekonomija u Investiment): Biex niċċaraw ftit. Din m'hijiex *issue* ….

ONOR. ALFRED SANT: Onor. Fenech, ħu paċenzja, int ministru hawnhekk u aħna qegħdin nitkellmu ma' min hu responsabbli. Tajba din! Sur Attard, meta wasallek ir-rapport ta' evalwazzjoni bażikament f'dan il-każ x'kienet id-diskussjoni li saret mal-kumitat ta' evalwazzjoni min-naħa tagħkom?

IS-SUR FRANCIS ATTARD: Aħna min-naħa tagħna għamilna ċerti mistoqsijiet biex nifhmu anke l-konklużjonijiet li qed jaslu għalihom u l-akbar enfasi li għamilna kienet li naraw li hemm rakkmandazzjonijiet ċari abbażi ta' kriterji li kienu nklużi fit-*tender* biex ma jkunx hemm diskriminazzjoni jew vantaġġ inġust lil xi ħadd mill-*bidders.*

ONOR. ALFRED SANT: Kif għamiltuha din l-analisi min-naħa tagħkom? Fuq liema kriterji għamiltu l-mistoqsijiet tagħkom?

IS-SUR FRANCIS ATTARD: Min-naħa tagħna aħna staqsejna b'mod partikolari fuq l-*award criteria*.

ONOR. ALFRED SANT: Kif tispjegahom?

IS-SUR FRANCIS ATTARD: L-*award criteria* huma dawk il-kriterji li abbażi tagħhom *tender* partikolari jiġi *awarded*. Per eżempju, f'dan il-każ kienet *the most economically advantageous tender.* Ma jfissirx li bilfors trid tkun l-irħas offerta, imma kienet *combination* ta' punti fuq evalwazzjoni teknika u finanzjarja.

ONOR. ALFRED SANT: Min-naħa tagħkom staqsejtu jekk kienx hemm konsulenti estranei li ġew użati mill-*evaluation committee*?

IS-SUR FRANCIS ATTARD: Ma niftakarx li staqsejna.

ONOR. ALFRED SANT: Għax jekk fhimt tajjeb, is-Sur Camilleri ssemma lil Lahmeyer bħala konsulent estraneu li ntuża fuq l-ambjent, imma f'dak li għandu x'jaqsam ma' konsulenza estranea fuq is-sistemi tekniċi u mekkaniċi, *whatever you want to call them*, ma jidhirx li ssemmew konsulenti estranei. Qed nifhem tajjeb jien?

IS-SUR FRANCIS ATTARD: Ir-responsabbiltà aħħarija, anke jekk l-*evaluation committee* ikkonsulta ma' konsulenti estranei – u din mhix l-ewwel darba - tibqa' fuq l-*evaluation committee.*

ONOR. ALFRED SANT: Imma skont l-informazzjoni li għandek inti jew li smajna llum, intużat konsulenza estranea fil-każ ta' impatt ambjentali *vis-à-vis* Lahmeyer, filwaqt li *vis-à-vis* konsulenza mekkanika u teknika, safejn taf int, għallinqas safejn nista' nikkonkludi jien mir-rapport li kellna, ma kienx hemm konsulent estraneu imma straħna fuq in-*know-how* li għandha l-*evaluation committee* appuntata mill-Enemalta.
Qed nifhem tajjeb jien?

IS-SUR FRANCIS ATTARD: Ir-responsabbiltà dejjem taqa' fuq l-*evaluation committee.*

ONOR. ALFRED SANT: Mhux fuq responsabbiltà qed nitkellem issa imma fuq konsulenza teknika. Illejla ssemmiet konsulenza teknika fil-livell ambjentali, imma jekk fhimt tajjeb ma ssemmietx konsulenza teknika fuq livell mekkaniku.

Qed nifhem tajjeb jien? Sur Camilleri, forsi tista' tikkonfortani fuq dan il-punt? (Interruzzjonijiet) Għax issa għandi mistoqsijiet oħra. (Interruzzjonijiet) Qegħdin nidħlu fil-mod kif waslu għad-deċiżjoni il-membri tat-*tender committee*. It-*tender committee* qed jgħidilna li kellu r-rapport tal-*evaluation committee* u issa lilna llejla ntqalilna li l-*evaluation committee* kellu konsulenza estranea f'dak li għandu x'jaqsam ma' ambjent, imma s'issa għadu ma rriżultax li kien hemm konsulenza estranea fir-rigward tekniku. Qed nifhem tajjeb jien? Jiġifieri kienet in-*know-how* interna għall-Enemalta li wasslet għal deċiżjoni fuq l-impatt tekniku. Qed nifhem tajjeb jew ħażin? Jekk qed nifhem ħażin għiduli.

THE CHAIRMAN: Qabel ma nkomplu xtaqt nagħmel avviż. Jidher li llejla dan is-suġġett biss se jkollna l-ħin li niddiskutu u għalhekk jekk hawn xi uffiċjali li m'humiex hawnhekk għal dan is-suġġett jistgħu jmorru.

Nistgħu nkomplu.

IS-SUR PETER GRIMA: Nikkonferma li l-*expertise* teknika kienet l-*expertise* tal-Enemalta.

ONOR. ALFRED SANT: *Fair enough.* Għedtilna wkoll li intom tħarsu lejn il-kriterji tal-*award*. Dan jinkludi id-deċiżjoni li ttieħdet li 25% ta' l-*evaluation* tkun teknika u 75% tkun finanzjarja. Dik id-deċiżjoni intom ħadtuha jew l-*evaluation committee?*

IS-SUR FRANCIS ATTARD: Id-deċiżjoni ħaditha l-Enemalta *in the first place* meta ħarġet it-*tender* u aħna rridu naraw li meta qed jiġu mogħtija l-punti dawn ikunu fil-parametri ta' dawk l-*award criteria* li jkunu ġew ippubblikati.

ONOR. ALFRED SANT: Jiġifieri qed tikkonfermalna li meta ħareġ it-*tender* fuq id-*draft* li għamlet l-Enemalta kien mistqarr pubblikament li 25% tal-*evaluation* se jkun tekniku u 75% se jkun finanzjarju.

IS-SUR FRANCIS ATTARD: Iva.

ONOR. ALFRED SANT: Intqal ukoll li s-sistema ta' evalwazzjoni li ntużat kienet ta' NPV. Dik għamiltuha intom jew għamilha l-kumitat ta' evalwazzjoni?

IS-SUR FRANCIS ATTARD: Dik għamilha l-kumitat ta' evalwazzjoni.

ONOR. ALFRED SANT: Jekk fhimt tajjeb, intqal ukoll li kien hemm żewġ binarji fuq l-NPV *calculations* li saru. Wieħed mill-binarji kien *capital costs* u t-tieni binarju kien *operating costs.* Qed nifhem tajjeb li saru żewġ tipi ta' kalkoli fuq l-NPV fuqhom dawn?

IS-SUR FRANCIS ATTARD: Dik it-tip ta' evalwazzjoni mhux min-naħa tad-Dipartiment tal-Kuntratti ssir imma mill-kumitat ta' evalwazzjoni.

ONOR. ALFRED SANT: Jiġifieri hemmhekk intom aċċettajtu d-dokumentazzjoni mibgħuta lilkom u l-konklużjonijiet tal-kumitat ta' evalwazzjoni.

IS-SUR FRANCIS ATTARD: Hekk hu.

ONOR. ALFRED SANT: Jista' xi ħadd mill-kumitat ta' evalwazzjoni jgħidilna kif saret din l-evalwazzjoni, jekk jogħġbu?

IS-SUR PETER GRIMA: Il-metodu li ntuża kien NPV. Konna ħadna l-*capital cost* kollu u l-*operating costs*.

ONOR. ALFRED SANT: Ħa nkun ċar. Jekk fhimt sew, fil-preżentazzjoni tiegħu s-Sur Camilleri qal li saru in *two phases*; NPV fuq il-*capital costs and related issues* u t-tieni *evaluation* saret NPV fuq l-*operation costs over* …

IS-SUR PETER GRIMA: NPV *financial evaluation* saret waħda li tibda bil-*capital costs* u tinkludi l-*operating costs throughout the lifetime …*

ONOR. ALFRED SANT: Hekk nafha jien, imma s-Sur Camilleri mhux hekk qal.

IS-SUR PIPPO PANDOLFINO (ex-*Chief Financial Officer*, Enemalta): NPV *evaluation* waħda kien hemm mhux tnejn, però ovvjament hemm *two aspects*, il-*capital expenditure* u r-*running expenditure*.

ONOR. ALFRED SANT: U x'kienet id-*discount rate* li wżajt?

IS-SUR PIPPO PANDOLFINO: Bl-amment ma nafx.

IS-SUR PETER GRIMA: 6%.

ONOR. ALFRED SANT: Għaliex użajtu 6%?

IS-SUR PIPPO PANDOLFINO: Kienet *decided a priori*. 6% hija l-*cost of borrowing* tal-Enemalta plus ir-*risk premium* minħabba l-*uncertainties*.

ONOR. ALFRED SANT: Imma, kif taf int, l-għażla tal-*interest rate* imbagħad tkun skont l-*input of costs down the years*. Jiġifieri dik għandha effett, hux veru?

IS-SUR PIPPO PANDOLFINO: *Yes, definitely.*

ONOR. ALFRED SANT: U s-*sensitivity analysis* li għamiltu kien fuq l-*interest rate* ukoll jew le?

IS-SUR PIPPO PANDOLFINO: Aħna internament nittestjaw bin-numri differenti, però a skop ta' *adjudication* nużaw waħda biss għax nippubblikawha, ngħiduha *and we stick to it.* Ovvjament internament nagħmlu *sensitivity analysis* biex naraw x'differenza jkun hemm, kemm qabel u kemm wara.

ONOR. ALFRED SANT: Jiġifieri bażikament qed ngħidu li s-6% *discount rate* kienet diġà maħduma u magħrufa mit-*tender document.*

IS-SUR PETER GRIMA: Iva.

ONOR. ALFRED SANT: Allura mbagħad il-kalkoli li għamiltu kemm fuq *capital costs*, anke bl-*installment payment* tagħhom *cash out* u anke l-*cash out* fuq *operating costs* ġew kollha stmati fuq il-bażi ta' 6% għall-kontestanti kollha?

IS-SUR PIPPO PANDOLFINO: Iva.

ONOR. ALFRED SANT: Mela tista' tgħidilna, jekk jogħġbok, għaliex 25% tekniku u 75% finanzjarju?

IS-SUR PIPPO PANDOLFINO: Dik inkunu wasalna għaliha bħala *overall adjudication* mhux bħala *finance officers* biss.

ONOR. ALFRED SANT: Imma minn fejn ġiet allura?

IS-SUR PIPPO PANDOLFINO: Qabel ma joħroġ *tender* trid tagħti *weighting* lit-teknika u *weighting* lill-finanzi. F'dan il-każ tajna *weighting abbastanza* b'saħħtu ta' 75% lill-finanzi.

ONOR. ALFRED SANT: Imma jrid ikun hemm raġuni għaliha din.

IS-SUR PIPPO PANDOLFINO: *It is ultimately subjective.*

IS-SUR DAVID SPITERI GINGELL: Onorevoli, bħala CEO id-deċiżjoni kienet li nagħti r-rakkmandazzjoni jien u r-responsabbiltà nassumiha jien. Bażikament ir-rakkmandazzjoni li tajt lill-bord qabel ma ħrigna l-*evaluation* kienet li fil-*cost of operations* - mhux għax it-

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teknika mhix importanti – il-*financial sustainability* minn banda tal-Enemalta u minn banda *to reduce the cost of electricity to the consumers* - fl-aħħar mill-aħħar *part of that will be passed over - was that we would give the two-thirds majority of the weighting to the financial aspects of the project.*

ONOR. ALFRED SANT: Jiġifieri inti qed tgħid li din *basically* kienet *policy* tal-bord, hux hekk?

IS-SUR DAVID SPITERI GINGELL: Rakkmandazzjoni tiegħi lill-bord.

ONOR. ALFRED SANT: U l-bord aċċettaha u ħarġet fit-*tender*.

IS-SUR DAVID SPITERI GINGELL: Iva.

ONOR. ALFRED SANT: Imma l-*justification basically* hija *in terms ta' costs cash out* imbagħad *vis-à-vis* il-konsumatur.

IS-SUR DAVID SPITERI GINGELL: *Yes.*

ONOR. ALFRED SANT: Min-naħa l-oħra mbagħad, f'dak li għandu x'jaqsam mal-ambjent l-ewwel bdejt tgħidilna li kien imperattiv li nilħqu ċerti *coordinates* ambjentali li huma marbuta wkoll ma' *targets* finanzjarji wara kollox għax ikollok multi eċċ. *Were those factored into it or not*?

IS-SUR DAVID SPITERI GINGELL: *At that point in time* – nitkellem għalija – ma kellix il-konċett f'moħħi li ndaħħlu x-*shadow price of carbon*, jiġifieri ma daħħalnihx ix-*shadow price of carbon.* Però li għamilna, li sa ċertu punt huwa *proxy* għax-*shadow price of carbon*, kien li wżajna l-NPV fuq il-*cost of emissions*.

ONOR. ALFRED SANT: *In terms* ta' xiex? Tal-multi li taqla'? Jiġifieri *you fed* il-multi *into the cost structure*?

IS-SUR DAVID SPITERI GINGELL: Bħala NPV, *so it was a proxy, it wasn't actually a shadow price of carbon.*

ONOR. ALFRED SANT: Jekk fhimt tajjeb dawn li qed jikkontestaw id-deċiżjoni tagħkom f'dak li għandu x'jaqsam ma' ambjent kulħadd l-istess qiegħed fuqha dik, hux veru?

IS-SUR DAVID SPITERI GINGELL: Fl-opinjoni tiegħi hemm differenzi marġinali u ma naħsibx li huma korretti f'dak li qegħdin jgħidu. Ma nafx jekk Peter iridx iżid xi ħaġa.

IS-SUR PETER GRIMA: Ir-*requirements ambjentali* kienu mandatorji. Kull *bidder* kellu jikkonforma ma' *specified maximum emission limits*, kull tip ta' emissjonijiet, mhux CO2 biss. Dawk il-*bidders* li kieku se jissottomettu offerta li kienet 'il barra mill-*minimum requirements* – attwalment ma kienx hemm – kienu jitqaċċtu barra mill-ewwel. Kienet *mandatory requirement stated up-front* fl-*invitation to tender* u ċara ma' kulħadd.

ONOR. ALFRED SANT: *Fair enough*, imma *basically* allura l-kriterju ambjentali fid-deċiżjoni ma kellux impatt ta' differenza fuq il-*bidders*.

IS-SUR DAVID SPITERI GINGELL: Ma kellux impatt ta' differenza għax kienu prattikament kostanti fl-*abatement effects* li kellhom.

ONOR. ALFRED SANT: *That's what I'm saying*. Allura l-*crunch* kien imbagħad il-75% *financial weighting* tal-proġett. Qed nifhem tajjeb jien?

IS-SUR DAVID SPITERI GINGELL: Qed tifhem sew fl-opinjoni tiegħi.

ONOR. ALFRED SANT: Apparti minn hekk, issemma li ħarġu *requirements* ambjentali ġodda min-naħa tal-gvern fl-avviż legali. Hemm xi oġġezzjoni li l-

korrispondenza kollha relattiva għal din tiġi ppubblikata? Jiġifieri qed nirriferi għat-talba min-naħa ta' Malta għal kjarifika *vis-à-vis* il-kummissjoni Ewropea, ir-risposta għall-Kummissjoni Ewropea u l-proċess li mexa 'l quddiem fuqu.

IS-SUR ALFRED CAMILLERI: Jien f'idejja għandi r-rapport tad-Direttur tal-Ambjent u m'għandi l-ebda problema li ngħaddi fotokopja ta' din il-korrispondenza lis-Sedja. Ma nafx jekk id-Direttur tal-Ambjent għandux korrispondenza aktar dettaljata min dan ir-rapport.

ONOR. ALFRED SANT: Nitlob li kull dokumentazzjoni li hemm dwar dan tiġi sottomessa lis-segretarja ta' dan il-kumitat. M'hemmx għalfejn issa.

IS-SUR DAVID SPITERI GINGELL: Nista' forsi nżid xi ħaġa. Meta jien ħadt l-*appointment* bħala CEO fis-17 ta' Lulju 2007 dik kienet waħda mill-*issues* li writt. Ovvjament jien għamilt evalwazzjoni tal-pożizzjoni li kienet qed tagħmel l-Enemalta u jien emmint li l-Enemalta kellha tibqa' tinsisti biex il-*legal notice 329 tal-Large Combustion Plant* tiġi konformi mad-direttiva tal-Unjoni Ewropea.

ONOR. ALFRED SANT: Waħda mir-raġunijiet għalfejn iqumu dawn il-problemi hija li m'hemmx struttura li hija trasparenti. Il-fatt li jmorru għand *evaluation committee* li huwa *ad hoc,* għax *it's an ad hoc system,* jiftaħ ħafna problemi.

THE CHAIRMAN: Jiena xtaqt nagħmel mistoqsija min-naħa tiegħi. La kien hemm dak l-enfasi ambjentali minħabba t-*targets* eċċ., sar *an independent* EIA?

IS-SUR DAVID SPITERI GINGELL: Meta jien kont CEO, *in tandem* mat-*tender* konna bdejna diskussjonijiet mal-MEPA - ovvjament hemm proċess ta' kif isir EIA, fejn tagħmel it-*terms of reference* eċċ. - u sakemm irriżenjajt il-proċess kien miexi sew biex isir dan l-*assessment.* Ovvjament dan ma setax isir qabel ma kellna ċerti affarijiet *in motion.* (Interruzzjonijiet) Sakemm kont hemmhekk jien ma kienx sar. Li kien sar kienu d-diskussjonijiet mal-MEPA biex ikollna t-*terms of reference* u jiġi appuntat …

THE CHAIRMAN: Imma l-mistoqsija tiegħi hija jekk qabel ma saret l-għażla sarx EIA.

IS-SUR PETER GRIMA: Qabel ma saret l-għażla le, però qabel ma saret l-għażla nbeda l-proċess tal-EIA bi ftehim mal-MEPA, hemm il-ġbir tal-*background information* u issa ladarba nafu preċiżament it-tip ta' impjant nistgħu nikkonkludu f'qasir żmien.

THE CHAIRMAN: Imma l-EIA isir qabel ma tagħmel l-għażla, mhux tagħmel *assessment* biex jiffittja l-għażla! Donnu hekk ġej ix-xogħol! Jekk se titlob parir titolbu qabel ma tieħu d-deċiżjoni. Jiġifieri jien qed nifhem tajjeb li EIA ma sarx qabel ma ttieħdet id-deċiżjoni finali tal-għażla.

ONOR. AUSTIN GATT: Mr Chairman, bir-rispett kollu assolutament ma naqbilx ma' l-i*statement*; qed tagħmlu b'mod gratuwitu. Li l-EIA irid isir qabel ifisser li trid tagħmel sitt EIAs, għax sitta kellna *tenders.* Li għamlu huma, kif dejjem sar, huwa li ġabu *independent experts* biex jiċċekkjaw li l-livelli ambjentali kollha jilħqu mad-direttivi tal-Unjoni Ewropea, imbagħad fuq il-*winning bid* tagħmel l-EIA għax l-EIA ma jidħollokx fuq il-partijiet li jkunu diġà ġew deċiżi waqt it-*tender.*

THE CHAIRMAN: Ma naqbilx ma' l-opinjoni tiegħek. (Interruzzjonijiet) Jien m'iniex nagħmel *statement*; sempliċement ridt inkun naf jekk sarx EIA u r-risposta kienet li le ma sarx.

IS-SUR DAVID SPITERI GINGELL: Il-proċess kien inbeda però ma sarx.

ONOR. ALFRED SANT: Sur Spiteri Gingell, qed nikkontradixxu lilna nfusna. Il-ministru għadu kemm qal li tagħmel l-EIA wara l-għażla, inti qed tgħid li kont bdejt tagħmel l-EIA qabel l-għażla. Qed nifhem tajjeb jien?

IS-SUR DAVID SPITERI GINGELL: Forsi spjegajt ruħi ħażin. Bdejna l-proċess biex isiru t-*terms of reference* u jiġu appuntati l-konsulenti min-naħa tal-MEPA biex *in tandem* isir l-EIA. Sfortunatament il-proċess mhuwiex wieħed qasir imma huwa proċess li għal ħafna raġunijiet jieħu ż-żmien. Sakemm kont għadni CEO hemmhekk jien, ma kienx sar EIA.

IS-SUR PETER GRIMA: Nista' forsi nżid xi ħaġa ma' dak li qal is-Sur Spiteri Gingell. L-EIA irid jara l-*interaction* ta' l-impjant il-ġdid, *whichever it is*, ma' l-impjant eżistenti u mal-*background conditions eżistenti*, il-Port ta' Marsaxlokk *and the surrounding areas*. S'issa l-EIA qed jara dawk il-*background conditions*, kemm l-impjant eżistenti tagħna kif ukoll il-*background* ta' impjanti industrijali oħrajn u fuq dak il-mudell li jinbena jidħol il-mudell ta' l-impjant il-ġdid.

THE CHAIRMAN: Għandi mistoqsija għas-Sur Spiteri Gingell. Inti enfasizzajt li t-teknoloġija avvanzata hija element mill-aktar importanti u, jekk qed nikkwotak sew, għedt li kieku tidħol il-bieraħ aħjar milli tidħol għada, jiġifieri li tintroduċi teknoloġija avvanzata. Allura ma' dan l-i*statement* kif tirrelata l-fatt li allokajtu 25% biss tal-*evaluation* fuq il-parti teknika?

IS-SUR DAVID SPITERI GINGELL: Mr Chairman, ma naħsibx li jien għedt hekk. Jien għedt li aħna konna qed nibnu strateġija ta' elettriku li kellha numru ta' partijiet fiha. Kellha l-parti tal-*generation* li tinkludi l-għeluq tal-Marsa, kellha l-parti li konna qed inħarsu lejn is-*submarine cable* u kellha l-parti tal-gass. Dawn kienu *three chunks* tal-istrateġija. It-*timing* ta' kull waħda minnhom mhuwiex neċessarjament l-istess. *In terms* tal-ġenerazzjoni ta' l-elettriku hawn Malta konna qegħdin naraw, għallinqas sakemm kont għadni hemmhekk jien, li jkollna tliet fażijiet ta' tliet *generating plants* ta' 150 *megawatts each*. Dan kien l-ewwel wieħed. L-intenzjoni tagħna – almenu tiegħi bħala CEO, li kelli moħħi ffokat fuqha – kienet li dan l-impjant kellu bżonn li jsir mill-iktar fis possibbli. Kemm minn *concerns* li kelli fuq *continuity of supply*, kemm fuq *concerns* tal-20,000 siegħa u l-*infringement process* eċċ., il-*pressure* tiegħi, għallinqas ir-responsabbilta li ħassejt jien kienet li *I would be ready to trade off the most innovative for time.*

THE CHAIRMAN: U l-opinjoni tagħkom kienet li mill-aspett teknoloġiku dan huwa l-iktar impjant avvanzat.

IS-SUR PETER GRIMA: L-*assessment* mhuwiex li huwa l-iktar impjant avvanzat, huwa impjant li jiffittja mar-*requirements* tagħna.

THE CHAIRMAN: Huwa l-iktar wieħed avvanzat biex jiffittja mar-*requirements* tagħkom.

IS-SUR PETER GRIMA: L-aħjar wieħed li jiffittja mar-*requirements* tagħna.

THE CHAIRMAN: Il-Ministru.

ONOR. TONIO FENECH: Nerġa' ndur ftit fuq id-Direttur tal-Kuntratti. Il-liġi, min tistabbilixxi li għandu jappunta l-*evaluation committee*?

IS-SUR FRANCIS ATTARD: Il-liġi ma tistabbilixxix min għandu jappuntah, min-naħa tad-Dipartiment tal-Kuntratti,

jappuntah il-kap tad-dipartiment li jkun se jagħmel ix-xiri.

ONOR. TONIO FENECH: U l-liġi tagħna hija konformi mal-*procurement regulations* tal-Unjoni Ewropea?

IS-SUR FRANCIS ATTARD: Iva, hija konformi mad-direttivi fuq *public procurement.*

ONOR. TONIO FENECH: Il-kumitat tal-kuntratti dejjem aċċetta r-rakkmandazzjonijiet tal-*evaluation committees*?

IS-SUR FRANCIS ATTARD: Le, mhux dejjem.

ONOR. TONIO FENECH: Jiġifieri intom kellkom id-dritt, kieku ridtu, li tgħidu li ma togħġobkomx dik l-*evaluation* u tibagħtuha lura.

IS-SUR FRANCIS ATTARD: Iva u mhux l-ewwel darba li ma naċċettawx rakkmandazzjonijiet ta' *evaluation committees.*

ONOR. TONIO FENECH: X'tagħmel kieku inti fost l-ismijiet ta' dawk li ġew appuntati għall-*evaluation committee* ikollok suspett li hemm xi ħadd li jista' ma jkunx imparzjali?

IS-SUR FRANCIS ATTARD: Min-naħa tiegħi żgur li ma naċċettahx u nerġgħu nirriferuh lura.

ONOR. TONIO FENECH: Jiġifieri hemm *checks and balances* biex jiġi assigurat li l-kumitat li qiegħed jaġġudika jkun wieħed li jagħti *assessment* oġġettiv?

IS-SUR FRANCIS ATTARD: Iva, hemm.

ONOR. TONIO FENECH: U għalik hija proċedura li tagħti trasparenza?

IS-SUR FRANCIS ATTARD: Iva.

THE CHAIRMAN: L-Onor. Sant.

ONOR. ALFRED SANT: Tista' jekk jogħġbok tgħidilna x'inhuma dawn iċ-*checks and balances?*

IS-SUR FRANCIS ATTARD: Il-*Public Contracts Regulations* jagħtu awtorità lid-Direttur tal-Kuntratti u anke lill-*General Contracts Committee* li ma jaċċettax rakkmandazzjonijiet minn *evaluation committees.* Jista' jkun hemm sitwazzjonijiet fejn *evaluation committee* ma jkunx irid ibiddel il-versjoni tiegħu. F'dak il-każ il-liġi taħseb biex dak il-każ partikolari jiġi riferut għand il-ministru tal-finanzi għad-deċiżjoni finali tiegħu.

ONOR. ALFRED SANT: Dak huwa *check and balance de jure* li qed tgħid inti, bħala liġi. Imma f'ċirkostanza fejn it-*tender committee*, milli għedtilna int, ma kellu ebda *know-how* u ma ħa ebda passi biex ikollu *know-how* tiegħu, m'hemm l-ebda *checks and balances*, għax fuq liema bażi se tgħid le fuq dak li se jgħidlek l-*adjudicating committee*? L-ebda bażi. Mhux hekk?

IS-SUR FRANCIS ATTARD: Le, mhux neċessarjament hekk. Aħna min-naħa tagħna rajna li r-rakkmandazzjonijiet li qegħdin isiru kienu abbażi ta' l-*award criteria* li kien hemm fit-*tender* u rajna li kien hemm rakkmandazzjonijiet ċari ta' min għandu l-aħjar offerta abbażi ta' dak li ġie ppubblikat fit-*tender.*

ONOR. ALFRED SANT: Imma, bir-rispett kollu, *check and balance* tfisser li meta tiġi biex tevalwa dak li jgħidlek xi ħadd ikollok l-*expertise* tiegħek biex tevalwah. Minn dak li għedt inti m'għandekx *expertise* biex tagħmel dan, almenu f'dan il-każ. *De jure* għandek iċ-ċans ta' *checks and balances* imma l-fatt li mgħandekx l-*expertise* biex tagħmel iċ-*check and balance* ma tistax tagħmel *check and balance.*

IS-SUR FRANCIS ATTARD: Irrid ngħid li r-responsabbiltà tad-dipartiment tagħna hi fuq il-*contracting procedure* mhux fuq l-evalwazzjoni tat-*tender* innifisha. Issa min-naħa tagħna ma kien hemm xejn li jindika li l-prinċipji ta' trasparenza jew diskriminazzjoni ġew miksura.

THE CHAIRMAN: Hemm aktar domandi? Ma jidhirx li hemm. Qabel ma nikkonkludu nitolbok, Sur Camilleri, sabiex tibgħat id-dokumenti li ġejt mitlub tibgħat lis-segretarja tal-kumitat. Nirringrazzjakom.

Fid-8:52p.m. il-Kumitat aġġorna.

Appendix 10

---------- Forwarded message ----------
From: "Darmanin Francis at Enemalta" <francis.darmanin@enemalta.com.mt>
To: "Shaul Morgenstern" <ShaulM@bateman.co.il>
Date: Mon, 4 May 2009 14:46:54 +0200
Subject: RE: Delimara Power Plant; Contract no. GM/DPS/8/2006 and CT2491/06

Dear Mr. Morgenstern,

Further to your e-mail of the 28th April 2009. I have been asked to formally inform you that the procurement procedure for this tender has been concluded. The recommendation made by the General contracts Committee of the Department of Contracts was published on the 3rd of April 2009 giving a 10 day period for any appeals.

No appeals were received by the appointed date so the process ended there. I am attaching for your reference the publication made on the Department of Contracts website www.contacts.gov.mt

Best regards,

Francis Darmanin