



**Enemalta Corporation
Tender for Generating Capacity
(GN/DPS 8/2006)**

**Supplementary Investigation by Auditor General
as Commissioned by the Public Accounts Committee**

May 2011

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List of Abbreviations

AG	Auditor General
BWSC	Burmeister & Wain Scandinavian Contractor AS
CC	Conditions of Contract
CEO	Chief Executive Officer
CFO	Chief Financial Officer
DECC	Diesel Engine Combined Cycle
DEPFA ACS Bank	Deutsche Pfandbriefbank, based in Dublin, Ireland
de-NOx	De-nitrification of nitrogen oxide emissions
de-SOx	Flue gas desulphurisation
DoC	Department of Contracts
DPS	Delimara Power Station
EMC	Enemalta Corporation
EU	European Union
GVTH	Grech Vella Tortell Hyzler Advocates
HFO	Heavy fuel oil
HoR	House of Representatives
ITT	Invitation to Tender
KPMG	Klynveld Peat Marwick Goerdeler
LI	Lahmeyer International
LN	Legal Notice
LoA	Letter of Acceptance
M	Million
MAN	Maschinenfabrik Augsburg-Nurnberg Diesel SE
MES	Mitsui Engineering and Shipbuilding Company Limited
MFEI	Ministry of Finance, the Economy and Investment
MIIT	Ministry of Investment, Industry and Information Technology
NAO	(Malta) National Audit Office
NOx	Oxides of Nitrogen
NT re Govt of Spore Invnt Corp P Ltd	National Trust Government of Singapore Investment Corporation
PAC	Public Accounts Committee
SCR	Selective Catalytic Reducer
SMBC	Sumitomo Mitsui Banking Corporation
SMFG	Sumitomo Mitsui Financial Group
SOx	Oxides of Sulphur
SSBT OD05	Omni China Treaty, Australian-based fund interested in Japanese equity positions across a range of firms
VAT	Value Added Tax

Executive Summary

The report *Enemalta Corporation - Tender for Generating Capacity (GN/DPS 8/2006)*, tabled by the Auditor General in April 2010, was the basis of discussion of a number of PAC sessions. During one such session, a PAC member addressed a letter to PAC Chairman. In this communication seven concerns, described as being based on facts that emerged after the April 2010 tabling, were listed. PAC mandated NAO to take up the investigation, on the basis of the letter contents.

NAO's investigative team analysed all seven issues. Documents deemed pertinent to the investigation were likewise analysed. In compiling its report, the team referred to data collected during the original investigation. Additionally, communication with key players, as deemed necessary was established and maintained.

Of the seven concerns listed in the letter, two dealing with relationships between key players and with the 2005 loan taken out by EMC respectively, were deemed to bear no impact on the tendering process. Two other concerns, covering changes reputedly effected to accommodate a particular bidder and conflicts of interest respectively, had already been extensively reported upon in the original April 2010 report.

NAO identified, however, key issues in the remaining three concerns listed in the letter. One deficiency that transpired was EMC's consistent recourse to direct orders on an ongoing/repeat exercise and the Corporation's surpassing authorised financial capping.

A second concern was the fact that in public procurement of entities dealing in water, energy, transport and postal services, public contracts regulations empowering authorities to control economic operators' participation in tendering on the basis of the latter's professional (mis)conduct were not applicable under the then prevailing legislation.

Another potential concern was that a partner of the legal firm representing BWSC's local representative had previously been EMC's legal advisor for twenty years. This same firm also (separately) represents BWSC locally.

Introduction

In January 2011, the Parliamentary Opposition members of the Parliamentary Public Accounts Committee (PAC) tabled a communication (dated 11 January 2011) featuring a number of concerns, all related to the award of the Enemalta (EMC) Delimara Power Station (DPS) Extension contract to the successful bidder BWSC.

NAO was officially mandated to carry out the investigation when the communication in question was forwarded to the Office by the Secretary of the PAC, on 22 February 2011. This communication, featuring as Appendix 'A' of this report, contained seven individual issues, as per below:

1. Business relationships between Mitsui Engineering and Shipbuilding Company Limited (MES), MAN and BWSC;
2. EMC's 2005 loan in which the Sumitomo Mitsui Banking Corporation (SMBC) was involved;
3. KPMG as auditors of both BWSC and SMBC and EMC's assignment of financial cost analysis to the audit firm;
4. Changes in legislation and technical specifications and strategic decision related to fuel type usage made during the tendering process;
5. Lack of action by the authorities with respect to the involvement of subcontracting firms in illegal activities;
6. Conflicts of interest; and
7. The representation of key players such as EMC, BWSC and BWSC's local representative by the same legal office.

In view of the detailed level of content of the communication in question, the Investigative Team of the National Audit Office considered this document to be the Terms of Reference to be followed in the conduct of this extension to the original NAO investigation, titled *Enemalta Corporation – Tender for Generating Capacity (GN/DPS 8/2006)* tabled in April 2010 and subsequently discussed during various sessions at the PAC.

The NAO, as is customary in such cases, considered all issues/concerns and followed each through. All seven matters are addressed individually in this report, in varying degrees of detail, depending on the nature of each allegation and the amount of data/information/evidence that the Investigative Team was able to collate and verify. Documents deemed pertinent to the investigation feature as appendices to this report. A more detailed description of the methodology followed is included as Appendix 'G' of this report.

Concern (1) – Business relationships between MES, MAN and BWSC

The 11 January 2011 communication makes reference to the fact that MAN is licensed by MES to build the engines used in BWSC's power stations worldwide.

It is pertinent to note that going into the merits of this statement would be outside the scope of the NAO – such scope was limited to the events directly impacting on the tendering process applied and the regularity thereof during the EMC DPS extension project. In actual fact, BWSC's offer to EMC, which offer ended up as the successful bid and as such the basis of the contract being executed, uses Wartsila diesel engines, and not MAN's.

This may be attested from the relevant tender documents as submitted by BWSC.

An allegation follows the above statement: given the above business relationship between BWSC and MAN, MES (as BWSC owner) would have stood to gain had MAN (who placed second in the EMC DPS adjudication) been awarded the contract.

Such an allegation is rhetoric in nature, given the outcome of the adjudication. In addition, it is not clear to the NAO Investigative Team as to how MES would have benefited through MAN being awarded the contract. BWSC's making use of MAN engines when building power stations does not imply the opposite, namely that MAN would have in any way involved BWSC had the former secured the tender.

In view of the above, NAO feels the facts being stated bear no impact on the adjudication process and the allegation of gain for MES does not constitute sufficient grounds for further investigation.

Concern (2) – EMC’s 2005 loan and SMBC’s involvement therein

Reference is made, in the January 2011 communication, to the loan taken out by EMC in mid 2005, amounting to Euro 210 million, and in which SMBC was involved.

The loan in question is covered by an agreement dated 30 June 2005 between EMC as Borrower and Banco Efisa, DEPFA Bank plc and SMBC Europe Ltd as Mandated Lead Arrangers. DEPFA Bank plc features as Agent and the Republic of Malta as Guarantor under the Guarantee.

The said contract covers a Euro 210 million Term Loan Facility. Schedule 7 of the contract specifies the banks and commitments as follows:

DEPFA ACS Bank	185,000,000
SMBC Europe Ltd	25,000,000
Total	210,000,000

As may be attested from the above, while SMBC was involved as stated in the January 2011 communication, such involvement was limited to a relatively minor commitment of 11.9 per cent (Euro 25M) of the total amount covered by the contract. Appendix ‘B’ of this report features relevant extracts from the contract in question.

The statement goes on to allege that SMBC is owned by MES.

As may be attested from information available online, SMBC is a member of the Sumitomo Mitsui Financial Group (SMFG) and is, in fact, wholly owned by SMFG. (<http://www.smbc.co.jp/investment/english/index.html>)

On its part, SMFG is listed on the Tokyo Stock Exchange. (<http://www.tse.or.jp/tseHpFront/StockSearch.do>)

Referring to http://www.smfg.co.jp/english/investor/stock/capital_shares.html, the following information is of particular interest:

SMFG - Number of Shares, Classified by Type of Shareholders as of 31 March 2010

	Number of shareholders	Number of shares (units of shares)	Percentage of total (%)
Japanese government and local government	8	4,926	0.03
Financial institutions	430	4,033,863	28.57
Securities companies	110	519,408	3.68
Other institutions	9,819	1,554,454	11.01
Foreign institutions:			
Of which other than individuals	964	5,848,545	41.42
Of which individuals	147	1,190	0.01
Individuals and others	356,146	2,157,496	15.28
Total	367,624	14,119,882	100.00
Fractional shares	-	2,067,425	-

A list of principal shareholders, extracted from the same online source, follows:

Principal Shareholders as of 30 September 2010

	Number of shares (100 shares)	Percentage of shares outstanding (%)
Japan Trustee Services Bank Ltd (Trust Account)	932,540	6.59
The Master Trust Bank of Japan Ltd (Trust Account)	781,486	5.52
Japan Trustee Services Bank Ltd (Trust Account 9)	285,515	2.01
SSBT OD05 Omnibus Account – Treaty clients	237,863	1.68
State Street Bank and Trust Company 505225	175,948	1.24
Mellon Bank, NA, as agent for its client Mellon Omnibus US Pension	168,454	1.19
The Chase Manhattan Bank 385036	157,343	1.11
Nippon Life Insurance Company	154,666	1.09
Rabobank Nederland, Tokyo Branch	153,340	1.08
NT re Govt of Spore Invt Corp P Ltd	143,269	1.01

In view of the above, the allegation that SMBC is wholly owned by MES is proved to be unfounded.

It is pertinent to note that, following comments that featured in the local media subsequent to the PAC sittings of January 2011 in connection with the above-discussed allegation, the legal representatives of BWSC A/S, Denmark, had written to the Auditor General. Via a communication dated 11 February 2011 (featuring as Appendix ‘C’ of this report) GVTH Advocates attested their client’s request to bring to the attention of the NAO company structure information depicting the position of MES and SMBC, and the business relationship between MES and MAN.

Taking into account base-time differences, the shareholding figures as quoted in the GVTH letter tally with those accessed from the individual companies’ annual reports as depicted in detail above.

It is to be noted that NAO founded its investigation for this concern on documents featuring on the individual companies’ websites, as per the references quoted. In a number of occasions, such extracts were from annual reports that were endorsed by the companies’ external auditors.

While recognising that such a verification exercise does not constitute definitive proof, in view of the fact that the source for the information is linked to the company under scrutiny, recourse to such an approach was deemed pragmatic, in view of the complications that would have materialised, and significant expenses that would have been incurred, had the Office opted for a more rigorous investigation. This would have, invariably, necessitated the commissioning of an agent in Japan tasked with obtaining formal authentication through (Japanese) independent and reliable financial institution(s) of the shareholding figures as quoted by GVTH and/or as available on the companies’ websites.

In the circumstances, the approach adopted by NAO is deemed to be sufficient as evidence for the case. It is also deemed to constitute a move towards achieving value for money by the Office, a concept the NAO endeavours to convey to its auditees.

Concern (3) – KPMG involvement with BWSC, SMBC and EMC

The third concern in the January 2011 communication deals with the involvement of the auditing firm KPMG.

KPMG is described as being the firm responsible for auditing both BWSC and SMBC.

BWSC's 2009 Annual Report, available online on <http://www.bwsc.com/Annual-reports.aspx?ID=42>, confirms that KPMG is the appointed auditing firm.

The 2010 Annual Report for SMFG likewise confirms KPMG as being the Group's appointed external audit firm.

Additionally, the MES 2010 Annual Report also shows that KPMG was the Company's audit firm.

Private companies are at liberty to select an audit firm of their choice and are, generally, not bound by any restriction in making this choice. The only one limitation that exists is that a firm to whom accounting and/or consultancy services have been farmed out cannot be appointed as external auditor by the same client. This 'firewall' exists in order to safeguard auditors' independence and autonomy¹.

The concern, apart from depicting KPMG's business relationship with BWSC and SMBC, also refers to Malta Government's assignment to KPMG in connection with the study concerning price increases of electricity and water tariffs.

The claim that EMC increased rates to repay the loan the Corporation had taken out in 2005 with SMBC cannot be entertained. Page 8 of this report furnishes proof that, of the Euro 210 million loan, only Euro 25 million were financed by SMBC Europe Ltd.

EMC's commission to KPMG to carry out the utilities rate study was still deemed by NAO to merit further investigation. An examination of the relevant file and documentation as held at EMC revealed that, in effect, the farming out of 'services for advice and assistance' in connection with adjustment in electricity tariffs was an exercise of an on-going nature.

EMC records concerning KPMG's commissions on the subject matter, as of 2006 to date indicate the following:

¹ Typical legislation is the Sarbanes-Oxley Act of 2002, aimed at instilling corporate and auditing accountability and responsibility in the United States of America. The law was enacted in response to a number of corporate and accounting scandals including those affecting Enron, Tyco International and WorldCom. Addressing auditor independence issues, the Act restricts auditing companies from providing non-auditing services (e.g. consulting) for the same clients.

Fee Note Ref	Fee Note Date	Task description	Amount charged and paid (Euro inc VAT)	MFEI Approval (Euro inc VAT)	Comment/ Clarification
20223613	29 Dec 2006	Review of regulatory framework of various electricity supply retail tariff structures	51,674	n/a	MFEI approval was not sought as, according to EMC, the initial estimate was Lm8,500 therefore MIIT approval was obtained
20232355 20233328	17 Nov 2008 5 Feb 2010	Review of regulatory framework, assessment of various electricity supply retail tariff structures and computation of retail bottled gas prices	143,783 37,241	143,783 37,241	MFEI approval sought and obtained for services as per Fee Note 20232355 and for additional costs covered by Fee Note 20233328
20234685	16 Mar 2009	Ongoing advice and assistance in relation to the revised water and electricity tariffs implementation	18,880	n/a	MFEI approval, if requested, was not made available by EMC to NAO
20234756 20236268	24 Mar 2009 22 Jun 2009	Assistance with the revision of electricity tariffs which came into effect 1 Oct 2008	80,240 30,680	70,800	MFEI approval sought and obtained solely for the 'fixed cost' element at Euro 60,000+VAT. The 'variable' element, charged on a time basis, was not covered by MFEI approval
20237431	23 Sep 2009	Ongoing advice and assistance in relation to the revised electricity retail tariffs implementation	36,580	n/a	MFEI approval, if requested, was not made available by EMC to NAO
20238713	27 Nov 2009	Advice and assistance with the adoption of an electricity tariff model proposed by the Malta Resources Authority	103,840	70,800	MFEI approval sought and obtained solely for the 'fixed cost' element at Euro 60,000+VAT. The 'variable' element, charged on a time basis, was not covered by MFEI approval
n/a	n/a	Advice and assistance in reviewing the current retail tariffs	--	70,800	MFEI approval sought and obtained solely for the 'fixed cost' element at Euro 60,000+VAT. The 'variable' element, charged on a time basis, was not covered by MFEI approval

The above is based on information as submitted by EMC to NAO.

It is pertinent to note that this is not the first incidence wherein EMC has made recourse to direct orders, in instances where the issuing of an ITT would have been more transparent and equitable. Referring to the April 2010 report on the EMC DPS Extension Tender, the NAO had dedicated an entire chapter of the report in question to the role played by Lahmeyer International (LI), consultants that had been commissioned by EMC, via a direct order and for two separate, if related, tasks.

In the case of LI, the case was admittedly even more critical as the firm was blacklisted internationally. At the time, EMC had stated that LI had been contracted via a direct order due to the fact that the firm was already in a business relationship with the Malta Resources Authority.

Asked for justification concerning the Corporation's course of action with respect to repeat commissions issued via a direct order, EMC CFO commented as follows on behalf of the CEO:

- a) The review of the tariffs was not a one-off exercise but is undertaken according to the dictat of the market, i.e. if market conditions affect the price inputs of EMC.*
- b) KPMG were engaged through a direct order. It was felt this field is very specialised and KPMG were considered to possess the required resources and competencies for this assignment. Given that they delivered what was expected of them we continued availing their services.*
- c) The assignment to KPMG was granted following internal discussion and approval by the Ministry.*

NAO is still wary of similar commissions for services of any type, especially when substantial amounts are involved, that are issued via a direct order. 'Specialised fields' may still very well be handled, and indeed should be handled, through competitive processes as contemplated by the public procurement regulations. In this case, the concern is even more significant, given the repeat/on-going nature of the order. The Office feels that recourse to procurement via direct orders should be on an exceptional basis, rather than by default. Such recourse should be appropriately authorised, and should only be allowed in cases of extreme urgency and/or where exceptional circumstances so dictate.

Compliance failure invariably leads to a lack of perceived transparency and equity in the public procurement mechanism across the whole of government.

In addition, once by EMC's own admission the exercise is to be frequently conducted, the Corporation should consider the possibility of carrying out the task in-house, reducing its dependence on third parties.

Finally, it is pertinent to note that, while EMC CEO declares that 'approval by the Ministry' was sought and obtained, the table above highlights discrepancies between amounts for which EMC sought and obtained Ministerial approval, and the corresponding amounts eventually invoiced and paid out on each assignment.

Concern (4) – Changes implemented during the tendering process

The fourth concern featuring in the letter forming NAO's Terms of Reference for this supplementary investigation implies that the direct and indirect links between the entities MES, BWSC, SMBC and MAN (as already discussed in previous sections of this report) were the cause of changes implemented by the pertinent local authorities to legal requirements and technical specifications during the course of the tendering process. The communication in question goes on to state that such changes were effected in order to ensure that BWSC secured the order basing on diesel engines running on heavy fuel oil (HFO).

In this regard, it is pertinent to note that the original report, *Enemalta Corporation – Tender for Generating Capacity (GN/DPS 8/2006)* as tabled by the Auditor General in April 2010, addressed in great detail issues and concerns related to changes in the prevailing legal framework, and corresponding changes to technical specifications and other parameters of the tender during the tendering process. The report in question featured audit opinions and recommendations on this subject matter.

As such, while it is deemed unnecessary for the NAO Investigative Team to treat these concerns again at this stage of the investigation, following is a resume' of the more salient related issues/concerns featuring in the April 2010 report:

- 1. The January 2008 legislative changes** – Adjusting Maltese legislation to be level with the source EU Directive on emission limits. This change, effected during the tendering process, changed the relative positioning of bidders where adjudication was concerned, in that it allowed DECC bidders to submit offers that were less expensive than what would have been submitted had the emission limits remained unaltered.
- 2. EMC's changes to ITT technical specifications based on legislative changes** – The April 2010 report explained in detail how tender technical specifications got changed by EMC midway through the tendering process, impinging directly and in a very significant manner on bid ranking during the evaluation and adjudication processes. The report further described how such amendments, carried out with the Department of Contracts' go-ahead, were made despite the fact that applicable emission limits, with which bidders were to comply, were defined specifically in the tender document. In the NAO report, the Office had opined that a greater degree of transparency and equity would have prevailed, despite inherent implications of time and cost, had the tendering process been aborted and restarted.
- 3. EMC's deviation in concept from the original demand for tried and tested solutions, as per ITT mandatory technical specifications, to the eventual acceptance of untried combinations, basing on theoretical assumptions** – This issue was copiously covered in the NAO report. It was reported how EMC had originally issued the ITT in a technology neutral format, limiting itself to defining performance requirements (specifications) and leaving it to prospective bidders to propose solutions, based on technologies of their choice, which would satisfy the tender specifications. One such technical specification, mandatory in nature, called for tried and tested solutions with proof being submitted by bidders in the form of reference to international sites where identical equipment was in operation. The April 2010 NAO report showed how, by 4 March 2008, the closing date of the Detailed and Final Bids, the two diesel engine based bids, as submitted by MAN and BWSC, did not indicate a complete system of engine, de-NOx, de-SOx and dust removal equipment. At this stage, EMC opted to change the previously-set evaluation/adjudication process (that was based on internal resources carrying out compliance checks of the bids against technical benchmarks preset within the ITT). As remedial action, EMC had called in a technical consultant, LI, and charged this firm with the carrying out of a feasibility study to determine whether the submitted diesel engine bids, running on heavy fuel oil, would in fact conform to the amended emission limits. In its report, NAO had been highly critical of the approach adopted by EMC and with the manner with which technical requirements, hard coded as mandatory conditions in the ITT, were effectively bypassed.
- 4. Divergence between EMC's technical evaluation report and LI's consultancy report** – NAO's April 2010 report had commented profusely on these divergences. More notably, these included the non-inclusion in EMC's technical report of:
 - a. LI's concern regarding NOx removal efficiencies, deemed extremely high by LI in the case of the diesel engine bidders;
 - b. Advice by LI with respect to securing of a maintenance agreement on a long term basis, in view of the fact that a prototype, as yet untested, combination, was being procured;

- c. LI's concern regarding the lack of experience on Selective Catalytic Reducers (SCR) installed downstream of a diesel engine; and
- d. Attention drawn by LI to the fact that BWSC had crossed out the word 'guaranteed' in all emission guarantee schedules contained in their bid.

5. Divergences in EMC's position before and after the contract as signed with BWSC – NAO's April 2010 report tackled this concern, deemed critical, in ample detail. Salient differences were noted in EMC's position as expressed in Section CC of the ITT, the Conditions of Contract, and the corresponding conditions featuring as clauses and articles of the contract as signed between EMC and BWSC following tender award. The more notable of these differences are listed hereunder, in bullet form. More detail may be obtained through perusal of the April 2010 report:

- a. Time limit for action following the submission of drawings;
- b. Liability in case of errors in drawings;
- c. Sub-letting of the contract;
- d. Contractor's and Purchaser's defaults;
- e. Termination-related issues;
- f. Issues related to delivery terms;
- g. Access to site of works;
- h. Transfer of ownership (vesting) of the plant;
- i. Rejection-related terms and conditions;
- j. Tests on completion, liquidated damages and early completion bonus; and
- k. Arbitration venue and applicable rules.

Concern (5) – Involvement in illegal activities by various subcontractors

The communication as tabled at the PAC features a statement that various of BWSC's subcontractors, involved in the EMC DPS Extension project, are involved in serious cases of corruption, fraud or money laundering. The communication further remarks that EMC, the Department of Contracts (DoC) and Malta Government did not take any action on the basis of these cases.

Two legal instruments covered procurement conditions up to the submission of the bids for the tender in question: at a macro, holistic, level there is the then-prevailing procurement legislation comprising of various sections of LN 177 (2005)² and LN 178 (2005), the latter dealing in procurement where water, energy, transport and postal services are concerned; at a micro level, there is the ITT itself, particularly the Conditions of Contract section.

It is pertinent to note that, where legislation is concerned, it is Regulation 49, LN 177, that lays down 'qualitative selection criteria' empowering procuring entities, at their discretion, to exclude an 'economic operator' from participating in a public contract. Criteria triggering such discretionary exclusion are addressed in Regulation 49 (1) (a)-(g). Sub-clauses (c) and (d) of the said Regulation deal with offences in connection with professional conduct. Appendix 'D' reproduces Regulation 49 of LN 177. The term 'economic operator' is defined in LN 178 Chapter 1, Regulation 1 to "cover equally the concepts of contractor, supplier and service provider. It is merely used in the interests of simplification". The same Regulation defines 'contractor', 'supplier' or 'service provider' to "mean either a natural or a legal person or a contracting entity within the meaning of Regulation 2(2) (a) or (b), or a group of such persons or entities, which offers on the market, respectively, the execution of works, and, or a work, products or services".

In this context, a sub-contractor is to be identified as an 'economic operator' as the entity offers products, services and/or works on the market, albeit not to the contracting authority directly, dealing instead with the main contractor (the Bidder).

While in the case of sub-contractors, under the broad definition of 'economic operator' allows for discretionary exclusion from the tendering process in the case of professional misconduct, for Bidders, such exclusion becomes mandatory on procuring entities. Regulation 49 (4), LN 177 (2005) clearly denotes this, as may be attested from the reproduction thereof in Appendix 'D'.

Despite the above consideration, it is pertinent to note that Regulation 49, LN 177 (2005) is located in Part V of the said legislation. As defined in Regulation 68 of LN 178 (2005), Part V of LN 177 is not one of the Act's applicable sections when entities operating in water, energy, transport and postal services are carrying out public procurement.

Recapitulating, Part V of LN 177 (2005) charged procuring entities with excluding from the bidding process all bidders who would have been convicted of various forms of criminal, fraudulent and corrupt practices. The same Regulation empowered contracting entities to apply their discretionary powers in the case of sub-contractors (and/or main contractors) that would have had shortcomings of various natures. However, such Regulation was rendered ineffective in the public procurement of water, energy, transport and postal services through LN 178 (2005).

Notwithstanding the above, in its ITT, specifically in Section CC – Conditions of Contract – EMC included two instances where qualifying criteria were applied.

Section CC.1.10 deals with "Documents Establishing Bidder's Qualifications" and reads:

CC.1.10.1 The documentary evidence of the Bidder's qualifications to perform the Contract if his Bid is accepted, shall establish to the Purchaser's satisfaction that:

- All the obligations imposed by the document on the intended signatory have been fully understood and accepted, where applicable, by the original Equipment Manufacturer(s) to whom it would be intended to sub-contract one or more of the main sections of plant.*

² As per Regulation 68 of LN 178 (2005), Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations, applicability of LN 177 (2005), Public Contracts Regulations, was restricted to Regulations 4, 5, 6, 7, 8, 9, 10, 11, 13 and 33, together with Parts VII, VIII, IX, X, XI, XII, XIII and XIV.

The above, in effect, obliges main contractors to ensure themselves that any sub-contractors they deal with on the project are sufficiently qualified to carry out the assigned tasks, but does not likewise impose any of the selective criteria dealing with professional conduct onto the same sub-contractors.

In addition, EMC included a ‘Statement on Excluding Circumstances of Regulation 49 of Public Contracts Regulations 2005’ as a Conditions of Contract Schedule. Through this statement, applicants were made to declare their position regarding: bankruptcy or the proceedings thereto; convicted offences/guilt in connection with professional conduct; status regarding social security contributions in Malta; tax position; and participation in criminal, corrupt or fraudulent practices.

While drawing on Regulations included within Regulation 49 of LN 177 (2005), the above-mentioned Statement manifests three main differences from the source legislation:

- a) It does not discriminate between discretionary and mandatory remedial action to be taken by Contracting Authorities in their selective qualification processes;
- b) The Statement does not distinguish between main contractors/Bidders and sub-contractors. On the contrary, the document is specifically addressed, and needs to be compiled solely, by Bidders – and covers solely their activities and not those of their sub-contractors; and
- c) While LN 177 (2005) allows for (mandatory or discretionary) exclusion of an economic operator found guilty of any of the listed grievances, the Statement on Excluding Circumstances, as included in the EMC ITT document, limits corrective action that can be taken by Procuring Entities to the imposition of a fine representing 10 per cent of the total value of the contract being awarded, with a potential increase to 20 per cent in case of a repeat offence within five years of the first.

In view of the above considerations, NAO opines that neither of the two legal instruments, namely the Conditions of Contract as included in the ITT and the then-prevailing legislation (LN 177 – parts thereof – and LN 178) mandated EMC, DoC and/or the authorities in general to take any remedial action in connection with any instances of professional misconduct, proven or otherwise, on the part of any of sub-contractors chosen by BWSC in its implementation of the EMC DPS Extension contract.

The Statement on Excluding Circumstances of Regulation 49 of Public Contracts Regulations 2005, as included in the EMC DPS Extension ITT document, featured as an appendix in the originally-tabled AG report. However, in view of copious reference to the said Statement within this supplementary report, the document is being reproduced in this report as Appendix ‘E’.

Concern (6) – Conflicts of interest

The sixth concern listed in the January 2011 letter to PAC Chairman addressed issues of vague distinction between the national interest and that pertaining to private entities and individuals. Reference was also made to financial funds allegedly collected by a political party. Such allegations fall outside the mandate of the Auditor General and the National Audit Office. However, one other allegation concerned the then-Chairman of EMC.

It is pertinent to note that the April 2010 Auditor General report had treated the issue of the Chairman's conflict of interest in great detail. NAO had opined 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"*.

NAO had likewise noted the fact that all members of the evaluation and adjudication boards dealing with the EMC DPS Extension had been appointed by the Chairman prior to his declared conflict of interest and that no attempt was thereafter made by the Chairman to inform his Minister to have such appointees confirmed (or otherwise) in their position.

Subsequent to the publication of the April 2010 report, various comments and opinions have been made public in connection with the issue of EMC Chairman's conflict of interest and the remedial action taken/that should have been taken.

It is deemed pertinent to further clarify NAO's position as featuring in the original report, even in view of the above-mentioned counter arguments.

On the matter of conflicts of interest, Article 8 of the EMC Act stipulates that:

Any member who has a direct or indirect interest in any contract made or proposed to be made by Enemalta, not being an interest which disqualifies such member from remaining a member, shall disclose the nature of his interest at the first meeting of the Board after the relevant facts have come to his knowledge; and after the disclosure has been recorded in the minutes of the Board, that member shall withdraw from any meeting at which such contract is discussed or decided on by the Board. (Chapter 272 - EMC Act, Article 8)

While, *prima facie*, the above article may give reason to EMC Chairman's decision not to resign his post as soon as the conflict of interest materialised, it is pertinent to note that, by its own title, Article 8 being quoted is meant to be applied only as *'Temporary retirement from sittings of the Board of Directors'*.

In effect, two years elapsed between the declared conflict of interest and the Chairman's eventual resignation, which resignation was not triggered by the said conflict. This implies that the twenty-four months during which the Corporation was handling its flagship tendering process were considered by the Chairman as being of a 'temporary' nature.

In addition, such reasoning does not take into account Article 7 of the same Act (EMC Act):

A person shall be disqualified for appointment to, or for remaining a member of, the Board if he –

- a) is a member of the HoR, or*
- b) has any financial or other interest in any enterprise or activity as is likely to affect prejudicially the discharge by him of his functions as a member of the Board. (Chapter 272 - EMC Act, Article 8)*

In the case of the EMC DPS Extension tender, it is clear that the then EMC Chairman, through his employment with companies affiliated with the main sub-contractor selected by BWSC, did have *'financial and other interests'* ... that were *'likely to affect prejudicially the discharge by him of his functions'* - in his case, not only as a Member of the Board but as Chairman.

MITC *Guidelines on Ethical Conduct of Directors (May 2008)* were quoted in NAO's April 2010 report. Of particular interest:

3.29 A Director having a continuing material interest that conflicts with the interests of the organization 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.

As in the case of the Enemalta legislation, the Code of Ethics distinguishes between short-term and persistent, ongoing conflicts of interest.

NAO opines that the steps taken by Chairman EMC to eliminate the grounds for the conflict of interest were not sufficiently effective, consisting solely as they did of a declaration of the conflict of interest and the subsequent distancing from matters related to the tender. In NAO's opinion, Chairman EMC failed to '*avoid any actual, perceived or potential conflict of interest at all costs*'.

Concern (7) – Legal representation of EMC, BWSC and BWSC local representative

The seventh concern featuring in the January 2011 communication to the PAC Chairman concerned the availing of legal services offered by the same firm GVTH by Government, EMC, BWSC and by BWSC's local representative. Another allegation declared that a member of the firm was charged with collecting funds for the party in government. This last allegation was again deemed to be outside the scope of both NAO's investigation and mandate. As such, the matter was not investigated.

With respect to legal representation of key players, NAO had already investigated the matter in the course of its fieldwork for the compilation of the April 2010 report.

On the matter, it is deemed pertinent to note the following:

NAO had written to BWSC on 25 January 2010, soliciting the firm to *"furnish details of its (external) legal advisor(s) for the Malta region for the period January 2006 to date."*

In answer, BWSC had declared, via a communication dated 26 January 2010, that the firm had consulted GVTH only once in June 2009, and that henceforth all matters related to the setting up of a local daughter company had been handled by KPMG. BWSC added that, however, it had availed itself of GVTH's advice since August 2009 on issues related to media coverage of the contract and the project of the DPS Extension.

On 26 January 2010, GVTH had also written to the NAO, confirming details as listed in BWSC's communication in connection with the latter's contacts and business relationships with GVTH since 2009. The GVTH communication further went on to state that one of the partners had been retained as external consultant to EMC for the period 1987 to January 2008. During this period, according to this same partner, GVTH had never been asked for advice and was never involved in any manner with the tendering process for the EMC DPS Extension.

Following further coverage in the media and discussions during the PAC sessions ensuing the tabling of the April 2010 report, GVTH submitted a second communication to the NAO, on 21 March 2011. This second communication made reference to previous exchanges of correspondence (covered above) but added a statement to the effect that the firm had never acted as legal advisor to Government in connection with the EMC DPS extension tender/contract.

Copies of the above-mentioned GVTH communications to the NAO feature as Appendix 'F' of this report.

In addition to the above, NAO also notes that GVTH, particularly the firm's partner who had served as EMC's external consultant (till January 2008), was legal advisor to BWSC's local representative as of August 2009.

In this respect, NAO expresses concern in that the legal advisor in question could end up in a difficult position when tendering legal advice to the BWSC local representative should any such advice be based, consciously or otherwise, on knowledge that the same legal advisor would have gained in his twenty years' service to EMC.

Conclusions

Following the investigation of concerns as expressed in Hon. E. Bartolo's communication of 11 January 2011 to Chairman PAC, NAO compiled a report addressing each of the seven concerns individually, and came to the following conclusions:

The **first concern** dealt with relationships between MES, MAN and BWSC and was shown to bear no impact on the adjudication process.

The **second concern** addressed EMC's 2005 loan and SMBC's involvement therein. The outcome: SMBC had advanced less than twelve per cent of the amount borrowed by EMC. The allegation that SMBC was owned by MES was disproved through published figures of the larger of the bank's shareholders.

The **third concern** was focused around KPMG's assumed role with key players BWSC, SMBC and EMC. BWSC's and SMBC's choice of external auditors was deemed to be outside NAO's mandate. However, EMC's repeated commissions to KPMG, issued on the force of direct orders, and surpassing Ministerial financial capping were deemed to be conducive to a lack of transparency and equity where public procurement is concerned.

The **fourth concern** covered various significant changes that occurred during the tendering process. This supplementary report referred to the original April 2010 report in which these changes – legal, technical and administrative – were addressed in detail. The supplementary report nonetheless re-listed, in brief, the more salient of these changes.

The **fifth concern** made mention of illegal activities of which several of BWSC's sub-contractors had been found guilty. The report listed and described the two mechanisms governing the dealings with economic operators: the then prevailing legislation and the contract conditions as included in the ITT. The report further demonstrated that none of the mechanisms in question empowered the competent authorities to eliminate sub-contractors on the basis of illegal activities and/or professional misconduct. This phenomenon was deemed to be a lacuna.

The **sixth concern** spoke of conflicts of interest. In this instance, the supplementary report referred to the original April 2010 report in which the matter of EMC Chairman's conflict of interest and NAO's opinion on how such a conflict of interest was managed were clearly depicted.

The **seventh concern** centred on the (local) legal representation of EMC, BWSC and BWSC's local representative. While the legal firm in question explained how such representations came into effect and when, NAO notes that, in the case of a particular partner of the firm, legal representation of BWSC's local representative followed after 20 years' service as legal advisor to EMC.

APPENDICES

Appendix 'A' – Communication as tabled by Parliamentary Opposition – January 2011

Lic-chairman Kumitat tal-Kontijiet Pubblici
l-Onorevoli Dr Charles Mangion,
Parlament,
Valletta.

Ghaziz Chairman,

Fl-ahhar laqgħa tal-Kumitat Kontijiet Pubblici (14 ta' Dicembru 2010) nfirmajt lill-kumitat li mindu l-Ufficcju Nazzjonali tal-Awditur hareg ir-rapport tiegħu dwar l-ghoti tal-kuntratt tal-estensjoni tal-power station f'Delimara lill-BWSC u mindu l-Parlament iddiskuta l-mozzjoni titlob ir-rizenja tal-Ministru Austin Gatt minhabba l-ghoti ta' dan il-kuntratt, hargu fatti godda li l-Opposizzjoni għaddiet lill-Ufficcju tal-Awditur matul is-sajf li għadda u kienet talbitu jkompli jinvestiga dan il-kuntratt. Fl-ahhar laqgħa kont irrepetejt din it-talba u tlabt formalment li l-investigazzjoni mill-Ufficcju Nazzjonali tal-Awditur tkompli.

Il-fatti godda li qed nitolbu investigazzjoni dwarhom huma dawn:

1. Il-kumpanija multinazzjonali Mitsui Engineering and Shipbuilding Co Ltd (MES) hija s-sid tal-kumpanija Daniza BWSC li rebhet il-kuntratt. Il-kumpanija MAN li giet it-tieni fl-ghazla hija kumpanija li ilha mill-1926 b'licenzja mill-MES biex tibni makni li jintuzaw f'hafna mill-power stations li l-BWSC tibni madwar id-dinja. Fl-ahhar 20 sena l-BWSC bniet 79 power station, 53 minnhom b'makni tal-MAN licenzjati mill-MES.

Il-MES gawdiet li l-BWSC rebhet il-kuntratt u kienet se tgawdi wkoll kieku l-kuntratt rebhitu l-kumpanija MAN li giet it-tieni skond il-kumitat tal-agjudikazzjoni li nhatar biex jiddeciedi dwar il-kuntratt.

2. F'nofs is-sena 2005, f'it qabel ma beda l-process tal-ghazla ta' min kien se jibni l-estensjoni tal-power station f'Delimara u meta l-BWSC kienet diga` bdiet tahdem biex tingħata l-kuntratt għal zieda fil-generazzjoni tad-dawl f'Malta, l-Enemalta u l-gvern iffirmaw ftehim mal-kumpanija Sumimoto Mitsui Banking Corporation – SMBC - għal self ta' 210 miljun euro. L-SMBC hija wkoll tal-kumpanija MES.

3. Kemm il-BWSC kif ukoll l-SMBC għandhom il-kumpanija KPMG bhala awdituri. Fl-istess zmien li kienet qed issir l-ghazla ta' min se jirbah il-kuntratt, il-gvern qabba lill-kumpanija KPMG tagħmel studju dwar kemm għandhom joghlew il-kontijiet tad-dawl u l-ilma biex fost affarijiet ohra l-Enemalta tkun tista' thallas lura d-dejn li għandha mal-SMBC u biex ikollha

Appendix 'A' – (continued)

flus biex thallas id-dejn li qed taghmel biex tibni l-impjant tal-BWSC f'Delimara.

4. Dawn il-kumpaniji kollha b'rabtiet diretti jew indiretti mal-MES sabu ghajnuna kbira biex il-hidma kummerjali taghhom f'pajjizna tirnexxi. Il-gvern biddel il-ligi u l-ispecificazzjonijiet li bihom harget l-offerta, u biddel il-politika tieghu li jhaddem il-power station bil-gass u rega' mar lura ghall-uzu tal-heavy fuel oil biex jizgura li l-BWSC tirbah il-kuntratt. Jidher li kien hemm min se jgawdi li l-estensjoni tal-power station taghmel snin ohra tahdem biz-zejt ghax l-Enemalta l-ewwel hadet passi biex tara kif ikollha l-facilitajiet ghall-provvista tal-gass f'Malta fl-istess zmien li kienet qed tahdem fuq il-kisba ta' estensjoni gdida ghall-power station f'Delimara mbaghad waqfet kollox u ghadna minghajr l-infrastruttura mehtiega ghall-provvista tal-gass.

5. Il-kumpaniji li maghhom il-BWSC ghamlet kuntratt biex qed jipprovduha l-partijiet kollha differenti tal-impjant bhall-Wartsila, l-ABB, is-Siemens u l-Pawels kollha ghandhom kazi serji ta' korruzzjoni jew frodi jew hasil ta' flus u l-Enemalta u d-Dipartiment tal-Kuntratti u l-gvern ghalqu ghajnejhom it-tnejn ghal dan.

6. F'din l-istorja tar-rebh tal-kuntratt mill-BWSC diffiqli taghraf id-differenza bejn l-interess privat u l-gid pubbliku. Kumpanija lokali (ta' Zaren Vassallo, ex sindku tal-PN, benefattur kbir tal-PN) li se tibni l-estensjoni tal-power station kellha c-chairman tal-Enemalta Alex J Tranter direttur f'wahda mill-kumpaniji taghha. Din il-kumpanija lokali li se taghmel il-bini bniet ukoll id-Dar Centrali tal-PN u hija wahda mill-kumpaniji li taghti fondi lill-PN. Il-PN ghandu sistema ta' gbir ta' fondi fejn kumpaniji li jirbhu kuntratti tal-gvern jaghtu fondi lill-PN. Dawn il-kumpaniji jaghmlu parti mil-lista maghrufa bhala 'JS'.

7. L-interessi privati u l-gid pubbliku marbuta flimkien dehru wkoll fl-uzu tal-istess ufficcju legali lokali maghruf bhala GVTH fejn ghandek avukati taht l-istess saqaf ikollhom bhala klijenti taghhom fl-istess hin lill-gvern, lill-Enemalta, lill-BWSC u lil Joseph Mizzi l-agent lokali tal-BWSC. Fost l-avukati hemm ukoll min jigbor fondi ghall-PN.

Evarist Bartolo, Membru Kumitat Kontijiet Pubblici
11 ta' Jannar 2011

Appendix 'B' – Extracts from the June 2005 Euro 210 million Term Loan Facility as borrowed by EMC

€210,000,000 Term Loan Facility

Dated 30 June 2005

ENEMALTA CORPORATION
(as Borrower)

BANCO EFISA
DEPFA ACS BANK
(as Mandated Lead Arrangers)

THE BANKS
(herein defined)

DEPFA BANK PLC
(as Agent)

THE REPUBLIC OF MALTA
(acting as Guarantor under the Guarantee)



Handwritten signatures and initials, including a large signature and the initials "A.", "7H", and "S".

Appendix 'B' – (continued)

Schedule 7 – Banks and Commitments

Banks	Commitment (€)
DEPFA ACS BANK	185,000,000
SUMITOMO MITSUI BANKING CORPORATION EUROPE LIMITED	25,000,000
Total Commitments	210,000,000

Handwritten signatures and initials, including a large 'A', a 'C' with an arrow, '7H', and a signature on the right.

Appendix 'C' – GVTH Advocates communication of 11 February 2011 to Auditor General



G8/JJVdb/12/10

11th February 2011

Mr Anthony C. Mifsud
Auditor General
National Audit Office
Notre Dame Ravelin
Floriana, FRN 1600

Handwritten signature and date: 14 Feb 11

192 Old Bakery Street
Valletta VLT 1455
Malta

Tel: (+356) 2122 8888
Fax: (+356) 2122 8808

info@gvthlaw.com
www.gvthlaw.com

Dear Mr Mifsud,

We write on behalf of Burmeister & Wain Scandinavian Contractor A/S (BWSC) of Gydevang 35, P.O. Box 235, DK-3450 Allerød, Denmark and wish to refer to recent local newspaper reports in respect of the contract for the extension of the Delimara power station and, in particular, to the relationship between BWSC's owner Mitsui Engineering and Shipbuilding Co. Ltd. (MES) and Sumitomo Mitsui Banking Corporation.

We have been requested by our client to bring to your attention the attached company structure information memorandum showing the position of the afore-mentioned "Mitsui" companies in Japan, as well as the relationship between MES and MAN Diesel & Turbo SE (MAN).

We trust that this clarifies the matter, however, should you require any further clarification do not hesitate to contact the undersigned.

Kind Regards.

Yours sincerely,

Luca Vella LL.D.



Stephania Borg B.A., M.Jur.(Eur. Law), Karl Briffa B.A., M.Jur. (Eur. Law), Adv. Trib. Eccl. Melit., LL.D., Jonathan de Maria B.A., LL.D., Albert Grech B.A., LL.D., Michael Grech B.A., LL.M.(Lond), LL.D., K.M., George M. Hyzler LL.D., Joseph J. Vella LL.D., Luca Vella B.A., LL.M.(Lond), LL.D., Joseph L. Zammit Maempel LL.D., Michael Zammit Maempel B.A., LL.D.

Appendix 'C' – (continued)



Head Office
3-16, Nihonbashi 1-chome,
Chuo-ku, Tokyo 103-0027

Factual Diagram

1. Mitsui Group

"Mitsui" companies in Japan

In Japan there are numerous companies having "Mitsui" in their company name deriving from the same origin, including followings;

- (i) Sumitomo Mitsui Banking Corporation (SMBC)
- (ii) Mitsui & Co. Ltd., and
- (iii) Mitsui Engineering & Shipbuilding Co., Ltd. (MES)

All three companies are separate legal entities and each entity is separately registered on the Stock Exchanges.

We below take pleasure in explaining one-by-one, the background as well as factual details of ownership structure including major shareholders (number of shares and Investment Ratio) for all three of the above-mentioned companies.

2. Ownership structure

(1) Sumitomo Mitsui Banking Corporation (SMBC)

SMBC is one of the biggest banking group in Japan fully owned by its holding company, Sumitomo Mitsui Financial Group (SMFG) listed on Tokyo Stock Exchange and other Exchanges, domestic and overseas.

Please find the major shareholders of SMFG.

(As of 30 September 2010)

Shareholders	Number of shares (100 shares)	Percentage of shares outstanding (%)
Japan Trustee Services Bank, Ltd. (Trust Account)	932,540	6.59
The Master Trust Bank of Japan, Ltd. (Trust Account)	781,486	5.52
Japan Trustee Services Bank, Ltd. (Trust Account 9)	285,515	2.01
SSBT OD05 OMNIBUS ACCOUNT - TREATY CLIENTS	237,863	1.68
STATE STREET BANK AND TRUST COMPANY 505225	175,948	1.24

Appendix 'C' – (continued)

MITSUI ENGINEERING & SHIPBUILDING CO.,LTD.

PAGE 2

MELLON BANK, N.A. AS AGENT FOR ITS CLIENT MELLON OMNIBUS US PENSION	168,454	1.19
THE CHASE MANHATTAN BANK 385036	157,343	1.11
Nippon Life Insurance Company	154,666	1.09
Rabobank Nederland, Tokyo Branch	153,340	1.08
NT RE GOVT OF SPORE INVT CORP P. LTD	143,269	1.01

Further information is available in their official web site.

http://www.smfg.co.jp/english/investor/stock/capital_shares.html

MES confirms it owns 553,200 (0.04%) of the shares of SMFG.

(2) Mitsui & Co. Ltd.

Mitsui & Co. is one of the biggest trading firms in Japan listed on Tokyo Stock Exchanges and other Exchanges, domestic and overseas.

Please find their major shareholders.

(As of 30 September 2010)

Name of Shareholder	Number of Shares (Thousands)	Investment ratio
The Master Trust Bank of Japan, Ltd. (Trust account)	161,190	8.81%
Japan Trustee Services Bank, Ltd. (Trust account)	126,220	6.90%
Sumitomo Mitsui Banking Corporation	38,500	2.10%
Nippon Life Insurance Company	35,070	1.91%
Government of Singapore Investment Corporation Ptd Ltd	31,263	1.70%
SSBT OD05 Omnibus Account (Treaty Clients)	27,886	1.52%
Japan Trustee Services Bank, Ltd. (Trust account 9)	26,448	1.44%

Further information is available in their official web site.

<http://www.mitsui.co.jp/en/ir/information/basic/index.html>

MES confirms it owns 6,732,783 (0.37%) of their shares.

Appendix 'C' – (continued)

MITSUI ENGINEERING & SHIPBUILDING CO.,LTD.

PAGE 3

(3) Mitsui Engineering & Shipbuilding Co., Ltd.(MES)

MES is listed on Tokyo Stock Exchanges and other domestic Exchanges.

Please find our major shareholders.

(As of 31 March 2010)

Name	Number of shares (thousands)	Percentage of shareholding
Mitsui & Co., Ltd.	42,944	5.18%
Japan Trustees Service Bank, Ltd. (Trust Account)	33,663	4.06%
The Master Trust Bank of Japan Ltd.(Trust Account)	27,889	3.37%
The 114th Bank	26,586	3.21%
Japan Trustees Service Bank, Ltd. (Trust Account for the retirement allowance for the Chuo Mitsui Trust & Banking Company Limited)	23,316	2.81%
Japan Trustees Service Bank, Ltd. (Trust Account 9)	19,530	2.36%
Citibank Hong Kong PBC Client (HK)	17,310	2.09%
Mitsui Life Insurance Company Limited	16,002	1.93%
Sumitomo Mitsui Banking Corporation	13,647	1.65%
Mitsui Sumitomo Insurance Co., Limited	13,485	1.63%

Further information is available in their official web site.

<http://www.mes.co.jp/english/investor/stock/shareholders.html>

As seen in these webs, SMBC, Mitsui & Co. Ltd. and MES, although having the name of "Mitsui" in their tradenames, are all completely independent and separate legal entities, and all are the public corporations whose shares are listed in and traded at the Stock Exchanges.

3. MES Relationship with MAN

- (1) In 1926, MES entered into a technical licensing agreement in 2-stroke low speed diesel engines with B&W of Denmark (presently known as MAN Diesel & Turbo SE). The cumulative production amount exceeded 70Billion brake horsepower in 2010.

Appendix 'D' – Public Contracts Regulations (2005) – LN 177 (2005)
Part V – Regulation 49 – Qualitative Selection Criteria

Qualitative
selection
criteria.

49. (1) Any economic operator may be excluded from participating in a public contract where the economic operator:

(a) is bankrupt or is being wound up, or whose affairs are being administered by the court, who has entered into an arrangement with creditors or who has suspended business activities or who is in any analogous situation arising from a similar procedure under national laws and regulations:

(b) is the subject of proceedings for a declaration of bankruptcy, for an order for compulsory winding up or administration by the court or for an arrangement with creditors or of any other similar proceedings under national laws or regulations:

(c) has been convicted of an offence concerning his professional conduct by a judgement which has the force of *res judicata*:

(d) has been declared guilty of grave professional misconduct proven by any means which the contracting authorities can demonstrate:

(e) has not fulfilled obligations relating to the payment of social security contributions in accordance with the law of Malta or the country in which he is established:

(f) 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:

(g) is guilty of serious misrepresentation in supplying the information required under these regulations or has not supplied such information.

Appendix 'D' – (continued)

(2) Where the contracting authority requires proof from the candidate or tenderer that none of the cases quoted in subregulation (1)(a), (b), (c), (e) and (f) applies to him, it shall accept as sufficient evidence, relevant certification issued by a competent judicial or administrative body in the country of origin or the country whence that person comes showing that these requirements have been met.

(3) Where the certification referred to in subregulation (2) is not available, it may be replaced by a declaration on oath or by a solemn declaration made by the person concerned before a Commissioner for Oaths in Malta or before a judicial or administrative authority, a notary or a competent professional or trade body, in that person's country of residence.

(4) Any candidate or tenderer who has been the subject of a conviction by final judgment of which the contracting authority is aware for one or more of the reasons listed below, shall be excluded from participation in a public contract:

(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 relating 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 prevention of the use of the financial system for the purpose of money laundering;

Appendix 'D' – (continued)

Provided that, the Director may authorise a derogation from the application of this subregulation for overriding requirements in the general interest.

For the purposes of this subregulation, the contracting authorities shall, where appropriate, ask candidates or tenderers to supply the documents referred to in subregulations (2) and (3) and may, where they have doubts concerning the personal situation of such candidates or tenderers, also apply to the competent authorities to obtain any information they consider necessary on the personal situation of the candidates or tenderers concerned.

Where the information concerns a candidate or tenderer established in a Member State other than Malta, the contracting authority may seek the cooperation of the competent authorities. Having regard for the national laws of the Member State where the candidates or tenderers are established, such requests shall relate to legal and, or natural persons, including, if appropriate, company directors and any person having powers of representation, decision or control in respect of the candidate or tenderer.

Appendix 'E' – Statement of Excluding Circumstances of Regulation 49 of the Public Contracts Regulations (2005)

Enemalta Corporation

Specification GN/DPS/8/2006, Schedules CC

CC

CONDITIONS of CONTRACT SCHEDULES

1-

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 Burmeister & Wain Scandinavian Contractor A/S

Postal Address P.O. Box 235
Gydevang 35
DK-3450 Allerød
Denmark

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 from 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.

Appendix 'E' – (continued)

Enemalta Corporation

Specification GN/DPS/8/2006, Schedules CC

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.

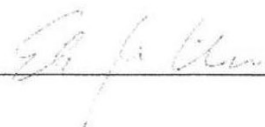
Bidders who have been guilty of making false declarations will incur financial penalties representing 10% of the total value of the contract being awarded. The rate may increase to 20% in the event of a repeat offence within five years of the first infringement

Appendix 'E' – (continued)

Enemalta Corporation

Specification GN/DPS/8/2006, Schedules CC

SIGNATURE: _____



NAME & SURNAME

Erik Breiner Kristensen

DATE

4 March, 2008

TELEPHONE NUMBER

+45 48 14 00 22

Enclosed please find:

- Extract Copy of Company Registration with the Danish Commerce and Companies Agency
- Official Certificate from the Danish Commerce and Companies Agency

Appendix 'F' – GVTH letters to NAO, 2010 and 2011



G8/JJVdb/37/11

21st March 2011

Mr Anthony C Mifsud
Auditor General
National Audit Office
Notre Dame Ravelin
Floriana, FRN 1600



192 Old Bakery Street
Valletta VLT 1455
Malta

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Dear Mr Mifsud

I write in respect of the on-going proceedings before the Public Accounts Committee (PAC) in connection with the contract for the extension of the Delimara power station and hereby authorise the National Audit Office (NAO) to submit to the PAC copies of the attached letters already in the NAO's records relative to our firm's relationship with BWSC and the other entities involved in the afore-mentioned contract.

More specifically, I am referring to the letter sent by the undersigned to the NAO on the 26th January 2010, as well as to the related letter sent by our client BWSC to the NAO (also dated 26th January 2010) in reply to the letter addressed to BWSC dated 25th January 2010.

This reason behind the submission of said letters to the PAC is to rebut the continued claims appearing in local press reports that GVTH Advocates is acting as legal advisor to Government, Enemalta, BWSC and Mr Joseph Mizzi in connection with the power station extension contract.

For the record we also wish to state that neither our firm nor the undersigned has ever acted as legal advisor to the Government in connection with the said power station extension contract.

Yours sincerely,

Joseph J Vella LL.D.

Stephania Borg B.A., M.Jur.(Eur. Law), Karl Briffa B.A., M.Jur. (Eur. Law), Adv. Trib. Ecol. Melit., LL.D., Jonathan de Maria B.A., LL.D., Albert Grech B.A., LL.D., Michael Grech B.A., LL.M.(Lond), LL.D., K.M., George M. Hysler LL.D., Joseph J. Vella LL.D., Luca Vella B.A., LL.M.(Lond), LL.D., Joseph L. Zammit Maempel LL.D., Michael Zammit Maempel B.A., LL.D.

Appendix 'F' – (continued)



G8/JJVdb/15/10

26th January 2010

Mr Anthony Mifsud
Auditor General
National Audit Office
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Dear Mr Mifsud

I write with reference to your query at the end of yesterday's meeting regarding the period of my involvement with Enemalta Corporation and further understand from BWSC that you are asking about their external legal advisors in Malta for the period from January 2006 to date.

I wish to inform you that BWSC first approached our firm in June 2009 on an unrelated matter, and that before such date we had no contact at all with them (or with anyone else for that matter) in respect of the Delimara Power Station Extension Tender. We started advising BWSC on this Tender as from August 2009 onwards.

I would also take this opportunity to put on record that I was retained as external legal advisor to Enemalta Corporation from 1987 to January 2008 and that throughout such period both I and all the other members of our firm were never asked for any advice, nor involved in any manner in respect of the Tender above mentioned.

I trust that the above information is useful for the purposes of your current investigation.

Should you deem this to be necessary I would be very prepared to confirm the above in an affidavit.

Yours sincerely



Joseph J Vella LL.D.

Stephania Borg B.A., M.Jur.(Eur. Law), Karl Briffa B.A., M.Jur. (Eur. Law), Adv. Trib. Ecol. Melit., LL.D., Jonathan de Maria B.A., LL.D., Albert Grech B.A., LL.D., Michael Grech B.A., LL.M.(Lond.), LL.D., K.M., George M. Hysler LL.D., Joseph J. Vella LL.D., Luca Vella B.A., LL.M.(Lond.), LL.D., Joseph L. Zammit Maempel LL.D., Michael Zammit Maempel B.A., LL.D.

Appendix ‘G’ – Methodology

In conducting the original investigation regarding the EMC DPS extension tender, NAO had held a number of meetings and interviews and had analysed with meticulous care the extensive documentation that was available concerning the subject matter, in both a direct and indirect manner. The Office has supplemented this fieldwork with research carried out by the Investigative Team and with advice from both the legal and technical experts.

In conducting the supplementary investigation the Office drew extensively on evidence and data collected as per above. In addition, transcripts of PAC sessions held in the interim were likewise utilised. Additional research and fieldwork, in the form of communication with key players and perusal of records as held at EMC, together with online and other forms of desk research were also pursued. Relevant correspondence exchanged with key players, often referred to in the report itself, was also extensively used as part of NAO’s supplementary investigation.

As is expected of the Office, this secondary 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.