

Report by the Auditor General

Enquiry on

*Road Construction Projects
partly financed through
Fifth Italo-Maltese
Financial Protocol*

June 2009

This Report has been prepared under sub-paragraph 9.(a) of the First Schedule of the Auditor General and National Audit Office Act, 1997 for presentation to the House of Representatives in accordance with sub-paragraph 9.(b) of the First Schedule of the said Act.

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Auditor General

National Audit Office
June 2009

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Abbreviations used in the report

ADT	Malta Transport Authority (Awtorita' Dwar it-Trasport)
BoQ	(Interim) Bill of Quantity
CEO	Chief Executive Officer
DG	Director General
DoC	Department of Contracts
ECA	European Court of Auditors
EUROSAI	European Organisation of Supreme Audit Institutions
FIDIC	International Federation of Consulting Engineers
FBoQ	Final Bill of Quantity
GIS	Geographic Information System
INTOSAI	International Organisation of Supreme Audit Institutions
LoA	Letter of Acceptance
M	Million
MEPA	Malta Environment and Planning Authority
MFEA	Ministry for Finance and Economic Affairs
MFEI	Ministry of Finance, the Economy and Investment
MoF	Ministry of Finance
MTC	Ministry for Transport and Communications
MUDR	Ministry for Urban Development and Roads
NAO	National Audit Office (Malta)
NID	Network Infrastructure Directorate (ADT)
OPM	Office of the Prime Minister
PAC	Public Accounts Committee
PPCD	Planning and Priorities Co-Ordination Division
PS	Permanent Secretary
QS	Quantity Surveyor
RD	Roads Directorate
ToR	Terms of Reference
var	Variance
VAT	Value Added Tax
WSC	Water Services Corporation

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Table of Contents

Chapter	Title	Page Number
	Executive Summary	6
	• The report	6
	• Evaluation of the control systems	6
	• Technical evaluation of the tender and supporting documents	6
	• Overall conclusion	7
	• Key recommendations	7
1	Introduction/Background	8
	• Original audit report – January 2004	8
	• Follow-up audit report – September 2005	9
	• Discussion on modernization of roads projects relating to the V th Italian Financial Protocol	10
	• PAC request to NAO for enquiry on roads projects	10
2	Approach and Methodology	12
	• Approach	12
	• Methodology	12
	• Financial tests on Bills of Quantity	12
	• Inspection of ADT files	13
	• Meetings with ADT	13
	• Expert (technical) opinion	13
	• Meeting and exchange of correspondence with MFEI	13
3	Findings on the robustness of the deployed control mechanisms	14
	• Findings emanating from bills and payments	14
	• Errors encountered in sampled BoQs and in an FBoQ	14
	• Unclear trigger of payment transactions	15
	• Findings emanating from project files examination	16
	• Pre-implementation stage	16
	• Decision to treat projects as a departmental tender	16
	• Ministerial (MoF) approval for the projects	16
	• Variations and the Protocol	17
	• Overruns in the Protocol projects	17
	• The Adjudication board	18
	• Delegation of project management responsibility to Supervisors	18
	• Ministerial (MUDR) instructions to ADT for latter to maintain its own controls	19
	• Implementation stage	19
	• Lack of evidence of ADT on-site measurement of works	19
	• Checks and measurement of works as maintained by Supervisors	19
	• Additional MoF instructions regarding extra expenditure	20
	• Unclear audit trail re decision to split into six (6) LOTs	20
	• General issues	21
	• ADT-commissioned report on the Hal Far Road Construction Project	21

Chapter	Title	Page Number
4	Technical findings on tender and subsequent documents	22
	• The nature of variances	22
	• Contractual procedures to administer contracts and contract variations	22
	• Selection/Nomination of the Supervisor	23
5	Evaluation	24
	• Evaluation of findings emanating through the examination of the control systems deployed	24
	• Bills and payments	24
	• Errors encountered in sampled BoQs and in an FBoQ	24
	• Unclear trigger of payment transactions	25
	• Pre-implementation stage	26
	• Decision to treat projects as a departmental tender	26
	• Ministerial (MoF) approval for the projects	26
	• Variations and the Protocol	27
	• Overruns in the Protocol projects	28
	• The Adjudication board	29
	• Delegation of project management responsibility to Supervisors	30
	• Ministerial (MUDR) instructions to ADT for latter to maintain its own controls	30
	• Implementation stage	30
	• Lack of evidence of ADT on-site measurement of works	30
	• Checks and measurement of works as maintained by Supervisors	31
	• Additional MoF instructions regarding extra expenditure	32
	• Unclear audit trail re decision to split into six (6) LOTs	32
	• General issues	33
	• ADT-commissioned report on the Hal Far Road Construction Project	33
	• Evaluation of findings emanating through the technical review of the tender and supporting documents	34
	• The nature of variances	34
	• Contractual procedures to administer contracts and contract variations	34
	• Selection/Nomination of the Supervisor	35
	• Conclusion – Technical review of the tender and supporting documents	36
	• A synopsis of the evaluation exercise (control mechanisms and technical review)	36
6	Recommendations	38
	• Contracts	38
	• Variations handling	38

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Table of Contents

Chapter	Title	Page Number
7	MFEI and DoC feedback	40
	• Ministry of Finance, the Economy and Investment feedback	40
	• Pre-financing payments	41
	• Procurement Procedures	41
	• Ministry of Finance Authority and the Role of the Supervisor	42
	• Funding Directions by Finance Ministry	42
	• Variances	43
	• Recommendations	44
	• Department of Contracts feedback	46
	• Set up of a Unit within DoC	46
	• Comments on letter from MFEI	48
	Appendices	50
	A – PAC motion	50
	B – Relevant extracts from NAO working papers	51
	C – NAO Expert Terms of Reference	56
	D – Relevant extracts from ADT files	59
	E – Full technical report	85
	F – Miscellaneous papers	98
	G – List of Road Construction Projects of the V th Italian Financial Protocol	104
	List of Tables	
3.01	ADT forecast costs of road projects related to V th Italian Financial Protocol	17
5.01	Budgeted allocation of funds as per issued Letters of Acceptance	27
5.02	Total project expenditure as at May 2008	29
B.01	Project costs (based on FBoQ figures) analysed by LOT and nature of bills	51
B.02	Payments and retention money reconciled to FBoQs	52
B.03	LOT1 (sample) BoQ checks	53
B.04	Running balance statement of account – LOT1	54
B.05	Extracts from FBoQ – LOT2a	55
	List of Charts	
5.01	Synopsis of the findings and evaluation exercise (control mechanisms and technical review)	37

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Table of Contents

Chapter	Title	Page Number
	List of Documents	
D.01	Extracts from internal emails regarding Department of Contracts' involvement – March 2003	59
D.02	Memorandum concerning MoF Authorisation to MTC to embark on Italian Financial Protocol road construction projects – October 2003	60
D.03	Text of the V th Italian Financial Protocol	62
D.04	Communication – ADT to PS MTC regarding project cost estimates	67
D.05	Communication – PS MTC to ADT regarding project cost estimates	69
D.06	Communication – Minister MUDR to ADT – financing the projects	70
D.07	Terms of Reference – Adjudication board – MTC – 13 January 2004	71
D.08	Minutes – First meeting – Adjudication board – 16 September 2003	72
D.09	Article 35 as per (ADT) Tender for road upgrading under the V th Italian Financial Protocol – Volume 2 – Section 2 – General Conditions, pp 137-140	74
D.10	Email concerning legal advice afforded to ADT – May 2004	78
D.11	Extracts from letter sent by MUDR to Chairman ADT	80
D.12	MoF communication regarding project funding – November 2004	81
D.13	ADT internal report – Suggestion to split project into six (6) LOTS	82
D.14	ADT internal document – payment authorization procedure	84
F.01	Bank guarantee – ERGON s.c.a.r.l. – Bank of Valletta p.l.c. dated 13 October 2004	98
F.02	Tender general conditions – Article 44 - Prefinancing	99
F.03	Contracts Circular No 18/2008 – Contracting Procedures	100
G.01	List of Road Construction Projects of the Fifth Italian Financial Protocol	104

The report

This report was triggered following discussions, initiated in 2004, at PAC, of two Performance Audit reports. In 2007, PAC instructed NAO to evaluate control mechanisms deployed by ADT in the construction of the Fifth Italo-Maltese Financial Protocol (partly) financed roads projects.

NAO carried out an evaluation of the control systems adopted by ADT and commissioned a technical evaluation of the relevant tender and supporting documents.

Evaluation of the control systems

Financial tests on bills and a document review revealed the following shortcomings in the control system deployed (by ADT):

- Treating the projects as a departmental tender resulted in the safeguards afforded by the Public Procurement Regulations being replaced by new, untested systems.
- MoF approval for ADT to manage the projects outside the more commonly applied public sector regulatory framework did not take into account extra-budgeted expenditure. Once the funds allocated for road construction projects through the Fifth Italo-Maltese Financial Protocol were exhausted, ADT resorted to Consolidated Funds despite Ministerial instructions to the contrary. From an originally-allocated Lm12.9M (Euro 30M, Italo-Maltese Financial Protocol funds dedicated to road works), project expenditure totaled Lm16.5M, despite instructions from MUDR to ADT at various instances to maintain expenditure within pre-determined budgets.
- ADT delegated project management responsibility to (external) Supervisors who had been nominated by the Contractors. No evidence was found to prove that ADT abided by MUDR instructions to the Authority to maintain its own controls.
- NAO checks on a sample project revealed that ADT had adopted an unorthodox payment process whereby the Contractor account was at times in credit, with payments having been made in excess of pending bills.
- Errors were encountered in bills. These had gone undetected for some time before being adjusted and in one instance the error (an overpayment) went unnoticed.

Technical evaluation of tender and supporting documents

ADT carried out a rigorous pre-tender process. However, issues arise with the manner with which ADT adopted a modified version of the FIDIC model of contract, with all the implications of such modifications.

The role of Supervisor was not correctly defined and the perception of transparency, effectiveness and accountability was clouded by the perceived link between Contractor and Supervisor. The various roles assigned to the Supervisor within the contract blurred this separation further.

Overall conclusion

On the basis of the above, whilst noting the timely completion of the projects, NAO is precluded from giving a positive opinion on the control systems deployed by ADT.

Key recommendations

- MFEI should consider whether, with the specific requirements of the (Public Procurement) Regulations, the FIDIC model is at all the most suitable.
- Effective control should not be traded off for expediting project completion. Replacing the tried and tested Public Procurement Regulations by ad-hoc (and untested) systems is not the ideal solution to advance completion of works. MFEI should consider setting up a unit that, working in strict liaison with the procuring entities, will be empowered and will have the necessary capacity to expedite project completion while operating within the safety of the standard regulations.
- When resorting to third party project management, procuring entities need to ensure they maintain robust, independent control systems. Such Supervisors should be selected by the procuring entities, and their roles should be clearly defined so as to avoid conflicts.
- Given that construction projects may incur extra-budgeted expenditure, all relevant contracts should contain clear terms specifying the procedures to be followed in such instances. Value for money should be ensured, with the procuring entity and MFEI jointly maintaining a high level of control over all unbudgeted expense.
- ADT should make more use of the cost experience the Authority has gained in road construction contracts.

Original Audit Report – January 2004

- 1.01 In January 2004, the National Audit Office (NAO) tabled a Performance Audit Report entitled *Managing Procurement – Road Construction and Restoration Contracts*.
- 1.02 The audit had been instigated following emphasis by the European Court of Auditors (ECA) on the performance of public procurement systems in acceding countries, coupled with constant and consistent reference in media, and other public fora, to the state of the local (road) infrastructure. In addition, expenditure on road projects was of such materiality as to be deemed to merit evaluation by the NAO.
- 1.03 The report's objectives were to determine the appropriateness of the procurement systems as deployed by the Department of Contracts (DoC) and whether the Awtorita' Dwar it-Trasport (ADT) was managing to obtain the necessary services in such a manner as to constitute value for money. A case study approach was taken with a number of road projects over the period 1998-2002 being selected.
- 1.04 Findings reported included:
- incomplete approach to planning and design;
 - inaccurate estimates;
 - contract shortcomings impinging on adjudication;
 - weaknesses in contract management;
 - significantly high time/cost variations; and
 - shortcomings in the financial system.
- 1.05 The report included various recommendations aimed at addressing the situation. Furthermore, the report had also taken into account changes the ADT and the DoC were undergoing at the time, in both road project planning and in contract documentation and adjudication. The recording of such changes was deemed necessary in view of the time lag element (the 2004 report was reporting on projects implemented 1998-2002 and planned even earlier).
- 1.06 In the ensuing discussions at the Public Accounts Committee (PAC), various pertinent and related matters were discussed in detail. At the last of these sessions, held on 30 June 2004, PAC Chairman had ruled that, in view of the changes in policy being implemented by the ADT and the DoC, the NAO was to review such changes and to carry out a follow-up audit. Findings emanating from this second exercise would enable the PAC to carry out a comparative analysis and to ensure that the systems, as being amended, addressed the shortcomings identified in the first report.

Follow-up Audit Report – September 2005

- 1.07 The follow-up, or progress, report, entitled *Improving the Management of Road Projects*, was tabled in September 2005.
- 1.08 In compliance with the PAC brief, this report addressed progress made by the ADT in areas of shortcomings identified in the original audit, and covered road project issues related to planning/design, tender documentation and evaluation, and project management.
- 1.09 The follow-up exercise acknowledged that the ADT had made significant progress with respect to organizational restructuring, the application of more stringent and effective financial controls and the planning and management of the larger projects. Notwithstanding, the report identified shortcomings (pointed out in the original audit) that were still prevailing, while recognizing the fact that given the relatively short time afforded, and the complex scenarios involved, remedial action would require a process of change that would span longer than the afforded period of time.
- 1.10 More specifically, the follow-up report's findings dealt with:
- restructuring of the Directorate within ADT responsible for road projects, making mention of improvements achieved to date;
 - lack of in-house (project) quality assurance due to resource limitations;
 - inconsistent application of control and monitoring measures as a consequence of lacunae in the formal documentation of procedures and checklists;
 - improvement in the planning, technical evaluation and project management for large-scale projects (but not for smaller ones);
 - enhanced coordination with utilities;
 - ADT's efforts to enforce contract conditions;
 - risks arising out of ADT's decision to appoint external project Supervisors;
 - problems associated with traffic management during the implementation of road projects;
 - inadequate attention to third-party interests affected by road projects' implementation;
 - enforcement in payment procedures;
 - non-regular compliance with the required involvement of the DoC in instances of variations exceeding the regulatory five (5) per cent threshold; and
 - improvement in road project delivery periods.
- 1.11 On the basis of the above findings, the follow-up report included a series of key recommendations, addressing issues and concerns identified in the audit. Specifically, ADT's overall culture, quality assurance, coordination, enforcement, planning/management of projects, the tendering process, traffic management, internal auditing and reviews and resourcing were addressed.

Discussion on modernization of roads projects relating to the Vth Italian Financial Protocol¹

- 1.12 A second series of discussions ensued at the Parliamentary Accounts Committee during the period March to June 2007. A request to the PAC, submitted by a Member of Parliament on 30 January 2007, and making reference to the follow-up report, brought the variations in expenditure incurred by the ADT in the management of the Roads Construction Projects financed through the Fifth Italo-Maltese Financial Protocol (also referred to as the Vth Italian Financial Protocol throughout this report), to the attention of the Committee.
- 1.13 During the course of these sessions, discussions focused on various related matters such as the planning, tendering and project implementation stages (including the handling of variations) and technical issues related to services and products availed of in the execution of the projects and communication with utilities. Sources of financing and control mechanisms deployed were also discussed.
- 1.14 The Authority gave a detailed presentation describing works carried out during the project planning/design, tendering and implementation stages. This presentation also included the scope of the project, the project milestone plan, contract award data, and analysed summaries reporting on contract values, actual works carried out, major categories of overruns² and reasons for these.

PAC request to NAO for enquiry on roads projects

- 1.15 The series of discussions reached a final stage when the Public Accounts Committee raised a motion, demanding action on the part of the NAO. The motion, reproduced as Appendix ‘A’ of this report, was based on observations made during the discussions, specifically taking into account:
- that the funds available through the Vth Italian Financial Protocol were supplemented with funds emanating from (other) public funds; and
 - the significant amount of variations incurred in the execution of the projects.
- 1.16 In the motion, approved on 6 June 2007, the PAC instructed the NAO to:
- a) determine whether the robustness, efficiency and transparency of ADT’s control mechanisms deployed in its authorization of overruns assured value for money and accountability; and

¹ A list of road construction projects partly financed through the Vth Italian Financial Protocol features in Appendix ‘G’.

² Service duct, shifting/laying services, retaining walls.

- b) in conjunction with the Ministry of Finance (MoF) recommend criteria aimed at strengthening public procurement transparency, effectiveness and accountability.
- 1.17 This report has been compiled in response to the requirements of the PAC. For this reason, issues dealing with timeliness were deemed to be out of scope. It is pertinent to note, however, that the road projects in question were completed within the projected timeframes. This in itself constitutes a major achievement.
- 1.18 Likewise, issues dealing with quality were not considered. Neither were the variations themselves analysed, from a technical point of view.
- 1.19 In line with the PAC brief, the exercise was limited to analyzing the approach taken by ADT in handling the road construction projects, the instruments that determined the parameters for the working methodologies applied during the project life cycle (namely the tender documents and the subsequent Contractor and Supervisor contracts) and the control systems applied during project execution.
- 1.20 In view of the fact that variations, overruns and/or project additions/enhancements (any expense that is extra-budget) and their management, cannot be considered in a vacuum, but need to be considered as a function and a consequence of projected works, NAO's review covers various aspects and occurrences deemed relevant in the entire project life cycle – from the pre-tendering/project conception/design stage to implementation.

Approach

- 2.01 The PAC brief was a two-pronged exercise requiring:
- an evaluation of the control systems deployed by ADT and the manner with which the Authority managed the projects, authenticated and authorized bills for payment, and handled variations; and
 - a separate exercise, technical in nature, determining whether the relevant tender documents and subsequent Contractor and Supervisor contracts, being the instruments stipulating the parameters of management of the projects, were conducive to the attainment of value for money.

Methodology

Financial tests on Bills of Quantity

- 2.02 The first task, namely that of evaluating control systems, was handled in-house. The first task was the compilation of project costs, appropriately analysed and collated from source documents. The entire set of six (6) Final Bills of Quantity (FBoQ), as approved by the ADT, was data-captured, re-cast and analysed.
- 2.03 This enabled NAO to obtain project costs analysed by stretch of road and nature of bill. In addition, relevant amounts for actual expenditure, contract amount and resulting variation were arrived at, in a similarly analysed manner.
- 2.04 Table B.01 in Appendix ‘B’ features a summarized version of this analysis, depicting net variance, main bills including variances, and percentage variances for each of the six (6) LOTs making up the project, further analysed by the nature of bills.
- 2.05 The figures thus acquired were then reconciled against the list of payments as effected by ADT to the project Contractors. Table B.02 in Appendix ‘B’ refers.
- 2.06 A spot check was also carried out on an interim LOT 1 Bill of Quantity (BoQ)³, in order to determine the robustness of the financial controls in the payment authorization process deployed by ADT. Table B.03 in Appendix ‘B’ features relevant findings. This exercise was complimented with the compilation of a chronological listing of bills and payments, enabling the drawing up of a running statement of account, covering the entire duration of the project (LOT1) as featured in Table B.04 in Appendix ‘B’.
- 2.07 The final task in the compliance checking of the payment authentication system was the reconciliation of the detailed FBoQs (line entries) to their respective summaries. Table B.05 (Appendix ‘B’) is an exception report drawn up on completion of this task.

³ Selected at random for sample checks.

Inspection of ADT files

- 2.08 The exercise involving the examination of BoQs and FBoQs was complemented with an analysis of pertinent ADT files obtained from ADT's Registry. This analysis enabled NAO to obtain a more detailed insight into the approach adopted by the Authority in managing the (partly) funded Vth Italian Financial Protocol road projects.
- 2.09 The deliverables of this exercise were a series of findings and observations, together with pertinent queries that were forwarded to ADT with requests for clarification.

Meetings with ADT

- 2.10 A number of meetings were held with ADT personnel, from the administrative and technical sections, in support of the file analysis exercises.

Expert (technical) opinion

- 2.11 NAO does not have in-house resources to carry out expert evaluations of road construction work tender documents and contracts. For this reason, it was deemed beneficial to engage the services of third party consultants for the purpose of providing a technical opinion in answer to PAC's request to determine whether these were drawn up in a manner as to be conducive to the attainment of value for money.
- 2.12 Early in the audit process, a suitable consultancy firm was sourced, and its services secured on the basis of Terms of Reference (ToR), a copy of which are included as Appendix 'C'. As may be appreciated from the ToR, the tasks assigned to the expert involved the examination of pertinent project parameter-setting documents, including the tender documents, letters of acceptance and subsequent Contractor and Supervisor contracts, together with various related ADT documentation.
- 2.13 The deliverable of this exercise was a report, forwarded to NAO, detailing findings, observations and opinions relating to the brief. A copy of this report features as Appendix 'E' of this report.

Meeting and exchange of correspondence with MFEI

- 2.14 A meeting was held with Directors General, Budget Office and Contracts. During the meeting, findings and recommendations were discussed. Exchange of correspondence was also made with MFEI relating to the findings and recommendations.

3.01 Points 2.02 to 2.07 (Chapter 2) described the tests NAO carried out to determine the reliability of the main documents used as source in the payment approval process. As is typical in projects of similar magnitude, these consisted of a series of (interim) BoQs, leading to an FBoQ, for each of the six (6) LOTs (1, 2, 3 and 1a, 2a, 3a) making up the Vth Italian Financial Protocol road construction projects. Following are findings emanating from the tests carried out.

Findings emanating from bills and payments

Errors encountered in sampled BoQs and in an FBoQ

- 3.02 Through (sample) checking of an interim BoQ – LOT 1, BoQ 13, significant errors were noted in Bills E (Storm water), F (Street furniture) and G (Street lighting), amounting to a net overstatement of expenses of Lm116,124. Table B.03 relates.
- 3.03 The BoQ in question, as per the control system deployed by ADT, had been:
1. raised by the Contractor;
 2. vetted by the Supervisor;
 3. vetted again by the Authority's technical section (Project Office); and
 4. approved for payment by ADT's financial section. (Document D.14 refers)
- 3.04 Apart from these stages in the bill creation/approval process, a Steering Committee composed of representatives of the Office of the Prime Minister (OPM) - DG OPM, and the Planning and Priorities Co-Ordination Division (PPCD) - amongst others, had the role of monitoring the Protocol.
- 3.05 On the basis of this finding, NAO extended the check further, to include Bills A to K, and Preliminaries⁴ for LOT 1 Bills 12 to 16 (FBoQ). These checks showed that the error was first apparent in Bill 13, and had persisted for a number of interim BoQs before being adjusted. Bill 14 features a net overstatement of Lm137,986 (Interim BoQs are cumulative). By Bill 15, some of the errors making up the discrepancy were noted, and the net overstatement was reduced to Lm6,407. This overstatement remained undetected up to project completion and issuing of the FBoQ. Table B.03 in Appendix 'B' depicts the situation with respect to the errors identified in Bills 12 to 16 of LOT1.
- 3.06 In view of the errors found in LOT1, the entire set of six (6) FBoQs was analysed and checked for mathematical correctness, as described in 2.02 to 2.07 (Chapter 2). This exercise provided the Office with budgeted and actual costs and variations for each stretch of road within each of the six (6) LOTs analysed according to the nature of the works carried out. Table B.01, Appendix 'B' refers.

⁴ Table B.05 (Appendix 'B') can be used as a legend describing the individual bills, classified according to the nature of work, making up (interim) BoQs and FBoQs.

- 3.07 The exercise revealed that, out of the other five (5) FBoQs making up the remaining LOTs, no such errors existed at FBoQ level. However, LOT 2a FBoQ contained an error of a different nature in that, two of the included summaries (on which payment was effected) differed in their value from the sum total of the relevant bills. Table B.05 refers.
- 3.08 Specifically, Summary 4, listed as amounting to Lm438,779, was supported by individual bills the sum total of which amounted to Lm434,906. Summary 6, amounting to Lm181,461, had supporting bills sum total of which amounted to Lm177,536. (Vide Table B.05, Appendix 'B'). In total, the discrepancy amounted to Lm7,798 (excl VAT). While it may be argued that the figure in question is not materially significant, it is relevant to note that the discrepancy was sourced in the FBoQ, with the sum total of component bills not tallying with their summary.
- 3.09 ADT stated that the discrepancy in question covered expenses classified in both summaries as pertaining to 'preliminary works' (and not included in the relevant supporting individual bills).

Unclear trigger of payment transactions

- 3.10 NAO compiled a running statement of account of a sample LOT. As errors had been noted at BoQ (and FBoQ) level for LOT 1, this project was chosen as sample.
- 3.11 Bills 1 to 16 (16 being the FBoQ) were listed in chronological order, as were ADT payments. The resulting list (featured as Table B.04, Appendix 'B') gave NAO the possibility to determine the status of the account from April 2004, being the date of the first interim BoQ, to July 2006, being the date the last payment was effected.
- 3.12 Analysis of the table in question clearly indicates that there were numerous instances when the account was overpaid. The triggering of the payment process in these instances was unclear to NAO, and the issue was raised during talks with ADT personnel.
- 3.13 Formal feedback (from ADT) was duly received with respect to the first instance of such overpayments, namely the Lm212,400 payment affected on 14 October 2004 (vide Appendix B.04). It resulted that the payment in question was a pre-financing payment against the Contractor's bank guarantee. The relevant documentation is included as Appendix F.01 of this report.
- 3.14 It is pertinent to note that the overpayment status was eventually changed, and that the account, as at July 2006 was settled except for moneys held back by the Authority by way of retention.

Findings emanating from project files examination

- 3.15 The tests run on BoQs and FBoQs as described above were complemented with a detailed examination of key ADT Registry files pertaining to the approach taken by the Authority in managing the projects. Following are key findings, related to the scope of this report, emanating from this exercise.

Pre-implementation stage

Decision to treat projects as a departmental tender

- 3.16 The decision whereby ADT assumed full responsibility for the projects in question, where tendering and adjudication were concerned, eliminating input from the Department of Contracts (DoC), is not clearly traceable.
- 3.17 From the sparse documentation available, it would appear as if DoC was, at least initially, ready to cooperate and to assist ADT in the management of the contracts, even in view of the limitations imposed by the Protocol with respect to selective tendering.
- 3.18 However, evidence indicates that ADT preferred not to avail itself of such assistance and to handle the projects on its own. Relevant extracts from internal communications between the parties involved feature as Document D.01 in Appendix ‘D’.

Ministerial (MoF) approval for the projects

- 3.19 The basis on which ADT managed the road construction projects under its own initiative, bypassing the more commonly applied public procurement regulations was a memorandum issued within the Ministry of Finance.
- 3.20 This memorandum, bearing the endorsement of the Minister of Finance, effectively authorized the Ministry for Transport and Communications (MTC) to:
- “proceed ... with regard to the tendering process for the implementation of the Road Network Programme to be financed out of Italian Protocol funds.”*
- 3.21 However, the memorandum in question makes no mention of the supplementing of these funds through other sources, as in fact occurred. Nor does the memorandum contemplate the eventuality of cost overruns and/or variations/additions to the projects. A copy of the memorandum in question is attached as Document D.02, Appendix ‘D’.

Variations and the Protocol

- 3.22 Being the instrument that triggered the entire road construction projects, the Protocol document itself was deemed to be of critical significance. An evaluation of the document in question reveals that no reference is made to variations, overruns, ancillary/additional works and similar contingencies. The Protocol text is included as Document D.03, Appendix D.

Overruns in the Protocol projects

- 3.23 At an early stage (May 2003), despite the fact that a maximum of Lm12.9M (Euro 30M)⁵ had been earmarked out of the Protocol funds to be utilized for Road Construction projects, ADT had informed the Ministry for Transport and Communications (MTC) that, according to its estimates, cost for these projects would amount to Lm17.1M (including ancillary additional costs covering land acquisition and utilities expenses). A breakdown of this forecast, as forwarded to the MTC, follows:

Road construction projects	Lm M
Land acquisition (Local funding)	1.1
Diversion of utilities (Local funding)	0.1
Protocol funds (Italian funding)	15.9
Total	17.1

Table 3.01 – ADT forecast of costs of road projects related to Vth Italian Protocol

Source: ADT files

- 3.24 It is not clear how the original Lm12.9M was depicted in ADT’s communication to MTC as Lm15.9M. Even allowing for the VAT element (at 18%), the figure would have read Lm15.2M.
- 3.25 In answer to this communication, MTC responded that “*you should keep your estimates to the 30 million (euro) approved under the Protocol and that the dossier being prepared for the Italian Contractors should reflect this.*”
- 3.26 This assertion is further strengthened through correspondence issued in April 2004 by the Minister, Ministry for Urban Development and Roads (MUDR), to Chairman ADT. Through this communication, MUDR informed ADT:

“Cabinet agreed that the Adjudicating Committee should conduct further negotiations with the Contractors for a possible reduction in the tendered price.

⁵ Based on a rate of exchange of Lm1=2.3196 Euro. Source: CBM Archive of Middle Exchange Rates as at 30 May 2003.

Please note that the funds allocated for these projects through the Fifth Italo Maltese financial protocol cannot be increased. Moreover Cabinet was contrary to supplementing the existing funds from the Roads Capital Vote.”

- 3.27 Copies of the documents referred to above are included as Documents D.04, D.05 and D.06 respectively.

The Adjudication Board

- 3.28 Following the decision that the Protocol projects were to be managed outside the standard Public Procurement Regulations, an Adjudication Board was set up, officially in January 2004. (Document D.02, Appendix ‘D’, refers).
- 3.29 The Terms of Reference (ToR) of this board (included in full as Document D.07, Appendix ‘D’), charged the board with managing the tender during the offer submission and subsequent evaluation stages.
- 3.30 It is pertinent to note that the board in question laid down the approach ADT was to take in managing the projects, namely the nomination of a “*consultant*” by the Contractor who, apart from performing tasks related to “*professional monitoring*”, “*could also provide the extra design services that could become necessary as the works progress*”.
- 3.31 This suggestion on the part of the Adjudication Board features in full, being included in the minutes of the Board’s first meeting, as Document D.08, Appendix ‘D’.

Delegation of project management responsibility to Supervisors

- 3.32 One notable aspect with respect to the control ADT maintained during project execution was the manner with which the Authority delegated project management, especially where modifications were concerned, to third party Supervisors.
- 3.33 It is to be noted that these Supervisors were, as laid down in the Tender document, nominated by the Contractors and subsequently accepted by the Authority. Supervisors were, also in terms of the conditions stipulated in the tender documents and the supporting contracts, reimbursed, on a percentage (of project cost) basis, by the Authority.
- 3.34 A perusal of Article 35 of the Tender General Conditions (a copy of which in included as Document D.09 in Appendix ‘D’) shows the extent of such delegation.
- 3.35 Specifically, the Article empowers the Supervisor “*to order any modification to any part of the works necessary for the proper completion and/or functioning of the works*”. In addition, in ordering such modifications, the Supervisor is initially bound to liaise solely with the Contractor and only on receipt of a Contractor proposal is the

Supervisor obliged to “*consult with the Contracting Authority*”. Even at this stage, the final decision on whether to carry out the modification or not rests with the Supervisor. Fixing of rates/prices for such modifications is similarly to a large extent the prerogative of the Supervisor.

- 3.36 This issue seemed to constitute a concern for the legal firm whose services were solicited by the ADT in 2004. Correspondence dated May 2004 indicates that the firm in question felt it pertinent to comment on the fact that it had not been involved in the drawing up of the conditions as stipulated in the tender document, and on the basis of which “*the parameters of the consequent contract and the rights and obligations of the parties thereto*” were drawn up.
- 3.37 Such review (at such a late stage), however, was advised against, as this would have “*necessarily re-opened negotiations and lengthened the process*”. A copy of the email correspondence in question features as Document D.10 in Appendix ‘D’.

Ministerial (MUDR) instructions to ADT for latter to maintain its own controls

- 3.38 The Ministry for Urban Development and Roads (MUDR) had issued specific instructions to the ADT, instructing the Authority to maintain its own (independent) system of checks and measurement of works (as per Document D.11, Appendix ‘D’).
- 3.39 ADT, however, did not abide by such instructions, relying instead on Article 35 of the tender that put the onus for such checks on the Supervisors.

Implementation stage

Lack of evidence of ADT on-site measurement of works

- 3.40 During NAO-ADT meetings, ADT personnel stated that the Authority’s Quantity Surveyors (Qs) carried out regular visits on site while the roads in question were being constructed. NAO requested access to logs recording such activities and detailing measurement of works the (Authority’s) Qs would have carried out during their visits.
- 3.41 No such documentation was made available, with ADT personnel justifying the absence of same by (verbally) stating that such control procedures were the prerogative of the Supervisors.

Checks and measurement of works as maintained by Supervisors

- 3.42 In view of the fact that, as per Article 35 of the Tender General Conditions, ADT had delegated control to the (external) Supervisors, and had refrained from maintaining its own independent system of checks and measurement of works, NAO requested access to relevant documentation as maintained by the Supervisors.

- 3.43 This request was formally submitted to ADT, and subsequently followed up. No such documentation was made available.

Additional MoF instructions regarding extra expenditure

- 3.44 The concept that the road projects were to be funded solely through the Italian Financial Protocol funds (with the exception of the VAT element) was *de facto* maintained until November 2004. This decision was, until that date, never rescinded, having been issued on the basis of a Cabinet decision, notwithstanding ADT's indications that extra funds would be necessary to complete the projects as designed (vide 3.2.3 above).
- 3.45 This decision was effectively reversed, although in an unclear manner, by means of a communication issued by Ministry of Finance to ADT in November 2004. The communication in question advises ADT of the Ministry's go-ahead to enter into contracts with Contractors awarded the works for LOTs 1a, 2a and 3a, on the proviso that, *"except for the VAT element, no budgetary funds shall be required from the Consolidated Fund to supplement the funds available under the ... Protocol."*
- 3.46 The communication, however, goes on to state that:
- "The Authority should be made aware that any complementary funds, which may notwithstanding be committed (except for the VAT element), must necessarily form part of the normal budgetary provision made available in the Financial Estimates to Malta Transport Authority for roads purposes."*
- 3.47 A copy of the document in question features as Document D.12 in Appendix 'D'.

Unclear audit trail re decision to split into six (6) LOTs

- 3.48 On 23 November 2004, Letters of Acceptance (LoAs) were issued to three (3) Contractors (other than the three (3) handling the original three (3) LOTs). These fresh LoAs covered specific parts of LOTs 1, 2 and 3 from which they were detached. In this manner, the Protocol roads projects were broken down into six (6) LOTs, each handled by a different Contractor.
- 3.49 While the reason for this move was the fact that none of the three (3) original Contractors were managing to deliver as projected, the decision process leading to actualization of the decision is not adequately documented in ADT's files. Documentation traced is limited to a request by ADT to the Ministry for Urban Development and Roads suggesting the re-distribution of projects into six (6) LOTs against the originally awarded three (3). Document D.13 in Appendix 'D' refers.

- 3.50 No fresh tender was issued in this instance, and NAO found no documented evidence as to how the Contractors in question were selected.

General issues

ADT-commissioned report on the Hal Far Road Construction Project

- 3.51 It is standard practice (and a recommendation of INTOSAI and EUROSAI standards that NAO complies with) that public sector auditors draw on and refer to work carried out by other professionally qualified auditors. For this reason, NAO had requested ADT to make available a copy of the ADT-commissioned Hal Far Road audit report. This exercise had been carried out by a local private sector auditing firm. The reason for NAO's request, made clear to ADT in the Office's solicitation for a copy of the report in question, was that the approach adopted by ADT in managing the Hal Far project was very similar to that deployed in the case of the Protocol Projects.
- 3.52 NAO followed the initial formal request with a number of reminders. However, the report in question was never made available to the Office.

- 4.01 NAO complemented the evaluation of the robustness of deployed control mechanisms by commissioning a technical expert to compile a report that was to focus on “*a technical evaluation of the relevant tender documents that would determine whether the system deployed by ADT, in lieu of the standard public procurement mechanism, was sufficiently effective and transparent so as to be conducive to achievement of value for money.*”⁶
- 4.02 While the full text of the expert report features as Appendix ‘E’ of this document, this part contains key highlights from the (expert) report in the form of findings.

The nature of variances

- 4.03 ADT carried out detailed preparatory work when compiling the tender. Relevant drawings and designs, together with the required surveys, inspections, investigations, tests, discussions and the acquisition of permits were all performed.
- 4.04 One limitation that nonetheless hampered this project, as it does with similar projects, was the general inaccuracy/incompleteness of records held by utility companies, giving rise to unforeseen situations and extra, unbudgeted, expenditure.

Contractual procedures to administer contracts and contract variations

- 4.05 The tender format adopted for the projects had two characteristics that are of particular relevance –
- the contract documentation was modeled on the FIDIC contract; and
 - the tender documentation required each tenderer to include, with the respective tender, the nomination of a warranted Perit as a Supervisor for the works.
- 4.06 Of particular interest is the role of the Supervisor as defined in various parts of the tender document. These roles include:
- analysis of, and recommendations relating to, ADT’s detailed plans/drawings, studies, surveys, investigations and results prepared by the Contractor;
 - supervision of works, monitoring progress and quality in accordance with standards specified;
 - attendance at any meetings with ADT, utilities and other stakeholders;
 - assistance to ADT in the verification of Contractor bills;
 - certification of works at various stages of construction;
 - participation in the official performance tests; and
 - verification and classification of ‘as completed’ drawings.

⁶ Source: Terms of Reference for the NAO (outsourced) technical expert – featuring in full as Appendix ‘C’.

- 4.07 In addition to the above roles, the Supervisor was (elsewhere in the tender document) defined as the person responsible for monitoring contract execution on behalf of ADT. Further, diverse, roles were assigned to the Supervisor in the General Contract Conditions. Amongst other roles, the Supervisor was given the role of a quasi Employer's Agent.
- 4.08 Article 35 gave the Supervisor the power to order any modification, including additions, omissions and substitutions via administrative order.
- 4.09 Article 47 and subsequent articles empowered the Supervisor to “*determine by measurement the actual quantities of the works executed by the Contractor*” and to issue approvals for interim payments and to prepare the final statement of account.

Selection/Nomination of the Supervisor

- 4.10 The very particular roles of the Supervisor as assigned in the Italian Financial Protocol projects have been already referred to.
- 4.11 This has to be reviewed in conjunction with the manner of selection of the Supervisor, which occurred via nomination in the Contractor's tender. In addition, if ADT were to terminate the contract with the Supervisor, the Contractor would have been entitled to nominate an alternative Supervisor. Furthermore, the honorarium paid to the Supervisor was based on the contents of the same tender.
- 4.12 Strictly speaking, in terms of the FIDIC contract, any independent checks ADT may have made on what the Supervisor was certifying could not be used to challenge a certified payment. The only method through which such a challenge would have been permissible was via the contract procedures, and these required either the agreement of the Contractor or an Arbiter's decision.

- 5.01 Chapters 3 and 4 of this report featured detailed findings emanating from the two exercises carried out in discharging PAC's brief, namely the evaluation of the control systems deployed and the technical review of tender and supporting/subsequent documents determining the manner with which the projects were managed.
- 5.02 This chapter will draw upon these findings and present observations and opinion therefrom. Where possible, in order to maintain modularity and ease of perusal, these observations are sequenced in the same order as their corresponding findings.

Evaluation of findings emanating through the examination of the control systems deployed (Chapter 3 refers)

Bills and payments

Errors encountered in sampled BoQs and in an FBoQ (vide 3.02 to 3.09)

- 5.03 The checking system deployed by ADT was a multilevel one, with a considerable number of stages during which control was exercised. This notwithstanding, it has already been demonstrated how sample checks run on a particular LOT's BoQs resulted in a situation whereby, due to mathematical errors in the detailed BoQ, a situation of overstatement prevailed through a number of (interim) BoQs, until remedial action was taken. The error in question was made up of a number of erroneous entries. Of these, one remained in a state of overpayment even once the project was concluded and the FBoQ drawn up⁷.
- 5.04 This significantly material failure in the rigorous, multi-stage system deployed was deemed to be a clear warning indicator of flaws in the control mechanisms constituting the system of authentication of Contractor bills and the subsequent payment approval processes.
- 5.05 While no documented operating procedures covering the ad-hoc bills approval/payment authorization process were made available to NAO at the time of the fieldwork, interviews with ADT finance personnel revealed that, of all the vetting stages, it was only the first, at Quantity Surveyor level, that the detailed BoQ would be checked. All subsequent stages of checking worked at a level higher than the detailed BoQ, on the assumption that the initial checks had been carried out efficiently and correctly.
- 5.06 In addition, ADT was finding comfort in the responsibilities to be assumed by Supervisors as per their contract and Article 35 of the tender document. In this sense, ADT was expecting BoQs to be correct by the time these reached the Authority, as the documents would have been vetted by the Supervisors after being raised by the Contractors.

⁷ Table B.03 – Appendix 'B' refers.

5.07 The stated case of sustained overpayment clearly illustrates that ADT was wrong in its assumption. In a similar fashion, the payment of bills featuring in the Bills Summary but not in the supporting detailed bills (of which the Summary is supposedly constituted) was deemed to be further proof of shortcomings in the deployed control system.

Unclear trigger of payment transactions (vide 3.10 to 3.14)

5.08 For various periods during project implementation, at least one of the six (6) LOTs (LOT 1 – chosen as testing sample) was maintained in a state of overpayment. Reference to Table B.04, Appendix ‘B’ reveals that ADT had overpaid the Contractor in ten (10) instances out of a total of twenty-two (22) payments effected during the period September 2004 to July 2006.

5.09 The Protocol itself contemplated advance payments (vide Document D.03, Article 3, Para. 3 – Appendix ‘D’ page 7). In addition, Article 44 of the Tender General Conditions – Pre-financing, provided for instances wherein Contractors could be granted pre-financing facilities for operations connected with the execution of works.

5.10 Specifically, Clause 44.a of the General Conditions stipulated that such pre-financing could take the form of “*a lump sum advance enabling him (the Contractor) to meet expenditure resulting from the commencement of the contract*”.⁸

5.11 However, NAO opines that:

- a) the prepayment on the part of ADT covering monies the Contractor was to deposit by way of a bank guarantee renders the same guarantee ineffective, defeating the entire concept behind such a mechanism deployed in the tendering stage;
- b) the clause quoted above (44a) is to be interpreted as referring to expenses incurred by the Contractor, and duly invoiced to the Contracting Authority, covering costs directly related to ‘operations connected with the execution of the works’; and
- c) the preferred bidder may have been given an unfair cash flow advantage over other bidders.

⁸ Full text of Article 44, Tender General Conditions, features as Appendix F.02.

Pre-implementation stage

Decision to treat projects as a departmental tender (vide 3.16 to 3.18)

- 5.12 In the handling of projects of such magnitude as the Italian Protocol road construction ones, it is necessary to have robust mechanisms that will ensure that Government acquires value for money. In ensuring this, the purchasing authority would need to ensure that it has all the competences required to manage such projects. In view of this, it would have made more business sense to make recourse to DoC on its expertise in the handling of variations.
- 5.13 Through discussions, the reason given for the decision to manage the projects outside the standard public procurement regulations framework was that such regulations, specifically the involvement of DoC, would have not been in line with EU Directives, in view of the fact that selective tendering was mandatory. However, as confirmed by MFEI, such directives had not yet been translated into local legislation at the time.
- 5.14 Furthermore, correspondence referred to in 3.16 to 3.18 (Chapter 3), namely Document D.01, Appendix 'D', clearly illustrates DoC's original intention to participate in the management of the contracts. Such intention was not appreciated by ADT.
- 5.15 The files perused during the exercise do not provide an audit trail supporting the decision to eliminate DoC from all aspects of contract management. This precludes NAO from drawing an opinion further than that of advocating that, once tried and tested mechanisms are in place, it makes more sense to adapt these and deploy them even in ad-hoc cases such as the Italian Financial Protocol, rather than go about creating new (and untested) alternative control systems.

Ministerial (MoF) approval for the projects (vide 3.19 to 3.21)

- 5.16 ADT managed the Italian Financial Protocol projects on the basis of an MoF authorisation (Document D.02, Appendix 'D') to proceed with the Road Network Programme.
- 5.17 The said authorization was legal in terms of Regulation 4(4) of the 1996 Public Service (Procurement) Regulations, empowering the Minister of Finance to allow a purchasing authority to carry out procurement in a manner other than that stipulated in the standard regulations.
- 5.18 However, the said authorization made no specific quantification of the amount of money ADT was being authorized to spend. As indicated in 3.19 to 3.21 (Chapter 3), the authorization was apparently based on the assumption that the only funds to be utilized were those being provided through the Protocol. In addition, the document did not contemplate instances of additional work and/or variations.

- 5.19 In view of the parameters stipulated by the authorization in question, the purchasing entity was obliged to seek additional instruction once additional work and/or variations materialized.

Variations and the Protocol (vide 3.22)

- 5.20 The Protocol itself, being the source document on the basis of which all systems were devised, sets up a mechanism whereby projects embarked upon under its cover would be paid by the Maltese Government, with the Italian Government subsequently reimbursing the amounts paid.
- 5.21 Out of a total of Euro 75M placed at the disposal of the Maltese Government, Euro 30M was earmarked for the ‘Modernisation of the Road Network Programme’.
- 5.22 While the Protocol did not take into account the possibility (and the corresponding handling procedures) for any additional works/overruns, perusal of the Letters of Acceptance as issued would indicate that contingencies were contemplated and accounted for. Table 5.01 below depicts the (budgeted) allocation of funds as per the issued Letters of Acceptance to the Contractors and Supervisors.

	Amounts are in Lm, and include VAT			
	Contractor	Supervisor	(Percentage)	Total
LOT 1	3,000,000	75,000	2 ½ %	3,075,000
LOT 2	3,700,000	148,000	4%	3,848,000
LOT 3	3,300,000	82,500	2 ½%	3,382,500
Totals	10,000,000	305,500		10,305,500

Table 5.01 – Budgeted allocation of funds as per issued Letters of Acceptance

Source: Letters of Acceptance and ADT-Supervisor contracts.

- 5.23 Taking into account the issue that the Euro 30M Italian Financial Protocol funds were to be supplemented by funds drawn from the Consolidated Fund to cover the VAT element⁹, the initial Letters of Acceptance covered a total project expenditure (excluding 18 % VAT) of Lm8.7M of the Lm12.9M grant, leaving Lm4.2M by way of contingencies.
- 5.24 At face value, a contingency of 48 % would seem to constitute a more than sufficient reserve to cover for unforeseen work.

⁹ Although specific evidence was not located, it seems to have been accepted that the Euro 30M would be the expenditure excluding VAT.

Overruns in the Protocol projects (vide 3.23 to 3.27)

- 5.25 Total project expenditure amounted to Lm21.4M including VAT. A breakdown of these costs features in Table 5.02.
- 5.26 Disregarding ancillary expenditure so as to enable a like-with-like comparison with the originally projected amounts as per Letters of Acceptance and Supervisor contracts, as per Table 5.01, works in total, to include Supervisor fees, amount to Lm19.5M including VAT. This translates to a sum of Lm16.5M excluding VAT, a figure which not only goes over the original estimate of Lm8.7M but also over the total available Italian Financial Protocol funds of Lm12.9M.
- 5.27 It is clear that, while contingencies amounting to 48 % of the original (total) projected costs were accounted for, as per 5.2.4, these were not sufficient to cover actual extra expenditure incurred.
- 5.28 While it is not the scope of this report to delve into reasons for which the original allocation was exceeded, it is pertinent to note that MUDR instructions issued to ADT at various instances during the project, with respect to maintaining expenditure within pre-determined budgets, were not complied with.

Expenditure	Lm
Works (as per FBoQs) ¹⁰	18,804,239
Variations pending approval	63,698
Supervisor costs	636,809
Variation works (Supervisors)	3,007
MEPA	30,000
Anas	20,962
Monitor	12,834
Agri Serv Coop	575
Expropriation	1,395,995
Loss of Crops	35,630
Embellishment landscaping (i)	260,215
Embellishment landscaping (ii)	26,598
Embellishment decorations	7,020
Testing of material	5,638
Installation of bus shelter	10,365
Utilities Enemalta	30,368
Utilities Go	38,589
Utilities WSC	3,138
MSD	11,043
Total	21,396,723

Table 5.02 – Total project expenditure as at May 2008
Source: ADT, except as indicated.

The Adjudication Board (vide 3.28 to 3.31)

- 5.29 The Terms of Reference (ToR) for the Adjudication Board, being the management of the tender during the offer submission and subsequent evaluation stages, have been commented upon.
- 5.30 It is surprising to note that, in disregard of the limits set by these ToR, the Adjudication Board went on, *ultra vires*, to “*suggest*” the manner with which ADT was to manage the projects, namely the provision of third party supervision and the handling of additional works.

¹⁰ Source: NAO working papers – vide Table B.01 Appendix ‘B’

- 5.31 This suggestion was, furthermore, afforded at a time (September 2003 – vide Document D.08, Appendix ‘D’) when the Board’s Terms of Reference had not even been formally drawn up¹¹, although the convened Board was aware that such ToR would indicate that the Board’s sphere of influence would be limited to the issuing of a tender and the adjudication of same.

Delegation of project management responsibility to Supervisors (vide 3.32 to 3.37)

- 5.32 While it is standard practice, even within the private sector, to opt for a project management model whereby the purchasing entity makes recourse to a third party Supervisor to manage the project on its behalf, such an arrangement would entail that the purchasing entity, and not the Contractor carrying out the works, nominates the Supervisor.
- 5.33 In this instance, the model was applied notwithstanding the fact that the contracting entity, and not the purchasing one, nominated the Supervisor.
- 5.34 ADT was aware of the risks such an approach would bring about, given legal advice afforded to the Authority before the project contracts were endorsed.

Ministerial (MUDR) instructions to ADT for latter to maintain its own controls (vide 3.38 to 3.39)

- 5.35 Possibly in view of the weakness (perceived or actual) in control mechanisms implied through the arrangement described in 5.34 above, MUDR had issued instructions for the maintenance of Supervisor-independent controls to be deployed by the ADT.
- 5.36 NAO opines that such an arrangement would have been conducive to the maintenance of a reasonable degree of accountability and transparency. ADT’s decision not to abide with Ministry instructions, opting instead to rely solely on checks run by the Supervisors, causes concern, especially so when coupled with the fact that the Supervisors in question had been nominated by the Contractors.

Implementation stage

Lack of evidence of ADT on-site measurement of works (vide 3.40 to 3.41)

- 5.37 In connection with points 5.35 to 5.36 above, NAO made repetitive requests for ADT to furnish evidence of regular measurement of works as carried out by the Authority during the construction of the roads projects.

¹¹ Official Terms of Reference were circulated in January 2004 and limited the authority of the Adjudication Board to the handling of the tendering process up to offer evaluation and submission of relative recommendations as to the award to the Ministry for Transport and Communications (vide Document D.07, Appendix ‘D’).

- 5.38 In view of the fact that no such documentation was made available, despite ADT's (verbal) statement that the Authority's Quantity Surveyors carried out regular on-site visits, NAO is concerned with the manner with which ADT handled the projects, in disregard of Ministerial instructions.
- 5.39 In addition, this contrasts with documentation recorded in ADT Protocol files. A flowchart, compiled by ADT personnel in May 2005, clearly shows that the Authority itself was to verify, at two separate stages, the quantities as being claimed by the Contractor and after being vetted by the Supervisor. Document D14, Appendix 'D' refers.

Checks and measurement of works as maintained by Supervisors (vide 3.42 to 3.43)

- 5.40 Once it was established that ADT had not compiled and maintained its own measurement records (as imposed upon it even by MUDR), relying completely instead on those compiled by the Supervisors, NAO requested access to records as maintained by Supervisors.
- 5.41 The objective of this request was to obtain evidence, and hence comfort, that some entity, apart from the Contractor, had monitored the works and had compiled documentation that would have eventually served as audit evidence proving that Contractor-independent measurements had been taken.
- 5.42 Despite repetitive requests, NAO was never furnished with such data. Verbally, ADT personnel stated that there were instances where Contractors' bill of quantity had been amended by Supervisors to reflect actual works performed.
- 5.43 Through perusal of ADT files, it transpired that 'Daily Reports' were supposedly being forwarded to ADT by the Supervisors. However, a substantial amount of these reports were missing and communication between ADT and Supervisors on various instances revealed that ADT had been chasing the Supervisors for these reports during project implementation, at times threatening to suspend payments unless the reports in question were made available.
- 5.44 Additionally, the contents of the daily reports were non-standard, in certain cases not even reporting the material utilized. It is difficult to envisage a manner with which these (daily) reports can be consolidated to the respective interim BoQ.
- 5.45 NAO would have only been in a position to declare the system accountable and transparent, with adequate control mechanisms, following detailed perusal of evidence depicting continuous and consistent review of Contractor bills by Supervisors, and had the Supervisors compared (Contractor) bills with readings/measurements taken on site by (Supervisor) personnel, in a manner that would have been totally independent of Contractors' data.

- 5.46 In the absence of such evidence, it is impossible for the NAO to sanction the control systems deployed. NAO's stand in this regard is further substantiated with the identification of errors in the sampled BoQs and in one FBoQ as per 5.03 above.

Additional MoF instructions regarding extra expenditure (vide 3.44 to 3.47)

- 5.47 The MoF communication of November 2004, whereby ADT was authorized to enter into contracts covering LOTs 1a, 2a and 3a, is enigmatic.
- 5.48 On the one part, MoF informed ADT of Government's official position prevailing at the time, namely that the expenditure was to be limited to the Italian Financial Protocol funds (Euro 30M) and that only the VAT element was to be supplemented to this amount. However, the same communication gave instructions to ADT to use amounts voted in the Estimates for road construction, should the Authority exhaust the Italian funds.
- 5.49 The latter statement seems to be in contradiction of the former, and of all instructions issued to date by Ministries of Finance, Transport and Communications and Urban Development and Roads (MoF in the original authorization – as per 5.16 above – MTC and MUDR in communications to ADT – as per 5.28 above).
- 5.50 The reason for the change in MoF's official stand regarding additional funding is unclear.

Unclear audit trail re decision to split into six (6) LOTs (vide 3.48 to 3.50)

- 5.51 The three (3) Letters of Acceptance (LoAs) dated 23 November 2004 cumulatively amounted to Lm3,646,200 including VAT¹². Eventually, total expenditure based on (approved) Contractors' FBoQs reached the sum of Lm6,219,561.
- 5.52 The lack of a clear audit trail leading to the decision to split the three (3) original LOTs into six (6) is ominous. Likewise is the fact that ADT files do not contain documentation identifying the decision maker. In addition, the basis on which the specific Contractors were selected is not supported by formal documentation.
- 5.53 Whilst it is appreciated that urgency was a concern, given the need to have the projects completed by the targeted date, NAO believes that meeting of deadlines should not be made at the expense of transparency and accountability in such a manner.

¹² Source: LoAs dated 23 November 2004, amounting to Lm3,090,000 excluding VAT.

General issues

ADT-commissioned report on the Hal Far Road Construction Project (vide 3.51 to 3.52)

- 5.54 NAO believes that access to the report in question would have proved beneficial to the exercise at hand, as findings and recommendations drawn up in the report would have provided a greater insight to the National Audit Office during its compilation of this report.
- 5.55 The perusal of similar reports, apart from being standard practice in the auditing world, was a prerogative the NAO had, given that the ADT-commissioned report had been financed through public funds.
- 5.56 It is not clear why the Office's repeated requests for access to the report in question were not complied with by the Authority and the Ministry for Infrastructure, Transport and Communications.
- 5.57 On a general level, the NAO is not content with the level of communication afforded by the ADT in the course of the exercise. While the Authority made available Registry files pertaining to the Italian Financial Protocol, and participated actively in all meetings called up by the NAO, most of NAO's requests for formal feedback and response to its many enquiries remained unanswered.
- 5.58 This lack of response, coupled with a general lack of documentation recorded in the ADT Registry files, thereby obstructing the construction of an audit trail covering critical decisions and actions taken during the project, effectively inhibited NAO from obtaining sufficient comfort to declare the control mechanisms deployed to be robust, effective and transparent, thus assuring value for money and accountability.
- 5.59 In this perspective, the various shortcomings discussed in this part of the report assume a high level of criticality, as all are pointers to deficiencies within the approach to control deployed by the ADT, at both pre-implementation and implementation stages.

Evaluation of findings emanating through the technical review of the tender and supporting documents (Chapter 4 refers)

The nature of variances (vide 4.03 to 4.04)

5.60 In the opinion of the NAO commissioned technical expert, ADT carried as rigorous a pre-tender process as could be expected. However, with road construction works, as is the case with most sub-structure works, it is practically impossible to predict with any accuracy the circumstances that give rise to variations.

Contractual procedures to administer contracts and contract variations (vide 4.05 to 4.09)

5.61 The contractual role of the Supervisor, as outlined in the previous chapter, was central to the issue of how contract variations were handled.

5.62 Major modifications would be communicated to the Supervisor, who would issue the relative administrative order to the Contractor. The Contractor would respond by indicating the applicable modifications, following which Supervisor-Contractor negotiations would be held.

5.63 The certification of interim payments was initiated by the Contractor's submission to the Supervisor of detailed bills with drawings. These would be checked by the Supervisor who would raise a payment request. In turn, this request would be checked, or reviewed, by the (ADT) Project Officer.

5.64 On the one hand, the Supervisor (according to verbal evidence) was required to give a breakdown of rates not included in the original contract together with an explanation for the reason(s) of approval of the rates. On the other hand, the role of the (ADT) Project Officer was to check that "*all documents required by the procedural template were present*".

5.65 In addition, the endorsements of the Director NID and of the ADT Financial Controller (that were given subsequent to the Project Officer's checks) were not meant to be, and could not be, a check on the correctness or validity of the Supervisor-submitted certificate but were a confirmation of the authorization to pay.

5.66 While this is not necessarily the process as envisaged in the contract, it is not clear what would have been the legal implications had ADT not approved a Supervisor-determined modification or a certification for payment.

5.67 Furthermore, referring to the contract as FIDIC is perhaps misleading. In effect, the contract was a modified version of FIDIC, with all the possible implications of such modifications.

- 5.68 One could argue that the FIDIC form of contract could be modified to suit a specific procurement and approvals process, as desired by ADT. 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.
- 5.69 In FIDIC, in variance to the procedure followed in the Italian Financial Protocol contracts, the Engineer is the person appointed by the Employer, with the knowledge and acceptance of the Contractor, to administer the contract in a fair and impartial fashion.
- 5.70 In answer to the question whether ADT established clear and transparent procedures for the handling of variations, at least in theory, such procedures existed.
- 5.71 This, however, has to be considered in conjunction with the fact that the role of the Supervisor was not correctly defined and the process would have been more robust had the Employer directly selected the professional required to assume this crucial role, as stipulated within the FIDIC form of contract.

Selection/Nomination of the Supervisor (vide 4.10 to 4.12)

- 5.72 In view of the very particular role of the Supervisor or ‘Engineer’, it is very questionable whether the concept behind the tender format, which envisaged the nomination of the Supervisor by the Contractor, was a good idea.
- 5.73 In the opinion of our technical expert, this is the single most questionable aspect of the process envisaged – not necessarily because the Supervisors did not do their work properly (and there is no evidence at all in this sense) but because the perception of transparency, effectiveness and accountability is clouded by the obvious link between Contractor and Supervisor.
- 5.74 In addition, the way that the role of the Supervisor was defined in different parts of the Contract, served to further blur the ‘separation’ between Supervisor and Contractor.
- 5.75 The Supervisor’s role, defining him (amongst other duties) as being responsible for the management, safety and quality assurance and for the certification of results or quality certificates effectively ‘tied’ the Supervisor more closely to the Contractor. This link made it conceptually more difficult for the Supervisor to assume an impartial role, as envisaged in FIDIC, or even, at the same time, acting as the Employer’s agent.

5.76 If the objective of the tender was to simplify and perhaps diversify, the process of selection of the Supervisor, it is clear this objective was not achieved. Out of six (6) contracts examined, four (4) separate, two (2) competing, tenders nominated the same Supervisor, and the remaining two (2) nominated a second Supervisor.

Conclusion - Technical review of the tender and supporting documents

5.77 In the light of the above considerations, one could conclude that ADT's objective of assuring overall transparency, accountability and value for money may have been defeated through the form of contract that envisaged close links, actual or perceived, between Contractors and Supervisors.

A synopsis of the evaluation exercise (control mechanisms and technical review)

5.78 Chart 5.01 below depicts, in brief, all points deemed salient emanating from the findings of the control mechanisms check and the technical review of the tender and supporting documents, together with points from the ensuing evaluation (of both sets of findings).

Findings – control mechanisms (Ch 3)

- Errors encountered in sampled bills (3.02-3.09)
- Unclear trigger of payments (3.10-3.14)
- Lack of clarity in decision to treat as a departmental tender (3.16-3.18)
- Non-compliance with instructions to limit expenditure (3.23-3.27)
- Delegation of project management responsibilities (3.32-3.37)
- No independent checks and measurements (3.38-3.41)
- Change in position regarding additional expenditure (3.44-3.47)
- Unclear trail in decision to split into six LOTs (3.48-3.50)

Findings – technical review Ch 4)

- High level, preparatory work by ADT (4.03)
- Problems with utility companies' records (4.04)
- FIDIC modelled contract with significant changes (4.10-4.12)
- Diverse roles assigned to Supervisor (4.05-4.09)
- Extensive authority vested in Supervisor (4.05-4.09)
- Contractor-nominated Supervisor (4.12)

Evaluation – control mechanisms and technical review (Ch 5)

Control mechanisms

- Shortcomings in the multi-level payment authorisation mechanism deployed (5.03-5.07)
- Unorthodox application of the pre-financing facility (5.08-5.11)
- Tried and tested systems replaced by new and untested ones (5.12-5.15)
- Issues with authorisation to operate outside the standard public procurement regulations (5.16-5.19)
- Variations and overruns in excess of planned contingencies (5.20-5.28)
- Unclear authority of Adjudication Board in suggesting approach to project management (5.29-5.31)
- Delegation of project management to third parties not countered by any independent checks/measurements (5.32-5.46)
- Contradiction in MoF eventual revision of its position regarding additional funding (5.47-5.50)
- NAO concern on lack of transparency in decision to splitting of project into six LOTs (5.51-5.53)

Technical review

- Variations not due to lack of pre-tendering planning (5.60)
- In theory, variation-handling procedures were deployed (5.61-5.71)
- Unorthodox method of selection of Supervisor impinged on fairness and impartiality of the contract administrator (5.72-5.76)
- Separation between Supervisor and Contractor was blurred (5.72-5.76)
- Objective to ensure transparency, accountability and value for money may have been defeated (5.72-5.76)

Conclusion

A marked improvement in ADT's pre-tendering activities was noted, as well as the timely completion of the projects. However, the various deficiencies identified in controls mechanisms deployed during project implementation by ADT preclude NAO from giving a positive opinion on the control systems deployed and the project management approach adopted.

Contracts

- 6.01 Entities resorting to procurement models wherein project management is delegated to third parties should maintain robust, independent checks and measurement systems to ensure the validity of bills presented to them for payment.
- 6.02 Transparency, effectiveness and accountability are more likely to be achieved, or perceived as achieved, if the Supervisor is selected directly by the Contracting Authority, and is therefore the person of trust of the Authority, rather than the person of trust of the Contractor. In addition, there should be a more careful definition of the role of the Supervisor, so as to avoid clouding his having to operate under conflicting hats. Particularly in the case of the Italian Financial Protocol contracts, at some stage the Supervisor was acting on behalf of the Contractor, at another stage on behalf of ADT, and at others still expected to act impartially.
- 6.03 While contract/tender clauses contemplating pre-financing facilities to successful bidders may be considered reasonable and equitable in instances where such pre-financing cover expenses strictly related to the execution of contracted works, resort to pre-financing must be limited to such use.
- 6.04 Bypassing the tried and tested Public Procurement Regulations in cases of urgency of task completion may seem, but is not, the ideal solution to expediting projects. The pitfalls connected with adopting 'ad-hoc' alternative control mechanisms are very significant. A more appropriate arrangement would be for the projects to be handled through special channels set up using MFEI/DoC and the procuring entity's resources. Such channels would operate within the comfort and safety afforded by standard regulations but would be empowered and have the necessary capacity and expertise to expedite the project during its entire life cycle with particular emphasis to occurrences of variations. Simultaneously, particular requirements brought about by urgency of works, in order to ensure that variations do not unjustifiably delay project completion, would be taken into account.
- 6.05 For the future, the proper form of contract, with properly defined roles and responsibilities, corresponding to the procedures and authorities that are required by law or regulation, needs to be selected before publishing a tender.

Variations handling

- 6.06 The introduction of better systems of underground services documentation is necessary to ensure that, in future, designers of such projects could have a better picture of the existing situation, and would therefore have 'less surprises' once the works have started.

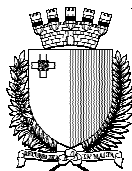
- 6.07 The cost experience that ADT has, for road construction contracts, should have been more formally used to assist the Supervisor, or anybody in a similar role, in determining appropriate rates for those tasks that, for some reason, were not included in the relative Contract – however, the form of contract selected did not envisage this mechanism. Had there been a mechanism wherein the cost experience accumulated by ADT could have been used to assess the cost of the variations, a better way of assuring ‘value for money’ would have been available.¹³
- 6.08 With the specific requirements of ADT, and Public Procurement Regulations, where the approval of variations is normally reserved to the relative Contracts Committee, one could question whether the FIDIC form of contract is at all suitable, unless it is specifically desired to assign the role of determination to the nominated Engineer. It would therefore be advisable to examine other forms of contract, besides FIDIC, to assess whether they better suit ADT’s purposes. The key to better project management is the selection of the appropriate form of contract, and to a sharper definition of the role of each party in the contract.
- 6.09 In view of the difficulty for contracts of this nature not to have cost variations, and possibly significant ones, other forms of contract offering cost certainty could be evaluated. However, achieving cost certainty does not equate to achieving a least cost contract. If cost certainty were the topmost priority, this can only be achieved by accepting that the Contractor, who would, in this case, shoulder a significant part of the risk of additional, unforeseen, costs, would require the payment of a premium over and above his normal rates.
- 6.10 It is the generally accepted opinion of technical experts that construction projects may incur variations, overruns and/or ancillary works. As such, it is pertinent to have all contracts covering such works to contain clear terms specifying the procedure to be followed. It is ideal, so as to ensure value for money throughout the entire project life cycle, that the procuring entity maintain a high level of control over all unbudgeted expense. Such control should, furthermore, not be the sole responsibility of the procuring entity but should also be sanctioned, before implementation, by MFEI.

¹³ This does not imply that the variations did not actually give ‘value for money’; simply that a better system would have ensured this was better perceived.

MFEI feedback

- 7.01 The draft report was, on completion, duly forwarded to the Permanent Secretary, Ministry of Finance, the Economy and Investment (PS MFEI), for the Ministry's comments, especially in connection with recommendations, in line with the PAC brief to NAO (Appendix 'A'). The brief had instructed NAO to make joint recommendations (with MFEI) aimed at strengthening public procurement transparency, effectiveness and accountability.
- 7.02 PS MFEI submitted feedback to NAO in the form of a communication dated 14 April. This communication is being reproduced *verbatim*, with additional relevant NAO comments.

MINISTERU TAL-FINANZI,
L-EKONOMIJA U INVESTIMENT



MINISTRY OF FINANCE,
THE ECONOMY AND INVESTMENT

MALTA

MF 85/2001/1
NAO 46/2007

14 April, 2009

The Auditor General
National Audit Office

Road Construction Projects Partly Financed through Vth Italian Protocol Funds

Pursuant to your letter of 18 March 2009, with which the final draft report on the subject in caption was appended, and while awaiting the comments of the Director General (Contracts), within the Contracts Department, it is felt relevant to provide the contribution hereunder:

As rightly pointed out, the PAC's brief to the National Audit Office was for the NAO:

1. to evaluate whether the procedures and rules followed by ADT, in the approval of cost overruns in the contracts for road construction financed out of Italian Protocol funds, were transparent and effective enough to ensure value for money and serious accountability; and

2. together with this Ministry, to recommend criteria deemed appropriate so as to strengthen the transparency, effectiveness and accountability with regard to use of public funds.

Indeed, not without cause, the report does go beyond the terms of reference laid down by the Public Accounts Committee and this Ministry will take the liberty to comment in this extended line of thought too.

Pre-financing payments

Such payments, when applicable, should strictly follow the terms and conditions laid down in the tender document, duly reflected in the final contract. It is positive to note (para. 3.14) that, by July 2006, no overpayment balances remained.

NAO comment: While accepting that by July 2006 all “*payments on account*” had been duly settled against contractor bills, discrepancies emanating through deficiencies in the control mechanisms deployed in the payment authorisation process, as reported in (3.05) and (3.08) of the report persisted.

Procurement Procedures

The procurement methodology used in the case under reference was “*sui generis*” as amply indicated in Finance Ministry Document D.02 of 8 October 2003 and was only possible then, by virtue of the 2003 Public Procurement (Amendment) Regulations and the transitional provisions pursuant to LN 387 of 2003, and no longer possible today, in terms of LN 177 of 2005, the Public Contracts Regulations. The time was tight on account of certain Italian Protocol conditionalities which were inconsistent with the provisions of the procurement regulations that were soon to come into force.

Malta thus benefited from €30 million of grant funds for much-needed road construction, which would otherwise have to be forked out from local funds.

NAO comment: Whilst noting that the funds made available were fully availed of, that the procurement methodology opted for was permissible under the prevailing legislation, and that the projects were completed on time, despite the relatively restricted time frame, NAO still feels that its opinion regarding the deficiencies identified in the payment authorisation process remain valid and pertinent.

Ministry of Finance Authority and the Role of the Supervisor

As rightly point out in the report (paras. 3.19-3.21), Finance Ministry approval did not cover subsequent variances necessitated through developments arising during the implementation period. The unfortunate element that could have brought about ADT's misconception was the appointment of the Supervisor whose responsibilities (Appendices D and E), *inter alia*, included assisting ADT in the verification of bills submitted by Contractors. Where variations/extra works were concerned, the need for modifications was communicated to the Supervisor, who would issue the relative administrative order to the Contractor. Negotiations were held between the Supervisor and the Contractor, with due consultation being held with ADT – and this when the Supervisor was nominated by the Contractor, to the satisfaction of ADT, as stipulated in the tender document.

As indicated in para. 5.30 of NAO's report under reference, it is questionable how much the Adjudication Board was empowered to suggest the manner with which ADT was to manage the projects, including the handling of additional works, through the provision of third party supervision. Indeed, by hindsight, ADT could have informed the Adjudication Board that such responsibilities could be outside the Board's remit and competence. As rightly indicated in the report, although it does not transpire that the variations were not justified and correctly costed, the perception of transparency and the separation of responsibilities are not evident.

Unfortunately, the functions of the Supervisor, in terms of the tender document, were so fundamental for the settlement of Contractor's claims that, as explained in para. 5.3 of Appendix E, ADT's independent checks could not be used to challenge a certified payment unless agreed to by the Contractor or decided upon by an Arbiter.

As already highlighted, the 2005 Public Contracts Regulations provide for a different more appropriate approach and the functions of the Director of Contracts and the Contracts Department in tenders of such magnitude, that require international tendering, are today clearly spelled out in these Regulations.

Funding Directions by Finance Ministry

While the financing direction by the Ministry of Finance was unequivocal: Use Italian Protocol funds, the direction also conveyed the message that, although the tender document itself provided for modifications (Document D.09), no extra-budgetary funds were possible and any excess that would be required for works not envisaged in the original contracts had to be forked out from the Roads' Capital Vote (vice other road works). The alternative would have been to have wasted unfinished road construction (1) with the whole outlay probably paid out of local funds, and (2) grave continued inconvenience in transport networks.

NAO comment: Financing instructions by the Ministry of Finance were only issued in November 2004. Up till then, all instructions afforded to ADT stipulated that the Lm12.9M Italian Financial Protocol funds (except for the VAT element) were not to be supplemented by funds from the Roads Capital Vote. This despite the fact that ADT had, as early as May 2003, provided a project forecast cost amounting to Lm17.1M including VAT. (Table 3.01 refers).

Variances

The report points out that, with road construction works, as is the case with most sub-structure works, it is practically impossible to predict with any accuracy the circumstances that give rise to variations. The utility entities' involvement continued to complicate matters owing to outdated records. In fact, it could well be the case that extra works were not triggered by lack of pre-tendering planning (para. 5.60). At the same time, the tender document could be interpreted as "open-ended" since it provided for the appointment and operations of the Supervisor (Appendix D) and the methodology to be used where modifications were involved (through administrative orders), without providing for a capping to such contingencies.

It is felt necessary to remark that, in terms of the report (Appendix E), the main reasons for the additional works that spear-headed extra costs were:

1. Changes in service culverts and in the design of the common service duct, as required by Enemalta;
2. Unpredicted re-building of retaining walls, where the required excavations turned out to be deeper than envisaged; and
3. Shifting and upgrading of utility services, excavation waste dumping charges and an additional service road.

NAO comment: It was not within the PAC brief for NAO to investigate the nature of the variations incurred in the Italian Financial Protocol road construction projects. This was clearly declared as per point 1.19 of the report. Rather, the study focused on the control mechanisms deployed by ADT in handling the projects.

This means that no amount of rigorousness in the preparation of tender design is enough, especially where tenders of the type under reference are concerned. It could well be the case that the blueprint used, through the particular “tailor-made” form of contract, proved to be non-applicable to public tenders where cost over-runs came in play. It is doubtful, however, how much certain elements of the additional works indicated above should have come as “surprises” during the project implementation stage, where predictability is concerned.

A “lump sum” contract could indeed have avoided such overruns (unless different pretexts would crop up during implementation stage, bringing about “justifications” for payments over and above the “lump sum”). However, as indicated in the report (Appendix E), the shouldering by Contractor of risks for additional and unforeseen costs would then come at a premium, over and above the Contractor’s normal rates, which still has to be borne by the Client.

Recommendations

It is of primary importance that, as per tender documents, the Supervisor is selected and remunerated directly by the Contracting Authority, to the satisfaction of the Contractor. The role of Supervisor should therefore reflect full allegiance towards the Contracting Authority. He fulfils the duties of Engineer and Agent on behalf of that Authority (*alias* the Employer), with no links with the Contractor. Thus, the financial aspect of a project’s implementation would not only be actually transparent and equitable, but also perceived and understood to be so.

Legal Notice 177 of 2005, the Public Contracts Regulations, is to be scrupulously followed without fail in all public procurements, without the need of ad hoc set-ups that could create precedents and lack of standardisation and uniformity.

<p>NAO comment: Comments compiled by NAO’s technical expert regarding the level of compatibility between Public Procurement Regulations and FIDIC feature against DoC feedback in the relevant section below.</p>
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Updated data on underground service facilities is a pre-requisite for road construction project implementation without hikes in project costs.

The Director of Contracts’ comments on the adaptability of a FIDIC form of contract are being made available under separate cover, especially with the Public Contracts Regulations as background, since it could well be the case that the FIDIC form of contract is not compatible with 2005 Public Contracts Regulations, LN 177 of 2005. In general, however, the tender document should allow the Contracting Authority to formally provide input in the determination of the appropriate rates for extra works. The general conditions of contract should provide for properly defined functions and responsibilities, ensuring checks and

balances that ultimately translate in the project's inputs truly justifying the planned costs incurred.

From a financial aspect, as explained in para. 6.10 of the report, all project costs, both those indicated in the original contract as well as those emanating from extra works and variations should ensure adequate funding from the Ministry of Finance prior to commitment being entered into. In practice, one needs to establish at what point, with the existence of the Supervisor, hands on the job, the Ministry of Finance is to be approached where the need for variances is discovered. Close liaison between the Contracting Authority and the Ministry of Finance and a contingency amount for unavoidable escalations are required. "Fait accompli" situations are not accepted to the Ministry of Finance. Thus, such requests may also need to be accompanied by trade off proposals, explaining that the Contracting Authority needs to enter into unforeseen commitment and is prepared to forgo other works (possibly to be performed in subsequent years) in lieu of the new unavoidable requirement.

The current practice of continuous liaison between the Contracts Department and the Ministry of Finance, the Economy and Investment, from the tendering stage onwards, helps to instil a sense of financial discipline on Contracting Authorities.

Alfred Camilleri
Permanent Secretary

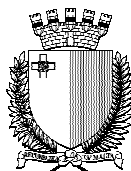
Copied to: Director General (Contracts)
Contracts Department

DoC feedback

- 7.03 Director General, Department of Contracts submitted pertinent written feedback to NAO on 23 April 2009. Extracts from the communication in question are being reproduced hereunder, with additional comments where relevant by NAO and the technical expert.
- 7.04 Other sections of the communication were omitted as the (DoC) suggestions therein were incorporated as amendments/enhancements to the original report text.
- 7.05 Other revisions to the text were also effected on the basis of agreed-to points raised during a meeting held between NAO senior management and Directors General, Budget Office and Contracts.

Extracts from the 23 April DoC communication to NAO:

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CT 23 12/2004
NAO 46/2007

23rd April 2009

The Auditor General
National Audit Office

**ROAD CONSTRUCTION PROJECTS PARTLY FINANCED THROUGH Vth
ITALIAN FINANCIAL PROTOCOL FUNDS**

Reference is made to letter dated 14th April, 2009 from the Ministry of Finance, the Economy and Investment addressed to you and copied to this Department and the draft report on the subject in caption.

Set up of a Unit within DoC

You may wish to consider that, in order to further put a check to variations (*NAO note: Variations encountered during the implementation of the Italian Financial Protocol road projects*), these could have been forwarded to the Department of Contracts for its consideration. This Department already has in place a system whereby requests for variations

are technically evaluated by its advisor. Then these are discussed by the General Contracts Committee which approves or otherwise.

NAO technical expert comment: If it is the case that DoC is required to give its approval only when variations exceed the 5% threshold, then two considerations arise; if FIDIC has to be used, the FIDIC intention that variations are, as much as possible, approved by the Engineer/Supervisor is effectively thwarted – it is true that FIDIC can accommodate a limitation on the amount that can be approved by the Supervisor/Engineer, without additional approvals – and in this case this would mean a cap up to 5% of value of Contract, but then the Contractor would have the right to stop his work until such approval is obtained. In other words, the other FIDIC objective that arguments about variations do not delay the works would also be thwarted. If most of the variations are below the 5% cap, and are determined only by the Supervisor, then delays will not occur. But, as soon as the variations go beyond the 5% cap, then delays can occur. Obviously, the lower the cap placed on the discretion of the Supervisor, the more the risk of delays.

On the issue of variations, it is the opinion of this Department that these arise mostly to the lack of proper planning. It is accepted that planning a works contract involves factoring for unknown components. Nonetheless, this Department feels that prior to the publication of a works tender a number of basic steps should be carried out. For this reason, the Department issued Contracts Circular 18/2008¹⁴. It is hoped that the new procedures will reduce the number of variation requests.

NAO comment: Lack of proper planning was definitely ruled out as being the cause of variations in the case of the Italian Financial Protocol road projects. Evidence showed that, on the contrary, planning was very extensive and a marked improvement on previous efforts.

NAO technical expert comment: DoC is not correct in ascribing variations as arising from lack of proper planning. This perception inhibits the setting up of a realistic process. Circular 18/2008 referred to is no guarantee that projects will have no variations, especially when dealing with substructure, submarine, or other types of excavation work. Even in private sector work, when extensive geo-technical investigations are conducted, one can still encounter the unexpected when the works actually open up the ground.

¹⁴ A copy of Contracts Circular 18/2008 features as Document F.03 (Appendix 'F').

Comments on letter from MFEI

This Department agrees with the opinion of the Ministry of Finance, the Economy and Investment that the approvals of variations by the Supervisor may not provide enough transparency and the separation of responsibilities. Indeed the situation still persists where not all the contracting authorities have the necessary human resources to monitor and certify payments related to works contracts. However, contrary to the procedure adopted under the Italian funds projects, the usual practice is that the contracting authorities contract a project Supervisor with no contractual relationship with the works Contractor. The Supervisor will be answerable to the contracting authority only. Therefore, there will be a system of checks to any claims for variations made by the works Contractor. Still the Supervisor cannot approve variations but s/he can recommend their approval to the Head of Department and the established procedures for their approval by the Department of Contracts will have to follow.

Although the Ministry (MFEI) is proposing the possibility of adopting a ‘lump sum’ contract, it is the view of this Department that whatever the type of contract, there must be proper planning. This must eventually lead to a detailed estimate of the works involved. In this way, the contracting authority will be able to compare the offers received with its estimate which will lead it to decide whether the offers provide value for money or not. A lump sum contract does not necessarily exclude the possibility of variations but it will help the contracting authority to refuse such claims. Furthermore, as pointed out by the Ministry, once a bidder will have to absorb costs which were not foreseen during the publication of the tender, there is the possibility that offers will be on the high side.

FIDIC conditions of contract are complementary to the Public Contracts Regulations. It is to be explained that the latter provide for the award of public supply, services and works contracts and any resultant variations. FIDIC conditions provide for the regulation of the relationship between the Contractor and the client after the signing of the contract. It is the view of this Department that FIDIC conditions should continue to be applied by contracting authorities. These are internationally contracting conditions which have been tested and applied in various countries. These conditions are also updated regularly by the Federation Internationale des Ingenieurs Conseils.

Francis Attard
Director General (Contracts)

NAO technical expert comment: DoC's reservations regarding a Lump Sum contract are very valid. While a Lump Sum contract gives cost certainty, it may not necessarily be the most cost-effective. If a Contractor offers a Lump Sum on the basis of a detailed BoQ, and then it transpires that reality varies from the BoQ, there will still be variations and the Lump Sum will no longer be a Lump Sum. If, on the other hand, the Lump Sum is associated with a 'design and build', the Contractor will take the responsibility for whatever he finds – but he will cover himself by an appropriate margin in his Lump Sum bid. In a way, this is similar to an insurance policy. If the Contractor is expected to carry the risks of things that may be uncovered but only when the works commence, then the entity contracting the works has to pay the Contractor who is carrying the risks.

The undersigned does not consider FIDIC to be complementary to the Public Procurement Regulations, in the manner envisaged by DoC. The main objective of FIDIC is that claims on variations and time extensions are determined by a person who, although appointed by the Client, is acceptable to the Contractor as a fair and independent person, who can be trusted to determine claims fairly. The entrusting of this task to this person is meant to ensure that there are no delays in the works when awaiting the necessary approvals – a point that DoC seems to gloss over, as if it is not a problem. In fact, FIDIC provides that after determination by the Engineer the works *have* to proceed, and if there is any disagreement, either by Contractor or Client, on what is determined, then remedy is only available by adjudication or arbitration. Such a mechanism is not complementary to the Financial Regulations that place DoC as the entity which determines and acts as the ultimate arbiter.

FIDIC is an excellent suite of forms of contract, applicable on an international level, and updated regularly. This notwithstanding (i) there are variants even in FIDIC – it is not always that one has to have a measured Bill, as is traditional in Malta; (ii) if one wishes to use FIDIC, then one has to endorse the objectives of FIDIC, and not just the form. Effectively, the system that DoC adopts is that the determination by the Supervisor/Engineer, whether selected by the Contractor or the Contracting Authority, can be ignored, in favour of the opinion of DoC's technical advisor. This runs counter to the spirit of FIDIC.

Public Accounts Committee – Motion of 12 June 2007

MOZZJONI

Wara li l-Kumitat sema u evalwa s-sottomissjonijiet kollha, kif ukoll fid-dawl tar-rakkmandazzjonijiet maghmula mill-Awditur fir-rapport tieghu "*Improving the Management of Road Projects*" ta' Settembru 2005. il-Kumitat jirrikmanda li:

1. L-Awditur jevalwa jekk il-proceduri u regoli osservati mill-ADT fl-approvazzjoni ta' l-*overruns* fil-bini tat-toroq mill-fondi tal-Protokoll Taljan kenux trasparenti u effikaci bizzjed li jassiguraw *value for money* u kontabilita' serja;
2. Il-Kumitat jitlob lill-Awditur biex flimkien mal-Ministeru tal-Finanzi jirrikmandaw kriterji li jidhrilhom xierqa biex tissahhah it-trasparenza, l-effikacija u l-kontabilita' fin-nefqa mill-fondi pubblici.

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'B'

Table B.01 – Project costs (based on FBOQ figures) analysed by LOT and nature of bills

All fiscal amounts are in Lm

Bill Category	Fiscal amounts are in Lm													
	LOTs													
	1		2		3		1a		2a		3a		Totals	
	Main bill inc	Net var	Main bill inc	Net var	Main bill inc	Net var	Main bill inc	Net var	Main bill inc	Net var	Main bill inc	Net var	Main bill inc	Net var
	% var		% var		% var		% var		% var		% var		% var	
0 - Preliminaries	12,800	(2,950)	9,850	12,392	12,872	12,672	18,161	28,014	1,588	12,951	1,588	30,028	86,678	57
	(19)	(6,718)	58,954	289	all	3,457	3,064	164	14	(843)	7,843	47,371	249,501	23
A - Site clearance	18,893	(6,718)	87,729	205	58	9,453	3,064	66,114	5	(10)	7,843	47,371	249,501	23
	(32)	(6,718)	87,729	205	(13)	58	3,064	66,114	5	(10)	7,843	47,371	249,501	23
B - Earth works	454,924	160,754	395,728	55	33	24,229	98,553	549,020	5	(2)	188,408	49,232	1,956,101	22
	55	160,754	395,728	33	(2)	24,229	98,553	549,020	5	(2)	188,408	49,232	1,956,101	22
C - Pavement works	689,703	107,514	529,002	(2)	(2)	773,415	(8,735)	31,679	(2)	(2)	337,252	31,894	2,935,517	(6)
	18	107,514	529,002	(2)	(2)	773,415	(8,735)	31,679	(2)	(2)	337,252	31,894	2,935,517	(6)
D - Construction of footpath	172,084	12,974	223,391	61	(4)	276,506	84,316	124,085	197,348	169	10,613	85,339	1,107,303	30
	8	12,974	223,391	61	(4)	276,506	84,316	124,085	197,348	169	10,613	85,339	1,107,303	30
E - Storm water works	554,766	(272,646)	447,585	(18)	(33)	1,120,854	(95,006)	639,305	88,374	414,587	(20,055)	207,207	547,179	3,216,794
	(33)	(272,646)	447,585	(18)	(33)	1,120,854	(95,006)	639,305	88,374	414,587	(20,055)	207,207	547,179	3,216,794
F - Street furniture	79,819	(20,786)	58,092	(32)	(60)	55,461	(26,813)	(19,665)	14,925	(57)	42,142	1,672	(175,391)	268,582
	(21)	(20,786)	58,092	(32)	(60)	55,461	(26,813)	(19,665)	14,925	(57)	42,142	1,672	(175,391)	268,582
G - Street lighting	103,369	21,677	102,272	36	162	224,483	27,122	138,909	4,122	48,195	30,316	(3,219)	218,926	584,240
	27	21,677	102,272	36	162	224,483	27,122	138,909	4,122	48,195	30,316	(3,219)	218,926	584,240
H - Retaining walls	803,877	481,679	534,292	60	26	174,466	199,702	275,878	668,528	70	165,791	(11,577)	1,002,946	2,406,855
	149	481,679	534,292	60	26	174,466	199,702	275,878	668,528	70	165,791	(11,577)	1,002,946	2,406,855
I - Shifting/laying new services	579,404	167,719	312,882	97	666	850,294	154,353	398,105	630,039	172	214,138	123,387	1,796,929	2,872,554
	41	167,719	312,882	97	666	850,294	154,353	398,105	630,039	172	214,138	123,387	1,796,929	2,872,554
J - Construction of service culvert	1,070,882	736,918	838,826	75	75	838,826	358,767	220,196	220,196	all	103,063	20,767	1,439,711	2,595,185
	221	736,918	838,826	75	75	838,826	358,767	220,196	220,196	all	103,063	20,767	1,439,711	2,595,185
K - WSC house connections	159,660	159,660	12,414	(84)	(84)	236,119	(67,591)	112,146	112,146	all	2,645	(169,690)	507,924	15,060
	all	159,660	12,414	(84)	(84)	236,119	(67,591)	112,146	112,146	all	2,645	(169,690)	507,924	15,060
Dumping charges	4,700,180	1,543,795	2,700,834	22	49	1,743,542	483,807	1,246,619	2,853,750	78	199,846	430,721	5,648,329	18,804,293
	49	1,543,795	2,700,834	22	49	1,743,542	483,807	1,246,619	2,853,750	78	199,846	430,721	5,648,329	18,804,293
Totals	4,700,180	1,543,795	2,700,834	22	49	1,743,542	483,807	1,246,619	2,853,750	78	199,846	430,721	5,648,329	18,804,293
	49	1,543,795	2,700,834	22	49	1,743,542	483,807	1,246,619	2,853,750	78	199,846	430,721	5,648,329	18,804,293

Includes an adjustment payment for LOT 2a, the bills for which were presented in 2007 (post FBOQ).

Source: MAC working papers
Compiled from ADT FBOQs

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'B'

Table B.02 – Payments and retention money reconciled to FBOQs

All fiscal amounts are in Lm

Year	LOTS						Totals
	1	2	3	1a	2a	3a	
2004	140,308	140,176	356,853				637,337
	598,174	108,303	250,000				956,477
	212,400	383,544					595,944
	193,166						193,166
	1,144,048	632,023	606,853				2,382,924
2005	235,074	138,874	161,782	227,351	54,915	44,343	862,340
	184,754	158,592	420,934	108,236	153,982	67,476	1,093,973
	174,959	201,422	240,008	123,153	170,527	75,697	985,767
	383,946	222,502	205,848	13,613	212,802	102,255	1,140,966
	29,137	345,393	518,313	194,488	83,685	97,067	1,268,084
	16,713		722,013	380,183	719,729	135,830	1,974,468
	3,984		1,178,923	534,414	132,832	350,565	2,200,718
	364,013		271,254	614,012	(609,940)	268,444	907,783
	485,675			118,000			603,675
	200,600			(56,341)			144,259
	201,589			(11,500)			190,089
	124,589						124,589
	155,949						155,949
	2,560,981	1,066,783	3,719,075	2,245,609	918,534	1,141,678	11,652,660
add 2005				56,341	609,940		666,281
				11,500			11,500
				67,841	609,940		677,781
2006	28,907	519,320	598,607	199,088	332,863	58,614	1,737,398
	138,373	345,218		196,575	41,182	58,614	779,963
	293,471						293,471
	229,665						229,665
	59,528						59,528
	749,945	864,538	598,607	395,663	374,045	117,228	3,100,024
total paid	4,454,974	2,563,344	4,924,534	2,709,113	1,902,519	1,258,906	17,813,390
Retention total	250,343	135,771	259,186	142,585	100,134	66,241	954,260
(paid+due)	4,705,317	2,699,115	5,183,720	2,851,698	2,002,653	1,325,147	18,767,650
NAO summation of FBOQs	4,700,180	2,700,834	5,183,718	2,853,750	2,002,650	1,325,158	18,766,290

Source: NAO working papers

Compiled from ADT FBOQs and (ADT) List of payments

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'B'

Table B.03 – LOT 1 (sample) BoQ checks

All fiscal amounts are in Lm

Bill	Lines	Reads	Should read	Error	Bill	Lines	Reads	Should read	Error	Bill	Lines	Reads	Should read	Error	
E/12	1.00 - 7.00b	33,492	33,492	0	G/12	1.00 - 12.00	21,234	21,234	0	G/13	1.00 - 16.00	23,255	23,255	0	
8.00 - 10.00c	33,492	33,492	0	6.00 - 9.00f	13,248	13,248	0	13.00 - 20.00	30,498	30,498	0	17.00 - 20.00	55,774	30,498	25,276
11.00a - 16.00	33,492	33,492	0	9.00g - 10.00j	15,318	15,318	0	No casting error							
17.00 - 24.00	33,492	33,492	0	11.00a - 11.00j	19,485	19,485	0	Amount overdeclared in BoQ							
No casting error															
E/13	1.00 - 8.00c	35,388	35,388	0	F/13	1.00 - 7.00c	2,448	2,448	0	Amount overdeclared in BoQ					
9.00a - 12.00	70,777	35,388	35,389	0	7.00d - 10.00e	17,785	15,318	2,467	Amount overdeclared in BoQ						
13.00 - 22.00	141,554	35,388	106,166	0	10.00f - 11.00j	4,167	19,485	(15,318)	Amount overdeclared in BoQ						
23.00 - 29.00	141,554	35,388	106,166	0	Amount overdeclared in BoQ										
Amount overdeclared in BoQ															
E/14	1.00 - 8.00c	42,531	42,531	0	F/14	1.00 - 7.00c	2,448	2,448	0	Amount overdeclared in BoQ					
9.00a - 12.00	85,221	42,531	42,531	0	7.00d - 10.00e	17,786	15,318	2,468	Amount overdeclared in BoQ						
13.00 - 22.00	171,474	43,562	127,912	0	10.00f - 11.00j	4,167	19,487	(15,320)	Amount overdeclared in BoQ						
23.00 - 24.00	171,474	43,474	128,000	0	Amount overdeclared in BoQ										
Amount overdeclared in BoQ															
E/15	1.00 - 8.00c	63,288	63,288	0	F/15	1.00 - 7.00c	6,388	6,388	0	Amount overdeclared in BoQ					
9.00a - 12.00	70,681	70,681	0	7.00d - 10.00e	25,665	19,258	6,407	Amount overdeclared in BoQ							
13.00 - 22.00	72,139	72,139	0	10.00f - 11.00j	29,632	23,425	6,407	Amount overdeclared in BoQ							
23.00 - 24.00	72,139	72,139	0	Amount overdeclared in BoQ											
No casting error															

Source:FD 126/02/2b series of files

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'B'

Table B.04 – Running balance statement of account – LOT 1

All fiscal amounts are in Lm

LOT 1 - Payments and bills reconciliation

Bills			Payments		ADT-Contactor position		
Date	Bill No	Bill amount	Date	Amount	Date	Amount	Over/under paid
28/04/2004	1	140,308			28/04/2004	-140,308	Under
			07/09/2004	140,308	07/09/2004		
23/09/2004	2	598,174			23/09/2004	-598,174	Under
			28/09/2004	598,174	28/09/2004		
			14/10/2004	212,400	14/10/2004	212,400	Over
29/10/2004	3	214,629			29/10/2004	190,937	Over
			29/10/2004	193,166			
09/12/2004	4	293,567			09/12/2004	-102,630	Under
			08/01/2005	235,074	08/01/2005	132,444	Over
24/01/2005	5	209,708			24/01/2005	107,489	Over
			24/01/2005	184,754			
14/03/2005	6	157,599			14/03/2005	-50,109	Under
			29/03/2005	174,959	29/03/2005	124,850	Over
20/04/2005	7	426,606			20/04/2005	-301,756	Under
			27/04/2005	383,946	27/04/2005	82,189	Over
			13/05/2005	29,137	13/05/2005	111,326	Over
			14/05/2005	16,713	14/05/2005	128,039	Over
			15/05/2005	3,984	15/05/2005	132,023	Over
17/05/2005	8	459,830			17/05/2005	-327,807	Under
			19/05/2005	364,013	19/05/2005	36,206	Over
20/06/2005	9	521,881			20/06/2005	-485,675	Under
			28/06/2005	485,675	28/06/2005		
01/07/2005	10	402,187			01/07/2005	-402,187	Under
			05/08/2005	200,600	05/08/2005	-201,587	Under
			09/08/2005	201,587	09/08/2005		
02/09/2005	11	124,589			02/09/2005	-124,589	Under
			29/09/2005	124,589	29/09/2005		
13/10/2005	12	251,086			13/10/2005	-251,086	Under
			18/10/2005	155,949	18/10/2005	-95,137	Under
05/12/2005	13	291,086			05/12/2005	-386,223	Under
			20/01/2006	28,907	20/01/2006	-357,316	Under
			20/01/2006	138,373	20/01/2006	-218,943	Under
17/05/2006	14	309,036			17/05/2006	-527,978	Under
			19/05/2006	293,471	19/05/2006	-234,507	Under
30/05/2006	15	241,753			30/05/2006	-476,260	Under
			09/06/2006	229,665	09/06/2006	-246,595	Under
13/06/2006	16	62,661			13/06/2006	-309,257	Under
			07/07/2006	59,528	07/07/2006	-249,728 *	Under
		4,704,700		4,454,972			* Retention

Sources: Payments - ADT List of payments
Bills - BOQs and FBOQ (ADT RD126/02/9b series of files 9b - 9b Vol 12)

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'B'

Table B.05 – Extracts from FBoQ – LOT 2a

All fiscal amounts are in Lm

Bill	Amount	Detailed bill (Y/N)
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Total **Summary 4** - Road works from De Rohan Gate to Zebbug Roundabout **WD15**

Preliminaries	3,873	N
A - Site clearance	5,841	y
B - Earth works	54,845	y
C - Pavement works	93,092	y
D - Footpath	28,663	y
E - Storm water	63,082	y
F - Street furniture	10,290	y
G - Street lighting	13,600	y
H - Retaining walls	221	y
I - Shifting/laying services	64,643	y
J - Service culvert	99,265	y
K - WSC connections	1,364	y

Total summary: 438,779

Total detailed bills: 434,906

Total **Summary 6** - Road works at Cortis Roundabout **WD11**

Preliminaries	3,925	N
A - Site clearance	10,346	y
B - Earth works	34,873	y
C - Pavement works	42,763	y
D - Footpath	32,331	y
E - Storm water	10,650	y
F - Street furniture	2,890	y
G - Street lighting	1,496	y
H - Retaining walls	2,118	y
I - Shifting/laying services	30,551	y
J - Service culvert	9,518	y

Total summary: 181,461

Total detailed bills: 177,536

Source: RD 126/02/10b/1 Vol 5

Terms of Reference – NAO (outsourced) technical expert

The brief from PAC to NAO was to:

1. *L-awditur jevalwa jekk il-proceduri u regoli osservati mill-ADT fl-approvazzjoni ta' l-overruns fil-bini tat-toroq mill-fondi tal-Protokoll Taljan kienu trasparenti u effikaci bizzejjed li jassiguraw value for money u kontabilita' serja.*
2. *L-Awditur, flimkien mal-Ministru tal-Finanzi jirrikmandaw kriterji li jidhrilhom xierqa biex tissahhah it-trasparenza, l-effikacija u l-kontabilita' fin-nefqa mill-fondi pubblici.*

PAC is mainly interested in how ADT managed the projects in general as regards to the management and control systems deployed to ensure accountability and transparency and in particular in the manner with which the authority controlled variations arising from the projects.

NAO considers this brief as being two pronged, as follows:

- a) An examination of the systems and controls used by the ADT to manage cost variations related to these projects¹, in order to determine whether these were robust and compliant with principles of sound financial management and good practices in project management (e.g. during requests for variations, the assessment and approval of variations, the submission of payment requests).
- b) A technical evaluation of the relevant tender documents, subsequent contractor and supervisor contracts, and supporting documents that would determine whether the system deployed by the ADT, in lieu of the standard government procurement mechanism, was sufficiently effective and transparent so as to be conducive to achievement of value for money.

NAO intends to carry out task (a) in house. This is due to the fact that it is envisaged that typical accounting/auditing/management disciplines will be utilized. Notwithstanding, the exercise being the evaluation of a system used to manage projects of a technical nature, NAO will request the (technical) expert to offer support on issues that may be deemed of a technical/non administrative nature. It is envisaged that such instances will materialize when NAO evaluates ADT's *modus operandi* in managing variations.

¹ ADT was administering the projects without intervention of the Department of Contracts. The latter's mechanisms had been side-tracked once selective tendering (stipulated by the Protocol) was opted for.

Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'C'

Terms of Reference – NAO (outsourced) technical expert (ctd)

Task (b) will be strictly within the sphere of interest of the expert. However NAO, as the owner of the exercise, reserves the right to attend any meetings the expert decides to call up with the audited entities, to include, but not be limited to the ADT and utilities.

It would be beneficial if the expert was to conclude his exercise and to issue the main deliverable, in the form of a report, by mid September. This is due to the fact that NAO needs to complete the entire exercise (including compilation of its own final report) by end September, prior to recommencement of Parliament sittings.

In order to start off the exercise, NAO has carried out preliminary work and compiled a starter data pack. This should enable the expert to get a good feel of the scope of the project and issues involved. Amongst the material included are:

- A set of financial FBOQ summaries and analysed totals and variances as compiled from source documents (FBOQs) (being forwarded also in soft copy);
- Other financial summaries deemed to be of possible relevance;
- Transcript of the initial meeting held between NAO and ADT (with areas of particular relevance highlighted);
- Transcripts of PAC sittings (with relevant extracts highlighted);
- Extracts of ADT documents pertaining to the three main variations described above and to the dumping charges variations;
- Index of entries in the (ADT) Italian Financial Protocol main file RD 126/02/12;
- A copy of the general tender dossier for the implementation of road infrastructure projects financed by the Italian Financial Protocol.

It is probable that the expert will need to peruse ADT's files during the course of his exercise. NAO will, in such cases, following a request by the expert and/or his agents, retrieve the required files from ADT, forward them to the expert and eventually recover same, returning them to ADT on completion of task at hand.

In addition, NAO reserves the right to accompany the expert on any work being carried out in connection with this brief.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'C'

Terms of Reference – NAO (outsourced) technical expert (ctd)

The main deliverable of this exercise (already referred to above) is a formal report detailing the (technical) opinion of the expert in connection with the management of the contract and, especially so, the variations.

It is envisaged that this report will form part/be the basis of the final report that NAO will be tabling at the House of Representatives. Similar reports are typically discussed by the Public Accounts Committee and in such an eventuality, NAO would require the expert to attend PAC meetings as necessary and participate as required in the discussions arising at the PAC and possibly at the NAO, substantiating and defending the contents of the technical report and opinions and furnishing relevant explanations when and as required.

On completion of the exercise, the expert will forward the report, together with copies of any supporting working papers compiled (by the expert). In addition, any ADT (or other entities') source documentation forwarded to the expert in the course of the exercise (and that would still be with the expert) has to be similarly returned to the NAO.

The report compiled and supporting working papers remain the property of the NAO.

These terms are being acknowledged and accepted.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.01 – extracts from internal emails regarding Department of Contracts’
involvement– March 2003**

***Extract from e-mail sent by Director General, Department of Contracts to Permanent
Secretary, Ministry for Transport and Communications:***

*I have to be consistent with what I suggested last January and, namely, that ADT are provided with a list of major Italian road building companies to whom we should write directly and individually requesting their confirmation that they would be prepared to tender. All those that reply affirmatively and are considered up to standard would then be provided with the tender dossier and requested to submit an offer at the Department of Contracts by a fixed time and date. This is what we call the selective call for tenders and is permissible in terms of the current Public Service (Procurement) Regulations which allow the Minister of Finance to grant an approval for such a procedure...
'Unless the Minister otherwise directs...'*

I stand to be corrected of course but at the moment I cannot see any practical alternative to the above given the constraints involved.

***Extract from e-mail sent by Chairman ADT to Permanent Secretary, Ministry for Transport
and Communications:***

I wonder why Government took the bother of setting up a Transport Authority if this is going to be run by the Civil Service.

That being the case, henceforth, kindly give us instructions and we will carry them out to the letter whether we agree with them or not.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.02 – Memorandum concerning Minister of Finance authorisation to
Ministry for Transport and Communications to embark on Italian
Financial Protocol road construction projects – October 2003**

Minister
(*through Permanent Secretary*)

**Fifth Italo Maltese Financial Protocol
Road Network Programme**

On the 3rd June 2003 Mr Joseph Scicluna, the former Permanent Secretary, had submitted a Memo regarding the Procurement Process which should be adopted in connection with the Road Network Project which is earmarked for financing under the Fifth Italian Protocol with Italy. As you are aware the Financial Protocol is still awaiting ratification by the Italian Parliament and the tenders cannot be officially launched.

Since the tendering process has to be restricted to the Italian Companies (except for expenses in connection with local works and labour which should not exceed 15% of the value of project and 30% in some cases) the normal system of open tendering through the Department of Contracts cannot be resorted to. Mr Scicluna had therefore requested your approval in terms of Regulation 4(4) of the Public Service (Procurement) Regulations, 1996 that other procedures should apply as you may direct in terms of Regulation 4(4) referred to above.

On the 14th August an ad hoc meeting was held to discuss the whole tendering process to be followed with regard to this particular project. Present for the meeting, which was chaired by Mr Zahra the new Permanent Secretary, were representatives of the Ministry for Transport and Communications and the Transport Authority besides DG Contracts and the undersigned. The salient points, which were discussed and subsequently agreed upon, were the following:

1. There should be issued an 'expression of interest' to identify possible bidders who can successfully undertake the relative contracts;
2. That there should be appointed an **ad hoc selection board** to shortlist the 'expression of interest' and that the board would have to be approved by the Ministry of Finance and Ministry for Transport and Communications;
3. Following the ratification of the Protocol, a selective call for tenders would be issued and those short-listed would be asked to submit their bids;

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.02 – Memorandum concerning Minister of Finance authorisation to
Ministry for Transport and Communications to embark on Italian
Financial Protocol road construction projects – October 2003 (ctd)**

4. There shall be appointed an **adjudicating board** to evaluate and award the bids received.

The Board should open tenders in the presence of the ADT Board. Tenderers as well as the public may attend. The prices quoted would be read in public by a member of the Board;

The **adjudicating board** will make the necessary recommendations to the Permanent Secretary, Ministry for Transport and Communications who would then forward his recommendations for approval by the Permanent Secretary, Ministry of Finance.

Ministry for Transport and Communications has requested that the **selection board** would also be responsible for the issue and award of tenders i.e. the **selection and adjudicating boards** would be one and the same. Mr Spiteri had expressed his reservation on this and advised that there should be two separate boards. However he was not averse to having the same person chairing the two different boards or some of the members of one board also sitting on the other board. The important thing was to have a new ad hoc board constituted for each of the two assignments and that one board should not be an exact replica of the first.

You may therefore wish to approve that Ministry for Transport and Communications to proceed as indicated above with regard to the tendering process for the implementation of the Road Network Programme to be financed out of Italian Protocol funds in terms of Regulation 4(4) of the Public Service (Procurement) Regulations, 1996 which empowers the Minister responsible for Finance to direct **in writing** that any procurement be carried out otherwise than in accordance with the established regulations. A copy of the relevant regulation is Red 78.



E Coleiro
Director, International Relations
8 October 2003

approved
Jel Dail
13/10/03

Document D.03 – Text of the Fifth Italo-Maltese Financial Protocol

**Fifth Protocol
relating to
Economic, Technical and Financial
Assistance
between
the Government of Malta
and
the Government of the Italian Republic**

The Government of Malta and the Government of the Italian Republic, hereinafter referred to as the “Contracting Parties”,

driven by the common desire to intensify the traditional relations of friendship and economic and cultural co-operation existing between the two countries and to facilitate the conditions leading to a rapid accession of Malta to the European Union,

have agreed as follows:

Article 1

1. The Government of the Italian Republic, intent on contributing directly to the continued improvement of the economic, social and cultural environment of Malta in the light of its integration in the Union, will put at the disposal of the Maltese Government grant contributions up to a total amount of 75 million Euros spread over the three year period 2003-2005.
2. These contributions will be used to finance programmes and projects in the economic, cultural and social sectors, identified and agreed upon by the Contracting Parties on the basis of the proposals presented by Malta and listed in the following article 2.
3. With the aim of achieving a rapid integration of Malta within the European Union, the Contracting Parties furthermore commit themselves to intensify their cooperation on an on-going basis in the sectors of transport and the fight against pollution and to continue the negotiations for the conclusion of agreements on the preservation of the artistic heritage, the protection of investments, surveillance and cooperation at sea, and tourism.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.03 – Text of the Vth Italo-Maltese Financial Protocol (ctd)

4. They will furthermore endeavour to encourage initiatives aimed at facilitating the economic, industrial and technical cooperation between commercial enterprises of the two countries, with special emphasis to those economic sectors that are mainly export-oriented and likely to create new employment opportunities.

Article 2

1. The funds referred to in article 1 will be put at the disposal of the Maltese Authorities for the amount of 35.000.000 Euros for the year 2003, for the amount of 30.000.000 Euros for the year 2004 and for the amount of 10.000.000 Euros for the year 2005. These will be utilised to contribute to the implementation of the following projects in the sectors indicated below:

Infrastructural

- 1.1 Modernisation of the Road Network Programme;
- 1.2 Malta North Sewage Treatment Plant;

Cultural and Educational

- 1.3 Italian Chair of Mediterranean and European Union Studies;
- 1.4 Scholarship awards for Maltese students;
- 1.5 Rehabilitation of 16th Century Organ at St. John's Co-Cathedral;
- 1.6 Restoration of the Chapel of the Italian Langue at St. John's Co-Cathedral;

Environmental Protection

- 1.7 Setting up of a Collection and an Incineration Unit at the Civil Abattoir;

Food Safety

- 1.8 Meat Deboning, Cutting and Packing Establishment;
- 1.9 Grading and Cold Storage Facility;

Maritime Surveillance

- 1.10 Strengthening of the Maltese Capability of Maritime Control;

Document D.03 – Text of the Vth Italo-Maltese Financial Protocol (ctd)

Health

- 1.11 Design, supply and installation of equipment and provision of services for Mater Dei Hospital;
 - 1.12 Procurement of an Information Technology System for Mater dei Hospital;
 - 1.13 Research in the Field of Health on Mental Retardation.
-
2. The Contracting Parties agree to carry out a technical and economic evaluation of the above listed projects and that the cost of this exercise will be charged to the financial resources of the Protocol. Such costs will not exceed 1% of the total value of the Italian contribution for each individual project, and will not exceed, in any case, 50.000 Euros for each project. The indicated percentage may be increased to a maximum of 4% in the case of projects for which the Italian contribution, per project, will not exceed 600.000 Euros.
 3. The Italian side will indicate to the Maltese side those Institutions and Agencies that will be able to provide technical assistance in a manner to be agreed upon by the Contracting Parties through diplomatic channels, including also the implementation aspects of the programmes and projects to be financed, the monitoring modalities, as well as the relative allocation and schedule of payments in accordance with the phases of implementation of the same projects. These details will be included in one or more exchanges of Notes between the two Ministries of Foreign Affairs to be finalised as soon as possible and in any way not later than six months from the entry into force of this Protocol. Subsequent amendments concerning project payments will be made, upon agreement, by following the same procedure and within the deadlines set out in article 4.
 4. The Maltese Government undertakes to furnish to the Italian Government an annual report on the results attained in the execution of the projects specified in this Protocol, with particular emphasis on the technical and economic details of their progress.
 5. Following the implementation of the projects contemplated in this agreement, the Contracting Parties commite themselves to continue with their cooperation in different forms, in line with the new and closer relationship that is likely to develop between the two countries in the light of Malta's accession to the European Union.

Document D.03 – Text of the Vth Italo-Maltese Financial Protocol (ctd)

Article 3

1. The funds of this Protocol will be disbursed as a refund to cover payments already made by the Maltese authorities in favour of entitled beneficiaries in accordance with the programmes and projects agreed upon, on submission of the appropriate documentation duly certified or confirmed by the competent Maltese authorities, and following confirmation of the actual implementation of the programme or project or, where such is the case, its related phases, as defined in the exchange of Notes referred to in article 2. The Italian Government will not reimburse expenses which are not contemplated in the present Protocol, in the exchange of Notes referred to in article 2 or in other international commitments which bind both Contracting Parties.
2. With regard to those projects that are implemented through the execution of works or through the provision of services, a rate not exceeding 15 per cent of the funds specified in article 1 may be allocated to cover local expenses for works and labour carried out by the Maltese Authorities in respect of agreed programmes and projects. However, in the cases of works in which a significant utilisation of labour or materials available in Malta is foreseen, the specified percentage may be increased to 30% of the above mentioned funds.
3. For the same category of projects, once a contract has been finalised, in accordance with modalities to be specified in the exchange of Notes referred to in article 2, an advance payment, not exceeding 20% of the total Italian contribution to the project, may be disbursed following a specific request by the Maltese Authorities.
4. The allocation of works and the adjudication and award of contracts shall be carried out by the Maltese authorities in conformity with their internal laws and regulations.

Article 4

The sums allocated for the projects under article 1, and which are not effectively disbursed in the year indicated, may be utilised for the same projects in the subsequent years, provided that the relative amendments in the schedule of payments are agreed upon, in accordance with the procedure set out in article 2, paragraph 3, within the 31 December of the respective year of reference, and in any case before 31 December 2005.

Document D.03 – Text of the Vth Italo-Maltese Financial Protocol (ctd)

Article 5

1. This Protocol shall enter into force on the date of receipt of the second of the two notifications by means of which the Contracting Parties shall have officially communicated to each other that the respective Constitutional procedures for its ratification have been completed.
2. This Protocol may be renounced through diplomatic channels at any time and the renunciation shall come into effect three months after notification to the other Contracting Party. Claims for reimbursements relating to contracts awarded under the terms of this Protocol before the above mentioned renunciation will be considered and honoured by not later than the 31st December 2005, unless otherwise indicated in article 3, paragraph 1.


IN WITNESS WHEREOF the undersigned Representatives, being duly authorised by their respective Governments, have signed the present Agreement.

Done at Rome on the 20 day of December 2002, in two copies, each in the English and Italian Languages, both texts being equally authentic.


**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.04 – Communication - ADT to PS MTC regarding project cost estimates



Roads Directorate




ADT
AWTORITA' DWAR IT-TRASPORT TA' MALTA

52

Our ref: RD 126/2002

12th May 2003

Permanent Secretary
Thro' Chairman 

5th Protocol Funded Projects

Kindly refer to our meeting with the Minister on the 6th instant.

Herewith attached is an updated schedule indicating the proposed subdivision of the road reconstruction works of the various routes in Malta and Gozo, and their related estimated costs, as are intended to be upgraded under this Protocol.

Consequently, the estimated financial requirements for Roads projects that to date have been identified for inclusion under this Protocol are as follows:-

	Project	Local Funding (Land Aquisition) LmM	Local Funding (Diversion of Utilities) LmM	Protocol Funds LmM	Total LmM
A	Road Restoration	1.1	0.1	15.9	17.1
B	Msida stormwater management	0.1	0.1	3.0	3.2
C	Crafts Training			1.0	1.0
	Totals	1.2	0.2	19.9	21.3

My knowledge of the obtaining position with this protocol is that the Lm12M Italian Government funds cannot be utilized to finance land acquisition costs and Utilities expenses. Additional funds have therefore to be provided to meet these needs some of which may need to be provided up front, before the project may start in earnest, as these monies would need to be paid to Land Department to cover costs of expropriations.

It is therefore essential that a meeting be urgently convened with Director

Address
Malta Transport Authority
Roads Directorate
Sa Maison Road
Floriana CMR 02

Telephone
(00356) 21 248191/2
(00356) 21 234609

Fax
(00356) 21 243753

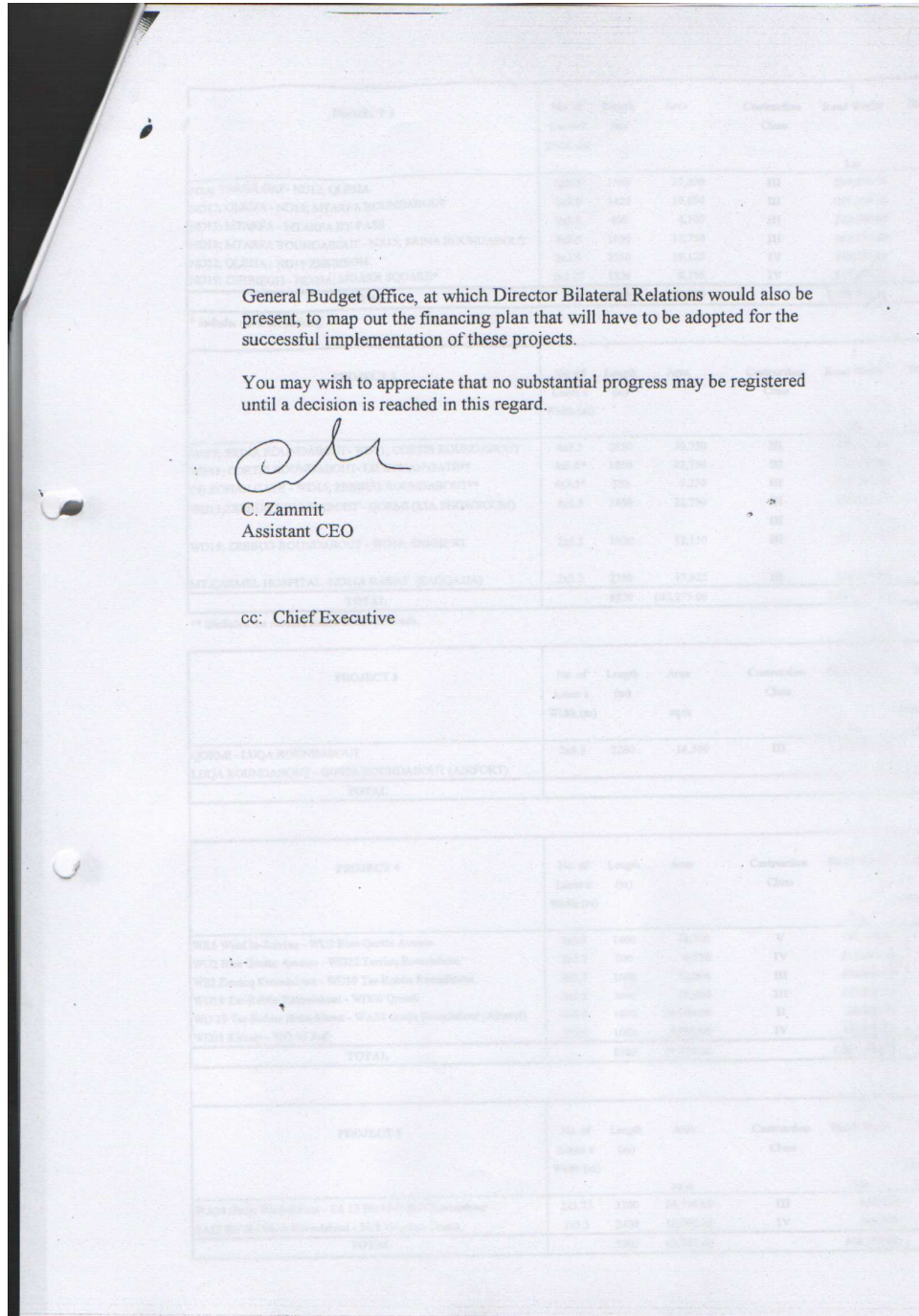
Email
rd@maltatransport.com

Website
www.maltatransport.com/rd

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

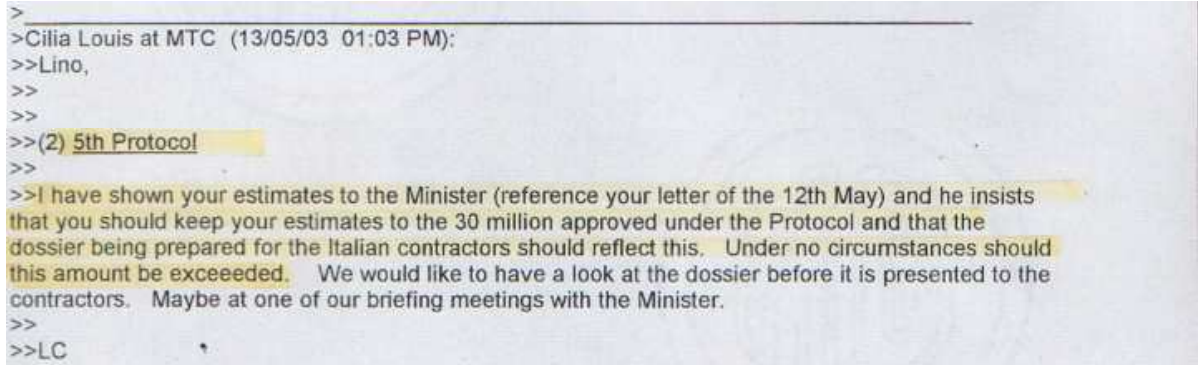
Document D.04 – Communication - ADT to PS MTC regarding project cost estimates (ctd)



**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.05 – Communication - PS MTC to ADT regarding project cost estimates

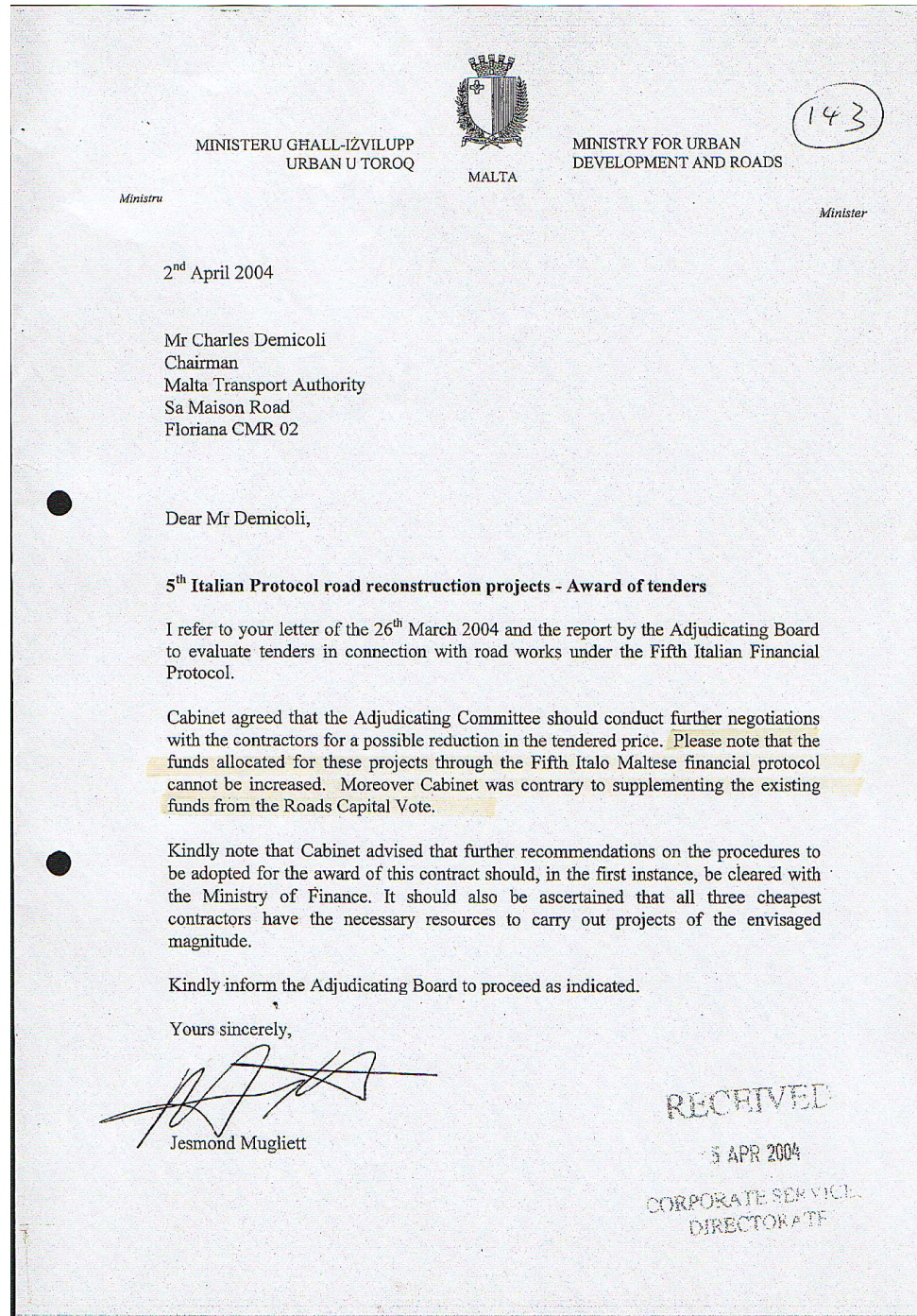


>
>Cilia Louis at MTC (13/05/03 01:03 PM):
>>Lino,
>>
>>
>>(2) 5th Protocol
>>
>>I have shown your estimates to the Minister (reference your letter of the 12th May) and he insists that you should keep your estimates to the 30 million approved under the Protocol and that the dossier being prepared for the Italian contractors should reflect this. Under no circumstances should this amount be exceeded. We would like to have a look at the dossier before it is presented to the contractors. Maybe at one of our briefing meetings with the Minister.
>>
>>LC

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.06 – Communication – Minister MUDR to ADT – financing the projects



**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.07 – Terms of Reference – Adjudication Board
Ministry for Transport and Communications – 13 January 2004**

ANNEX 'D'

**Terms of Reference
of the Board appointed to Adjudicate
Tenders received in connection with Roads Construction Projects
under
The Vth Italo-Maltese Financial Protocol**

1. To oversee the opening of the tender-box after the closing date for receipt of tenders on Thursday 15th January 2004 at 10.00am at the Offices of ADT.
2. To ensure that all tenderers have been advised of the time, date and venue when the tender-box is being opened in public and that they have been invited to attend.
3. To ensure that prices quoted are read by a member of the Board during a public session immediately following which a list of those who submitted a tender and the prices quoted by each tenderer are made available for public viewing on the notice board at the offices of ADT and the Ministry for Transport and Communications.
4. To evaluate tenders submitted and make definitive recommendations thereon to the Ministry for Transport and Communications on the basis of best value for money in all respects, at the lowest possible cost.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.08 – Minutes – First Meeting– Adjudication Board – 16 September 2003

1st Meeting of the Committee – Tenders Vth Italian Protocol

<i>Date</i>	16 th September 2003	<i>Time</i>	10.00am – 01.00pm
<i>Place</i>	ADT premises		
<i>Attendees</i>	Mr Anthony Pavia Mr Carmel Zammit Dr Mark Bonello Mr Anton Spiteri Mr Mario Ellul	Chairman Director Roads ADT Chairman MMA Director (Review) MTC ADT	

Item 1

The first item on the agenda was the discussion of TOR, as these had not yet been received the Committee proceeded to discuss general details from the information available and the Issue of the restriction of offers to the Italian registered companies.

After examination the correspondence that preceded the establishment of the current twelve expressions of interest, the Committee agreed that its TOR should clearly indicate that its role was to consider these offers, received following the previously established and approved procedure, then to agree on the contents of a tender dossier, and finally to decide on the most advantageous offers.

On the first step to agreed that the Committee should short list the offers received by removing those that were perceived to be not technically competent to carry out the work.

Dr Bonello asked whether there had been previous occasions when a similar adjudication procedure was carried out that could be used as a reference for the Committee.

Although the tenders for the construction of the Air Terminal and the Mater Dei hospital were quoted as possibly similar to the present circumstance no specific occasion could be identified.

Item 2

Following an overview of the events that preceded the appointment of this Committee, the discussion turned to the various options available as to the actual award of the contracts and it

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.08 – Minutes – First Meeting– Adjudication Board – 16 September 2003 (ctd)

was felt that rather than awarding a 'lump sum' contract, it would be better for the contracts to be awarded as a 'measured bill', calculated in a way as to leave an amount of funds unutilised to make good for unforeseen expenditure, with a proviso that further works could be awarded based on the performance in the initial contract (to ensure the full use of the funding available).

On the need to have professional monitoring of the work carried out, it was suggested that the contract would include provision for the payment (by ADT) of a consultant, identified by the contractor (and being legally authorised to certify such works in Malta), and who could also provide the extra design services that could become necessary as the works progress.

Item 3

Mr Anthony Pavia noted that he had been informed that the Auditor's report was not available since it was still confidential and in any case the function of the committee was not to go into details of the report. In view of the comments by Permanent Secretary MFEA, it was understood that what was required of the Committee was rather a consultation with the Auditor regarding the award process using the 'selective call for application' that was being followed.

Mr Anton Spiteri was asked to arrange a meeting with the Auditor for Monday 0900hrs following which the Committee would continue with its work at ADT's premises.

29th September 2003

**Document D.09 – Article 35 as per (ADT) Tender for road upgrading under the Vth
Italian Financial Protocol – Volume 2 – Section 2 – General Conditions, pp 137 – 140**

Article 35: Modifications

- 35.1 The Supervisor shall have power to order any modification to any part of the works necessary for the proper completion and/or functioning of the works. Such modifications may consist of additions, omissions, substitutions, changes in quality, quantity, form, character, kind, position, dimension, level or line and changes in the specified sequence, method or timing of execution of the works. No order for a modification may result in the invalidation of the contract. However, the financial effect, if any, of such modifications shall be valued in accordance with the following Articles.
- 35.2 Modifications may only be made by administrative order, subject to the following provisos:
- a) if, for whatever reason, the Supervisor believes it necessary to give an order orally, he shall confirm the order by an administrative order as soon as possible;
 - b) if the Contractor confirms in writing an oral order given for the purpose of Article 35.2(a) and the confirmation is not immediately refuted in writing by the Supervisor, an administrative order shall be deemed to have been issued for the execution of the modification;
 - c) an administrative order for a modification shall not be required when increasing or decreasing the quantity of works because the estimates in the bill of quantities or price schedule were too high or too low.
- 35.3 Save when Article 35.2 provides otherwise, prior to issuing an administrative order for a modification, the Supervisor shall notify the Contractor of the nature and form of that modification. As soon as possible, after receiving such notice, the Contractor shall submit to the Supervisor a proposal containing:
- a) a description of the tasks, if any, to be performed or the measures to be taken and a programme for execution;
 - b) any necessary modification to the programme of performance or to any of the Contractor's obligations under the contract; and

**Document D.09 – Article 35 as per (ADT) Tender for road upgrading under the Vth
Italian Financial Protocol – Volume 2 – Section 2 – General Conditions, pp 137 – 140
(ctd)**

- c) any adjustment to the contract price in accordance with the rules set out in Article 35.
- 35.4 Following the receipt of the Contractor's submission referred to in Article 35.3, the Supervisor shall, after due consultation with the Contracting Authority and, where appropriate, the Contractor, decide as soon as possible whether or not the modification should be carried out. If the Supervisor decides the modification is to be carried out, he shall issue an administrative order stating that the modification is to be made at the prices and under the conditions given in the Contractor's submission referred to in Article 35.3 or as modified by the Supervisor in accordance with Article 35.5.
- 35.5 The prices for all modifications ordered by the Supervisor in accordance with Articles 35.2 and 35.4 shall be ascertained by the Supervisor in accordance with the following principles:
- a) where work is of similar character and executed under similar conditions to work priced in the bill of quantities or price schedule, it shall be valued at such rates and prices contained therein;
 - b) where work is not of a similar character or is not executed under similar condition, the rates and prices in the contract shall be used as the basis for valuation in so far as is reasonable, failing which a fair valuation shall be made by the Supervisor;
 - c) if the nature or amount of any modification relative to the nature or amount of the whole of the contract or to any part thereof is such that, in the opinion of the Supervisor, any rate or price contained in the contract for any item of work is by reason of such modification rendered unreasonable, then the Supervisor shall fix rate or price as he thinks reasonable and proper in the circumstances;
 - d) where a modification is necessitated by a default or breach of contract by the Contractor, any additional cost attributable to such modification shall be borne by the Contractor.
- 35.6 On receipt of the administrative order requesting the modification, the Contractor shall proceed to carry out the modification as if it had been stated in the contract. The works shall not be delayed pending the granting of any extension of time for completion or adjustment to the contract price.

**Document D.09 – Article 35 as per (ADT) Tender for road upgrading under the Vth
Italian Financial Protocol – Volume 2 – Section 2 – General Conditions, pp 137 – 140
(ctd)**

- Where the order for a modification precedes the adjustment to the contract price, the Contractor shall keep records of the costs of undertaking the modification and of the time expended thereon. Such records shall be open to inspection by the Supervisor at all reasonable times.
- 35.7 Unless otherwise provided by the Special Conditions, in the event of an increase or decrease in the total volume of work required by the Contracting Authority or resulting from circumstances which are caused neither by the Contractor's negligence nor by any action on his part, the Contractor may not claim compensation unless that increase or decrease, calculated on the basis of the original prices and without varying the object of the contract, exceeds a percentage of the original contract price specified in the Special Conditions. In these circumstances, on making a reasoned request submitted to the Contracting Authority, the Contractor shall be entitled to have the contractual period of performance changed.
- 35.8 Where the increase or decrease, calculated in the manner described, exceeds the percentage laid down in the Special Conditions, the Contractor may, when the general statement is drawn up, make a claim for compensation on the grounds of any damage he has suffered as a result of modifications to the original project. He shall also be entitled, on making a reasoned request submitted to the Contracting Authority, to a modification in the contractual period of performance. Where the modification, calculated in the manner described, exceeds 33%, the Contractor is entitled to refuse to carry out any work beyond that value. In that case, he shall inform the Contracting Authority of his decision by registered letter with acknowledgement of delivery within two months of the administrative order specifying that modification. The Supervisor shall, after consulting the Contracting Authority and the Contractor, determine any addition/compensation and extension of period of performance.
- 35.9 Subject to the limits indicated in the Special Conditions, if the contract contains a bill of quantities or breakdown of the overall price giving an itemized list of the scale and prices of the various works, and if modifications required by the Contracting Authority or resulting from circumstances which are caused neither by the Contractor's negligence nor by any action on his part alter the scale of some of the works in such a manner that the quantity shown for any item is increased or decreased by 20% or more, the Contractor shall, on making a reasoned request to the Contracting Authority, be entitled to compensation for any damage he has suffered as a result of modifications to the original project, once all quantities in the relevant item have been executed for the purposes of the contract.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.09 – Article 35 as per (ADT) Tender for road upgrading under the Vth
Italian Financial Protocol – Volume 2 – Section 2 – General Conditions, pp 137 – 140
(ctd)**

- 35.10 Contract modifications not covered by an administrative order must be formalized through an addendum to the contract signed by all parties. Changes of address or bank account may be simply notified by the Contractor to the Contracting Authority.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.10 – Email containing legal advice afforded to ADT – May 2004



Mail

Received mail: Road work contracts under the 5th Italian Protocol

Sender:	Nicolette Cassar	Reply by date:	
Sent:	21/5/2004 11:34	Reply to:	ncassar@sapiano-legal.com.mt
Importance:	Normal	Delivered:	21/05/2004 12:43 21/05/2004
Priority:	Normal	Read:	12:58
Sensitivity:	None	Acknowledged:	
		Replaced:	

Recipients:

Name	Type	Reply req.
m.falzon@maltatransport.com	To	No
carmel.zammit@gov.mt	Cc	No

Dear Mr. Falzon

I make reference to our telephone conversation of this morning with respect to the above captioned. You realise that this office has been involved in the preparation of these contracts at a very late stage when the tenders had already been awarded.

We were not involved in the drafting of the relative tender documents, which documents stipulate the parameters of the consequent contract and the rights and obligations of the parties thereto. As discussed with Dr. Sapiano, it is not advisable to disturb any of said conditions, since this would necessarily re-open the negotiations and lengthen the process.

This morning I had a meeting with Dr. Cora Vella from the office of the Notary to Government. She said that she is still awaiting the relative documentation (Tender documents, letter of acceptance, authenticated identification of the judicial representative of the Italian companies, reference to the Performance Bond...) from ADT to be able to draft the public deed between the Authority and the Contractor. Perit Zammit assured me that all the necessary documents requested by Dr. Vella will be delivered to her this morning.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

Document D.10 – Email containing legal advice afforded to ADT – May 2004 (ctd)

Dr.Vella is of the opinion that the public deed should merely make reference to the relevant documentation and should not include specific references to particular conditions.

With respect to the agreement between the Authority and the Supervisor, Dr. Vella suggested that this should take the form of a private writing in order to avoid further expenses for the Authority. I will be preparing said agreement which will then be referred to and annexed to the Public Deed between the Authority and the Contractor.

I fully understand the urgency of the matter, however kindly appreciate that the drafting of contracts and the compilation of the necessary documentation is a lengthy process.

Regards

Nicolette

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

**Document D.11 – Extract from letter sent by Minister, Ministry for Urban Development
and Roads, to Chairman ADT**

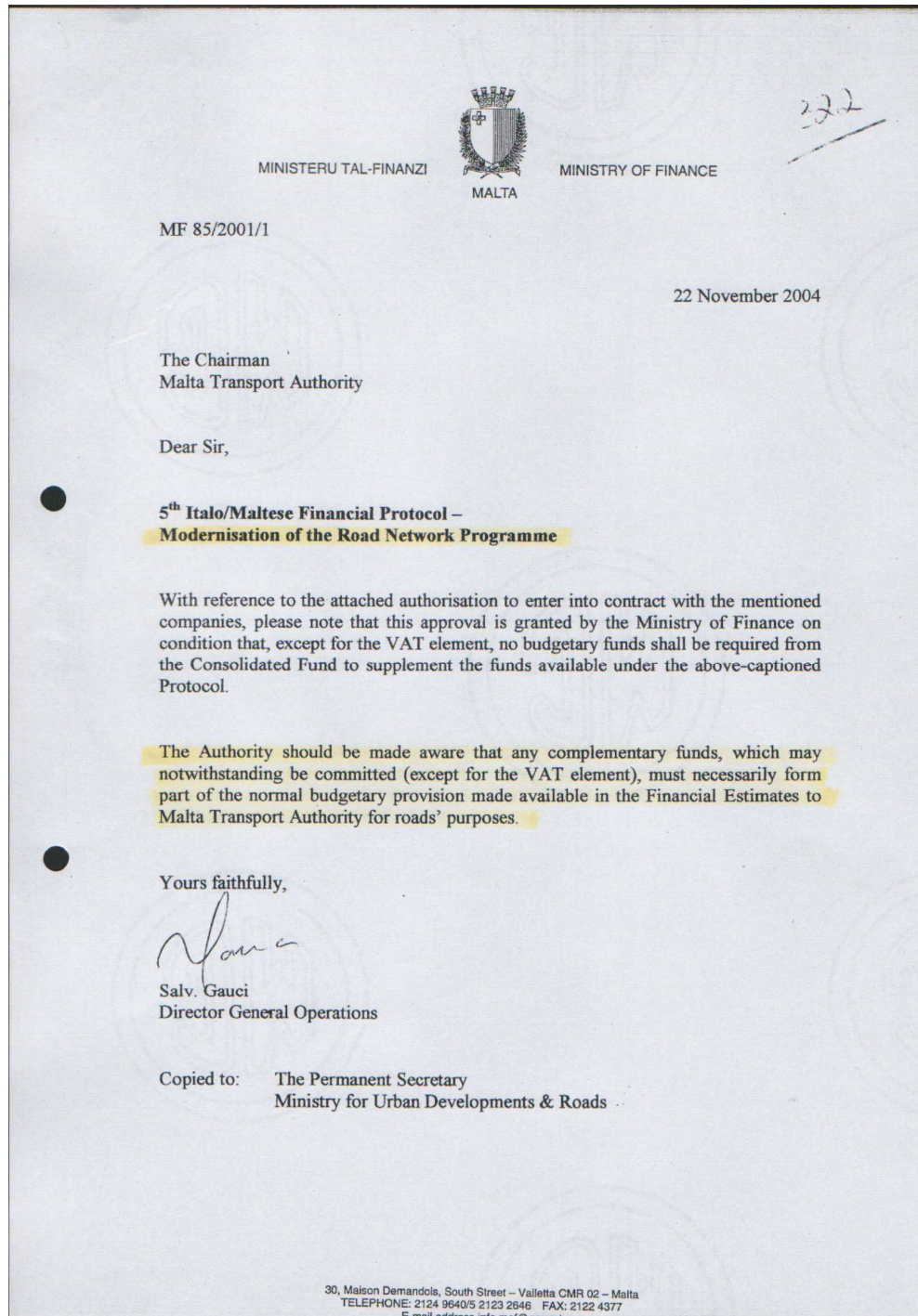
My Ministry will therefore be monitoring very closely four aspects of the works viz. timeliness, expenditure, inconvenience to traffic and public, and quality of works related to these tenders...

Although the chosen contractors have supervisor firms attached to them, good practice requires that the Malta Transport Authority carries out its own measurement of works and assessments of tests carried out by the contractors. It is only through these procedures that we can ascertain that the Maltese Government gets best value for money spent.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'D'

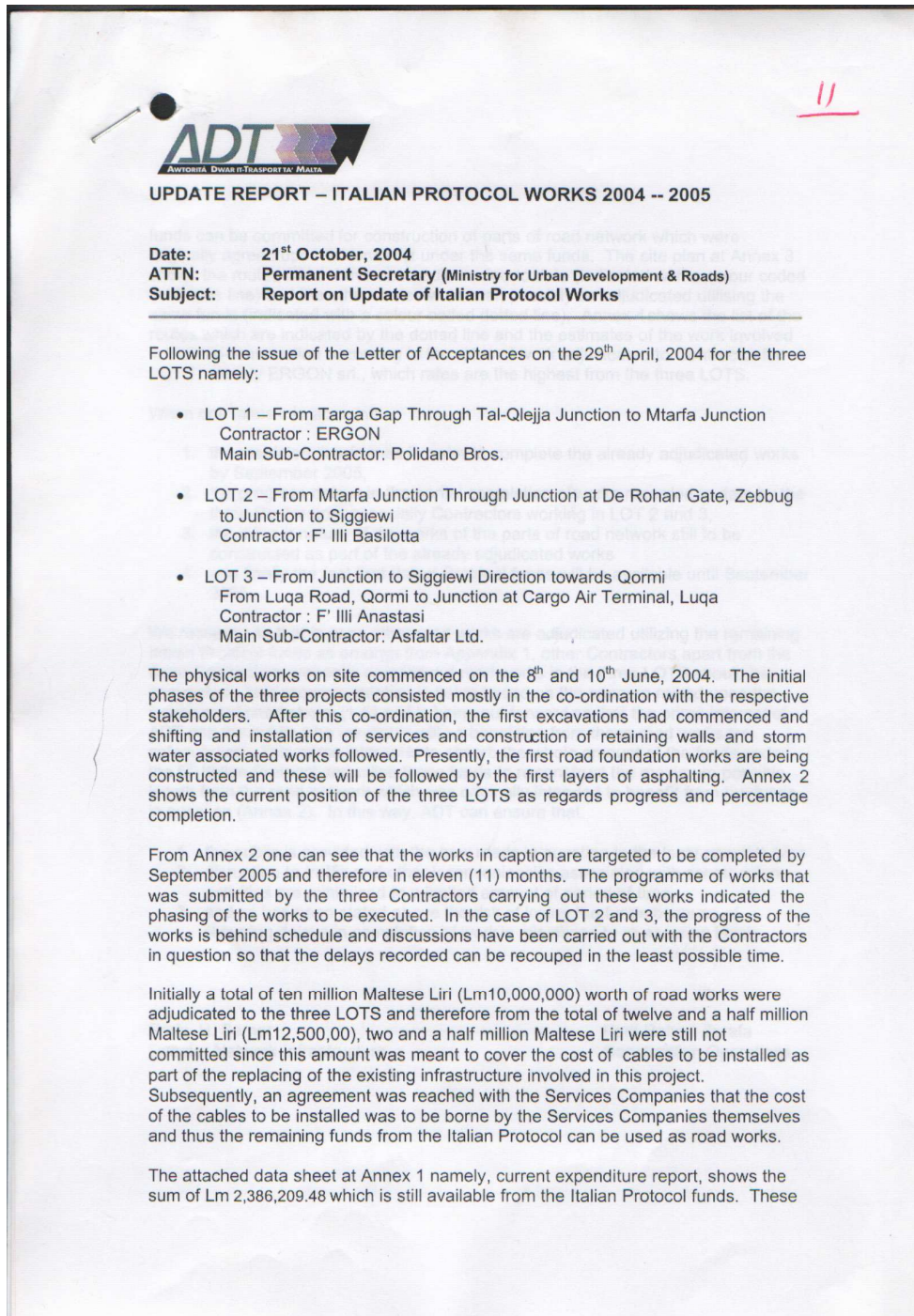
Document D.12 – MoF Communication regarding project funding – November 2004



Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'D'

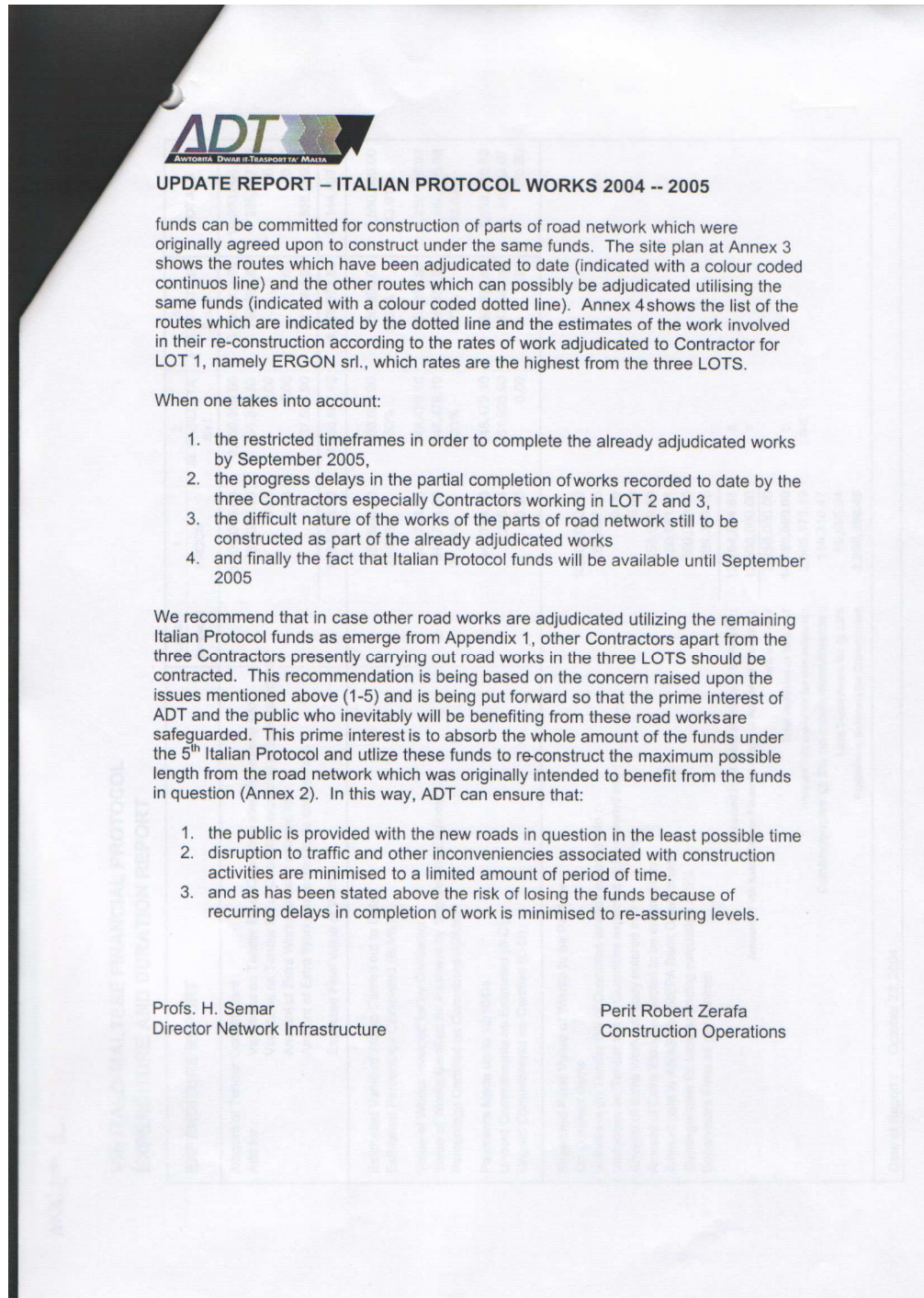
Document D.13 – ADT internal report – Suggestion to split project into six (6) LOTs



Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'D'

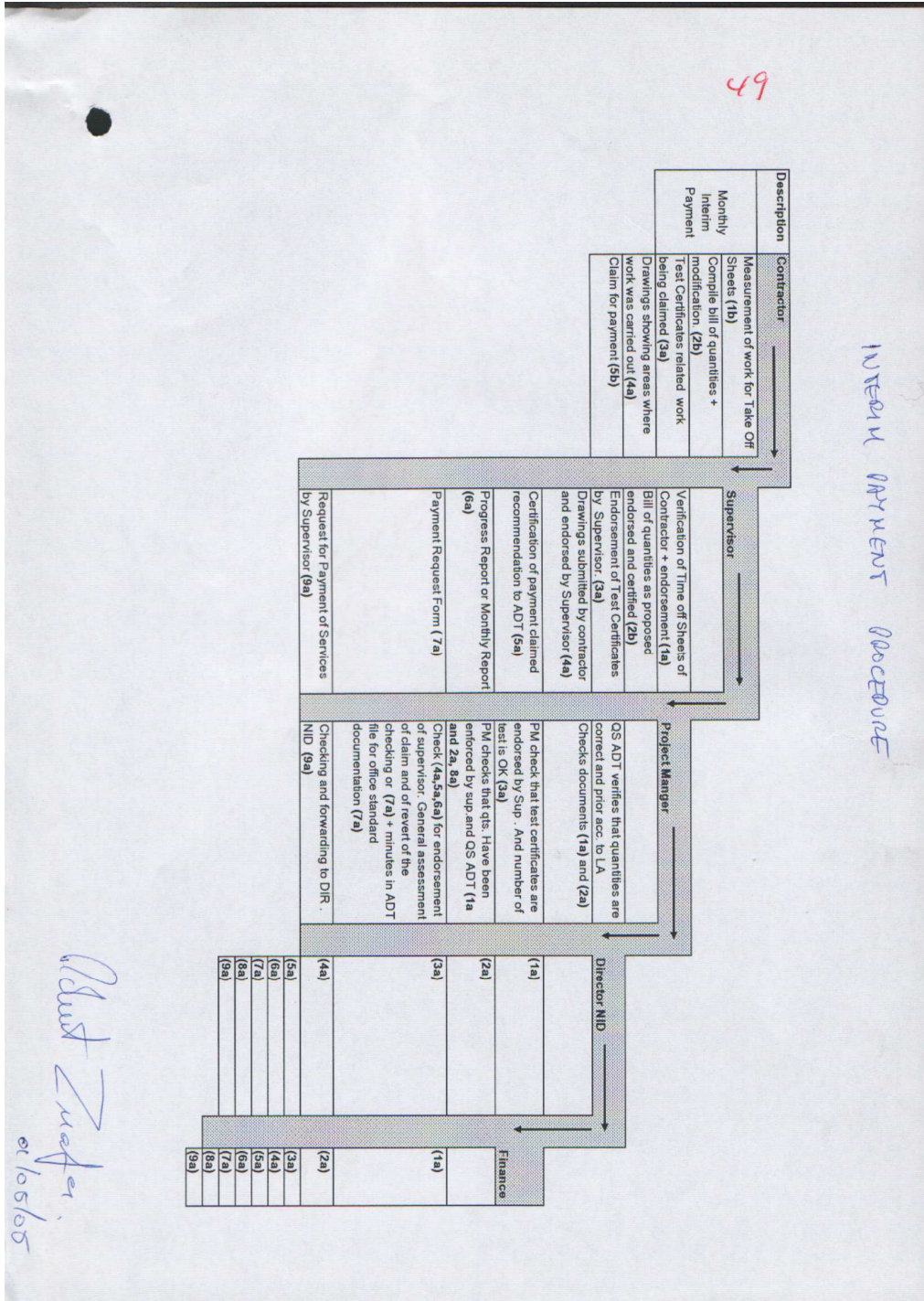
Document D.13 – ADT internal report – Suggestion to split project into six (6) LOTs (ctd)



Road construction projects partly financed through Fifth Italo-Maltese Financial Protocol

Appendix 'D'

Document D.14 – ADT internal document – payment authorisation procedure



**Expert report commissioned by NAO in connection with exercise requested
by PAC on ADT Italian Financial Protocol Road Construction Contract**

1.0 Terms of Reference

- 1.1 The expert was requested to assist the NAO in regard to the technical aspects of the audit requested by the PAC in connection with the ADT – Italian Financial Protocol Road Construction Contract Variances.
- 1.2 The PAC Brief to the NAO was (translated by the expert):
 - 1.2.1 that the Auditor General evaluate whether the procedures and rules followed by the ADT in the approval of cost overruns in the contracts for road construction financed from the Italian Financial Protocol were transparent and effective enough to ensure value for money and serious accountability;
 - 1.2.2 that the Auditor General, together with the Ministry of Finance, recommend criteria deemed appropriate so as to strengthen the transparency, effectiveness and accountability in regard to the use of public funds.
- 1.3 The Brief to the Technical Expert was to offer support on issues that may be deemed of a technical/non-administrative nature. The Technical Expert was required to offer a *“technical evaluation of the relevant tender documents that would determine whether the system deployed by ADT, in lieu of the standard government procurement mechanism, was sufficiently effective and transparent so as to be conducive to the achievement of value of money”*.

2.0 Background Documentation

- 2.1 The undersigned was given access to various documents including:
 - (i) The General Tender Dossier for the Implementation of Road Infrastructure Projects financed under the Vth Protocol relating to Economic, Technical and Financial Assistance between the Italian and Maltese Governments.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'E'

- (ii) Copy of the Report of the Board appointed by the Permanent Secretary Ministry for Urban Development and Roads to Evaluate Tenders received for Road Works under the Vth Italian Financial Protocol, and various related correspondence;
- (iii) Copies of Letters of Acceptance to the various Contractors involved in the Contracts;
- (iv) Copies of the Contracts signed between various Contractors and the ADT;
- (v) Copies of Contracts signed between the Supervisors, nominated by the Contractors, and ADT;
- (vi) Transcripts of the relevant PAC sittings;
- (vii) Summaries of the Variances for the Service Culverts, Retaining Walls and Dumping Charges;
- (viii) Financial BOQ summaries and totals and variances compiled by NAO personnel from source documents;
- (ix) Transcripts of meetings held between NAO and ADT officials.

The expert was also given an index of all other documents available and invited to request access to any of such documents, as deemed necessary by him.

2.2 The nature of the Contracts awarded in connection the Road Construction Projects, financed by the Vth Italian Financial Protocol, was amply documented in the above; it was also amply explained to the PAC by ADT officials. In particular, the procurement process adopted, once the tendering was required to be restricted to Italian contractors, has been amply discussed. The issue of the necessary authority to publish, adjudicate and award the relative contracts, outside the normal procedures of the Contracts Department, and the consequent uncertainty as to the authority to approve variances, which implied additional expenditure from public funds, rather than from the Italian Protocol, are considered by the undersigned to be administrative matters, which are not addressed by this report.

2.3 In view of the debate within the PAC, the expert understands that his role is to give advice on the technical aspect of the procedures and rules that were adopted in the approval of the cost over-runs in the construction of roads financed by the Italian

Protocol, in support of the NAO's evaluation as to whether these were transparent, and effective enough to guarantee value for money and accountability. The following report therefore concentrates on the nature of the cost over-runs, on the predictability of the causes of the variances, and on the procedures adopted to administer the relative contracts, and to offer his advice whether the systems and controls to manage cost variations were robust, and compliant with sound financial management and good project management practice.

3.0 Nature of Variances

3.1 It has been amply explained that the main reasons why the cost over-runs occurred were:

3.1.1 Changes in the design of the common service duct, as required by EneMalta;

3.1.2 Unpredicted re-building of retaining walls, where the required excavations turned out to be deeper than envisaged;

3.1.3 Shifting and upgrading of utility services;

3.1.4 Excavation waste dumping charges;

3.1.5 An additional service road.

This was explained by ADT officials to the PAC, and was confirmed by separate auditing by NAO officials. A senior official within ADT insisted, to a certain extent with reason, that most of the additional costs could not be considered as cost over-runs, but were related to *additional works* that had to be included within the project, to make sure that the project was of the right quality, and that it would have the required life.

3.2 The first question, therefore, is whether the preparation of the tender design was sufficiently rigorous such that such additional works could have been anticipated before contract award.

3.3 ADT officials have explained in detail the work preceding the publication of the tenders, including topographic surveys, traffic counts, site inspections along the whole length of the proposed routes, site investigation on existing road build-up,

buried services, existing bridges and culverts, road surface tests, including beam reflection tests and plate bearing tests, meetings with utility companies and discussions on typical culvert sections; and then the design phase, with the preparation of alignment drawings, curves, longitudinal sections, road construction design, storm-water pipe network calculations and design, street lighting, and traffic management schemes. The process also included the acquisition of relative development permits from MEPA, and expropriation of privately-owned land required for the road construction.

- 3.4 In the opinion of the undersigned, the evidence available shows that this design work was diligently carried out, to a degree that, perhaps, has not previously been reached, in recent decades, by the Roads Department. The undersigned accepts that, in spite of the frequency of geo-technical investigations carried out along the route, the rigorous preparatory work carried out before the publication of the tender did not exclude the possibility of unforeseen geo-technical conditions that would require additional and unexpected work.
- 3.5 The undersigned also confirms that, in his experience, the records held by the utility companies, for services laid over the last thirty years, say, are not very accurate, and certainly not complete, so that it is certainly not unusual to find that the exact location of utility services is in fact different to that documented. The lack of a national GIS utility services mapping service is a significant handicap in the preparation of such projects. It therefore is not surprising that situations arise, for example, where the excavation, which uncovers existing services, would need to be deeper than envisaged, or that the condition of the services uncovered would be worse than expected, and would thus require changing.
- 3.6 In the opinion of the undersigned, ADT officials carried out as rigorous a pre-tender process as could be expected; with road construction works, as is the case with most sub-structure works, it is practically impossible to predict, with any more accuracy, the circumstances that gave rise to the variations. The only better way to handle the contractual complications, arising from the “uncertainty” created by this type of work, is to make a contingency allowance, which is higher than that for normal construction works, and to keep such contingency allowance outside the respective contract, to be administered by rules that may need to be drafted ad hoc.

4.0 Contractual Procedures to Administer Contracts and Contract Variations.

4.1 The Tender format that was adopted for these tenders has two particular characteristics that are relevant to the issue at hand. In the first instance, it has been stated, in the evidence given by ADT officials, that the Contract documentation was modeled on the FIDIC contract, which is one of the more commonly used procurement forms, at international level. Secondly, the Tender documentation required each Tenderer to include, with the respective Tender, the nomination of a warranted Perit (the nomenclature used is architect and civil engineer, which is a nomenclature that has been superseded by the Periti Act of 2000), as Supervisor for the Works. Paragraph 0.2.2 of the Special Conditions (of the Tender) require the nominated Supervisor to carry out the following services:

- 4.1.1 Analyze and make appropriate recommendations to the Contracting Authority about all detailed plans, drawings, studies, surveys, investigations, and reports prepared by the Contractor for the construction of the project, and including documentation for the use of statutory organizations in the granting of any necessary permits and licences;
- 4.1.2 Supervise the works, monitor its progress and quality in accordance with the standards specified;
- 4.1.3 Attend at any meetings with the Contracting Authority and Utilities representatives and other stake holder's appointed representatives as necessary;
- 4.1.4 Assist the Contracting Authority in the verification of bills submitted by the Contractor for payments to be affected for completed works;
- 4.1.5 Certify the construction of the various stages of the works, and on completion, of the entire work carried out under the Contract;
- 4.1.6 Participate, on completion of the Contract, in the official performance assessment tests undertaken or otherwise commissioned by the Contracting Authority prior to taking over;

4.1.7 Verify and certify “As Completed” drawings, of all sections of the completed works

“and in general provide all the expert professional and technical advice, and skills which are normally required for the class of services for which he shall be engaged to perform”.

The Tender documentation required that the details of the technical expertise, and track record, of the nominated professionals, and the acceptance of the nominated professional to act as Supervisor, to be submitted as part of the Tender. The proposed “Honorarium” of this professional was also to be submitted as part of the Tender.

The Tender documentation advised that ADT could accept or refuse any such nomination; and in case of acceptance, a separate contract would be entered between ADT and the relative professional. The ADT could also terminate the agreement with the particular Supervisor, except that, in this case, the Contractor would be invited to nominate a replacement.

4.2 In spite of the above, the role of the Supervisor is again defined in Volume 1 Section 5 Glossary as the person responsible for monitoring the execution of the Contract on behalf of the Contracting Authority. The Supervisor is also alternatively referred to as the Engineer as per FIDIC rules.

4.3 In Volume 2, which is the text for the General Contract Conditions, the Supervisor’s role is defined yet again. Article 5.1 states that the “*Supervisor shall carry out the duties specified in the Contract*”. These duties are then specified in various parts of the Contract. For example, in Article 8, the Supervisor is the channel by which drawings and instructions are issued to the Contractor, and also the authority who approves drawings or other documents submitted by the Contractor. In Article 9 the Supervisor is given the role of a quasi-Employer’s Agent, in relation to orders issued to the Contractor in respect to premises made available to the Contractor. The same position is also detected in Art.11.9, with the Supervisor consulting with Contracting Authority before consenting or otherwise to the publication of any details on the Contract.

- 4.4 The relationship between the Contractor and the Supervisor is further explained in Article 11, particularly in respect of the Supervisor’s role in assessing the qualifications of the workmen of the Contractor, of the Supervisor’s role in controlling the use of the Contractor’s equipment on site, and the obligation of the Contractor to submit to the Supervisor’s approval a programme of performance, or a detailed breakdown of prices.
- 4.5 Finally, Article 35 regulates the procedures that are required to be followed in respect of “Modifications” to the Contract. The Supervisor is given the power to order any modification, including additions, omissions, substitutions etc., via an administrative order. If such administrative order is deemed by the Contractor to imply modifications to the programme, or adjustments to the contract price, then the Contractor is required to so notify the Supervisor, who is then required “*after due consultation with the Contracting Authority*” to decide whether or not the modification should be carried out. The Supervisor may then authorize the carrying out of the modification, either under the conditions given in the Contractor’s submission, or as modified by the Supervisor. Article 35.5, in fact, outlines the rules that the Supervisor has to use in order to assess the prices for all modifications.
- 4.6 Article 47, furthermore, requires that the Supervisor “*determine by measurement the actual quantities of the works executed by the Contractor*”. The subsequent articles indicate how the Supervisor issues approvals of interim payments, and, at the end of the works, to prepare the final statement of account.
- 4.7 Finally, the role of the Supervisor in verifying the quality of the works, and in the partial and final acceptance procedures, is outlined in Articles 54 to 59.
- 4.8 The contractual role of the Supervisor, as outlined above, is central to the issue of how variations, to the Contract, were handled. ADT officials have explained that the major modifications, that led to the main “cost over-runs”, were triggered either by Utility Company requirements made known to ADT during the progress of the works, as in the case of the service duct and EneMalta, or by the uncovering of unforeseen geo-technical conditions on site, or of services in a worse state than expected. According to the ADT officials, the need for a modification would be communicated to the Supervisor, who would issue the relative administrative order to the Contractor. The Contractor would respond by indicating the applicable modifications to the programme or to the contract value. Negotiations would then

be held between the Supervisor and the Contractor, until there was either an agreement to the modifications required, or, in the absence of an agreement, a reasoned determination by the Supervisor. It is not clear whether additional approvals by ADT officials were required at this stage – the Contract only refers to “*due consultation with ADT*”, and this does not necessarily imply that ADT had the right to veto a particular determination.

- 4.9 The certification of interim payments was initiated by the submission by the Contractor to the Supervisor, of detailed bills with explanatory drawings, which would be thoroughly checked by the Supervisor, before issuing a certificate for payment. The payment request, prepared and endorsed by the Supervisor, would be checked, or reviewed, by the Project Officer, and would then pass to counter-signing by the Director NID, and finally by the ADT Financial Controller. According to the verbal evidence, the Supervisor was required to give a breakdown of rates not included in the original Contract, and an explanation why such rate had been approved. On the other hand, the role of the Project Officer was to check that “*all documents required by the procedural template were present*”. It is understood that the endorsements of the Director NID and of the ADT Financial Controller were not meant to be, and indeed could not be, a check on the correctness or validity of the certificate submitted by the Supervisor, but were really required as confirmation of the authorization for payment to be effected.
- 4.10 This is not necessarily the process which is envisaged in the Contract, in the sense that it is not clear what would have been the legal position had the Supervisor “determined” a modification, or certified a payment, and, subsequently, such determination, or payment certificate, not been approved by the Employer.
- 4.11 The reference to the FIDIC format for the Contract is perhaps misleading, in the sense that the form of Contract used is not actually a FIDIC contract, but a *modified* version of FIDIC. Modifications to a standard form of contract, as is FIDIC, may have a significant effect on the way the contract actually operates. In the FIDIC Contract, the “Engineer” is *not* necessarily the consultant, or the one who is the author of, or takes responsibility for, the design work. The Engineer is the person, appointed by Employer, with the knowledge and acceptance of the Contractor, to administer the Contract in a *fair and impartial* fashion. FIDIC envisages that the Engineer is given the authority, by both parties, to determine claims on increases in

programme, or in cost. This authority may be tempered by the requirement for certain approvals from the Employer, but such limitations on the Engineer's authority, (for example a limit on the amount that the Engineer can approve without additional authority from the Employer), have to be specified in the Particular Conditions of the Contract. The basic concept is that a determination, or any other decision by the Engineer, is binding unless there is a different but amicable settlement between Employer and Contractor, or unless either party resorts to arbitration, or to any dispute resolution mechanism envisaged in the Contract.

- 4.12 In any case, in answer to the question whether ADT had established clear and transparent procedures for the handling of variations, one could therefore answer that, at least in theory, such procedures existed.

5. Selection or Nomination of the Supervisor

- 5.1 In view of the very particular role of the Supervisor or "Engineer", it is very questionable whether the concept behind the Tendering format, which envisaged the nomination of the Supervisor by the Contractor, was a good idea. In the opinion of the undersigned, this is the single most questionable aspect of the process envisaged – not necessarily because the Supervisors did not do their work properly (and indeed there is no evidence at all in this sense) but because the perception of transparency, effectiveness and accountability is clouded by the obvious link between Contractor and Supervisor.
- 5.2 Even if ADT sought to temper the link between Contractor and Supervisor, by requiring a separate agreement to be signed between ADT and Supervisor, the fact that the selection of the Supervisor occurred via nomination in the Contractor's tender, that the honorarium paid to the Supervisor was based on the contents of the same tender, and that, if the ADT were to terminate the Contract with the Supervisor, the Contractor were required to nominate an alternative Supervisor, reinforce the feeling that the link between Supervisor and Contractor remains throughout the life of the Contract.
- 5.3 It is clear that the members of the PAC felt that there was such a link between Supervisor and Contractor, and in one exchange asked whether the ADT made any independent checks on what the Supervisor was certifying. Strictly speaking, in terms of the FIDIC Contract, such checks could not be used to challenge a certified

payment, unless it occurred via the procedures established in the Contract, which eventually required either the agreement of the Contractor, or a decision by an Arbitrator.

- 5.4 In addition, the way that the role of the Supervisor was defined, in different parts of the Contract, served to further blur the “separation” between Supervisor and Contractor. Amongst his various duties, the Supervisor was made responsible for the management, safety and quality assurance of the works; or to certify the Contractor’s test results, or quality certificates. Effectively, this role “tied” him even more closely to the Contractor, and made it conceptually more difficult for him to assume an impartial role, as envisaged in FIDIC, or even, at the same time, acting as the Employer’s agent.
- 5.5 In the opinion of the undersigned, transparency, effectiveness and accountability are more likely to be achieved, or to be perceived as achieved, if the Supervisor is selected directly by the Employer – and is therefore the person of trust of the Employer, rather than the person of trust of the Contractor. In addition, there should be a more careful definition of the role of the Supervisor, so as to avoid clouding his having to operate under conflicting hats – at some stage, acting on behalf of Contractor, at another stage on behalf of the ADT, and at others still expected to act impartially. (One could also add that it is not clear why, in the agreement signed between ADT and Supervisor, the Supervisors’ respective spouses were required to appear as surety?)
- 5.6 If the objective of the Tender was to simplify, and perhaps diversify, the process of selection of the “Supervisor”, it is clear that this objective was not achieved. Out of six Contracts examined, four separate, and competing, Tenderers nominated the same Supervisor, and the remaining two nominated a second Supervisor. Surely, this was an unusual coincidence.

6.0 Conclusions

- 6.1 Significant variances occurred in most of the Contracts let in connection with the ADT Italian Financial Protocol Road Construction Projects. The main causes of such variances were the changes in the envisaged common service duct, the unexpected work in shifting and upgrading services, the unexpected amount of retaining walls that had to be dismantled and re-built, and to a lesser degree additional works, such as an additional service road, or additional costs, such as excavation dumping charges. In this sense, it could be stated that the increase in costs was justifiable.
- 6.2 The undersigned is of the opinion that, on the evidence available, these variations were **not** the result of a poor pre-tender preparation; on the contrary, the pre-tender work was meticulous and detailed. The bigger part of the variations were the result of changing requirements by the service utility companies, or by services' upgrading, which should have been the responsibility of the utility companies themselves. The introduction of better systems of underground services documentation is necessary to ensure that, in future, designers could have a better picture of the existing situation, and would therefore have "less surprises" once the works have started. As things stand, it was very difficult for the incidents that led to cost over-runs to have been foreseen, other than by a blanket contingency allowance.
- 6.3 The question whether the costs for such additional works constituted value for money can only be addressed, at this stage, by evaluating the processes that were in place in order to ensure that this was the case. The procedure envisaged was quite normal, in the sense that Contractor submittals and claims would be evaluated by an independent professional, in this case called the Supervisor, and either negotiated amicably, or, in the absence of an agreement, "determined" by the Supervisor. The cost experience that ADT has, for road construction contracts, should have been more formally used to assist the Supervisor, or anybody in a similar role, in determining appropriate rates for those tasks that, for some reason, were not included in the relative Contract – however, the form of Contract selected did not envisage this mechanism. Had there been a mechanism wherein the cost experience accumulated by ADT could have been used to assess the cost of the variations, a better way of assuring "value for money" would have been available. This does not

imply that the variations did not actually give “value for money”; simply that a better system would have ensured this was better perceived.

- 6.4 The role of the Supervisor (or, as apparently envisaged, the Engineer, in terms of the FIDIC form of Contracts), was **not** correctly defined. In the context of FIDIC, it would be unusual, and indeed incorrect, to require the Contractor to nominate his “preferred” Supervisor. The Supervisor, or Engineer, is given, by the FIDIC form of Contract, very strong powers of determination of claims, including time extensions and cost increases. Strictly speaking, other than a cap on the amount that the Supervisor, or Engineer, can determine without endorsement by the Employer, the Employer cannot influence the determination process (i.e., the determination by the Supervisor or Engineer cannot be made subject to the Employer’s approval, since this would negate the “impartiality” of the Supervisor or Engineer). Of course, the Employer could disagree with a particular determination, as could the Contractor, but in this case the means of redress would be Adjudication or Arbitration.
- 6.5 In the light of the above, it would seem sensible that the Employer directly selects the Supervisor, or Engineer, in which he has complete trust, with the Contractor invited to accept or otherwise the Employer’s nomination. In this context, it can be commented that the situation was compounded by defining the role of the Supervisor as including a responsibility for the management, safety and quality assurance of the Works, since this binds him more closely to the Contractor, from whom he is meant to be independent, or at arm’s length. If it were required that the Contractor demonstrate that he had professionally qualified personnel to carry out this task, then prospective bidders could have been required to nominate a professional (Perit) to take such a responsibility, but this is not the same thing as nominating the Supervisor (or Engineer), in the sense envisaged by FIDIC. As pointed out earlier, the process would have been more robust had the Employer directly selected the professional required to assume this crucial role within the FIDIC form of Contract.
- 6.6 In view of the specific requirements of ADT, and Public Procurement Regulations, where the approval of variations is normally reserved to the relative Contracts Committee, one could question whether the FIDIC form of Contract is at all suitable, unless it is specifically desired to assign the role of determination to the

nominated Engineer. It would therefore be advisable to examine other forms of contract, besides FIDIC, to assess whether they better suit ADT's purposes. The key to better project management is the selection of the appropriate form of contract, and to a sharper definition of the role of each party in the contract.

- 6.7 One could of course argue that the FIDIC form of contract could be modified to suit a specific procurement and approvals process, as desired by ADT. 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.
- 6.8 In the light of the above, one could conclude that ADT's objective of assuring transparency, accountability and "value for money" may have been defeated through the form of contract that envisaged close links, actual or perceived, between Contractors and Supervisors.
- 6.9 Finally, it has to be commented that it is very difficult for contracts of this nature not to have cost variations, and possibly significant ones. Cost certainty could be obtained by other forms of contract – for example, lump sum contracts; however, achieving cost certainty is not the same thing as achieving a least cost contract. In other words, if cost certainty were the topmost priority, this can only be achieved by accepting that the Contractor, who would, in this case, shoulder a significant part of the risk of additional, unforeseen, costs, would require the payment of a premium over and above his normal rates.
- 6.10 In conclusion, therefore, the undersigned is of the opinion that the recommendation for the future should be that of ensuring that a proper form of contract, with properly defined roles and responsibilities, corresponding to the procedures and authorities that are required by law or regulation, be selected before publishing a tender.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'F'

**Document F.01 – Bank Guarantee – ERGON s.c.a.r.l. – Bank of Valletta p.l.c
Dated 13 October 2004**



Bank of Valletta p.l.c.
BOV Centre
High Street
Sliema, SLM16
Malta
Tel: 23884146-8 Fax: 23884150

Date: 13/10/2004 13:32

Branch Naxxar

Gtee No: G63TFC4167

ADT-Malta Transport Authority
Sa Maison Road
Floriana
MSD 08
Malta

Dear Sirs,

Our Guarantee No. G63TFC4167 for Lm 212,400.00

By order of ERGON s.c.a.r.l.

Reference is made to the contract related to the execution of road works in the limits of Rabat and Mosta both in Malta, (RD126/02/9) (hereinafter referred to as the Contract) entered into between you and Ergon s.c.a.r.l. of Via Antonio da Noli n 2/4 50127 Firenze, Italy, hereinafter referred to as the Contractor, whereby the Contractor is to receive an advance payment of Lm212,400 (Maltese liri two hundred twelve thousand and four hundred) and whereby the Contractor is required to furnish a bank guarantee for refund of the said advance payment.

On instructions of the Contractor, we, Bank of Valletta p.l.c., Naxxar Branch, hereby irrevocably undertake to pay you any amount not exceeding Lm212,400 (Maltese liri two hundred twelve thousand and four hundred) in the event that the Contractor fails to fulfil its obligations under the Contract.

It is understood that this guarantee will become payable on your first written demand and that is shall not be incumbent upon us to verify whether such demand is justified.

For avoidance of doubt and for all intents and purposes of law, it is hereby specifically declared that although this instrument gives rise to legal relations between the Guarantor and Beneficiary, this guarantee does not exempt the Contractor from any obligations, acts of performance, or undertakings assumed under the Contract.

This Guarantee expires on the 13th March, 2005 whether this document is returned to us or not and unless it is extended by us or returned to us for cancellation before that date, any demand made by you for payment must be received by us in writing not later than the aforementioned expiry date.

This guarantee becomes operative in so far as Lm180,000 (one hundred and eighty thousand Maltese liri) is concerned, only upon receipt by us of payment of Lm180,000 (Maltese liri one hundred and eighty thousand) for account no: 40013422910 of Ergon s.c.a.r.l. and in so far as Lm32,400 (Maltese liri thirty two thousand four hundred) is concerned, only upon receipt by us of a document issued by the VAT Dept. evidencing payment of Lm32,400 (Maltese liri thirty two thousand four hundred) VAT by ADT - Malta Transport Authority on behalf of Ergon s.c.a.r.l. quoting RD 126/02/9.

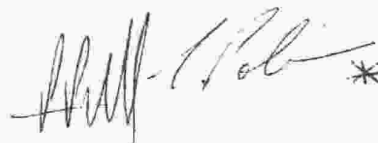
This document should be returned to us on utilisation, for cancellation, expiry or in the event that the Guarantee is no longer required.

This guarantee is personal to yourselves and is not transferable or assignable.

Yours faithfully,


Authorised Signatories
Bank of Valletta p.l.c.

Registration Number: C2833
Website: <http://www.bov.com>
E-mail Address: customercare@bov.com





Document F.02 – Tender General Conditions – Article 44 - Prefinancing

Article 44: Prefinancing

If the Special Conditions so provide, the Contractor shall, at his request, be granted prefinancing for operations connected with the execution of the works, in the cases listed hereinafter:

- a) as a lump-sum advance enabling him to meet expenditure resulting from the commencement of the contract;
- b) if he affords proof of the conclusion of a contract for the purchase or order of materials, plant, equipment, machines and tools necessary for the execution of the contract, and of any other substantial prior expenses such as the acquisition of patents or study costs.

44.2 Such prefinancing, which shall not exceed 10% of the original contract price for the lump-sum advance referred to in Article 44.1(a) and 20% of the contract price for all the other prefinancing referred to in Article 44.1(b).

44.3 No prefinancing shall be granted until:

- a) the conclusion of the contract;
- b) provision to the Contracting Authority by the Contractor of the performance guarantee in accordance with Article 13; and
- c) provision to the Contracting Authority by the Contractor of a separate directly liable guarantee for the full amount of prefinancing provided by the institution referred to in Article 13.3, which shall remain effective until the prefinancing has been completely repaid by the Contractor out of interim payments under the contract.

44.4 The Contractor shall use prefinancing exclusively for operations connected with the execution of works. Should the Contractor misuse any portion of the prefinancing, it shall become due and repayable immediately and no further prefinancing will be paid to him.

44.5 Should the prefinancing guarantee cease to be valid and the Contractor fail to revalidate it, the Contracting Authority may either deduct the amount of the prefinancing from future payments due to the Contractor under the contract or apply the provisions of Article 13.6.

44.6 If the contract is terminated for any reason whatsoever, the guarantees securing the prefinancing may be invoked immediately in order to repay the balance of the prefinancing still owed by the Contractor, and the guarantor shall not delay payment or raise objection for any reason whatever.

44.7 The prefinancing guarantee provided for in Article 44 shall be released as and when advances are repaid.

44.8 Further conditions and procedures for granting and repaying prefinancing shall be as laid down in the Special Conditions.

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'F'

Document F.03 – Contracts Circular No 18/2008 – Contracting Procedures

CT 2455/2005

Contracts Circular No 18/2008

Department of Contracts
Notre Dame Ravelin
Floriana

To Ministries and
Heads of Departments

02 June 2008

CONTRACTING PROCEDURES

Heads of Department and Government Agencies are to ensure that all contracting procedures are carried out in a spirit of fairness, transparency and non-discrimination between economic operators. In this regard, public procurement is to follow the procedures as laid out in the Public Contracts Regulations.

In order to achieve these objectives, tender documents should be drafted in a manner that clearly sets out the way that bids are to be adjudicated. Ambiguous expressions should be avoided. Particularly for high valued tenders it is recommended that contracting authorities obtain the necessary assurance that bidders have the necessary experience to offer the services or to carry out the works that are being requested. In these types of tenders, there should be a clear distinction between the selection and award phase. Experience can be used as a selection criteria but it cannot be used as an award criteria. The Department of Contracts had put on line tender templates to guide contracting authorities when drafting new tenders. It is recommended, that contracting authorities should always draft tenders on the basis of the latest templates being provided on the Department of Contracts website – <http://contracts.gov.mt/tenderstemplates.asp>.

The adjudication of bids should be carried out solely on the basis of the tender conditions. Evaluation Committees are to ensure that bids are fully administratively and technically compliant with the tender conditions. This will ensure fairness and transparency. Clear conclusions and recommendations will reduce the number of objections made by economic operators thereby speeding up the procurement process.

Contracting authorities should familiarise themselves with the different procurement procedures laid out in the Public Contracts Regulations. These are the (a) the open procedure (b) the restricted procedure (c) the negotiated procedure and (d) the competitive dialogue. The regulations provide for ways by which the stipulated publication period of 52 days can be reduced. Contracting authorities are advised to familiarise themselves with the provisions of the accelerated procedure. In order to reduce further the publication period, contracting authorities are advised to publish a Prior Information Notice covering public procurement for

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'F'

the following twelve (12) months. This notice should be published as soon as the availability of funds to finance that particular procurement is conformed.

Variations on contracts should be reduced to the barest minimum. This objective can be achieved if proper planning is carried out prior to the publication of tenders. In order to assist contracting authorities in the planning process, the Department of Contracts has prepared the attached check list in respect of works tenders. This check list should invariably be submitted with requests for the publication of works tenders. The Department of Contracts will not consider any requests for variations unless there will be any explanations on the background to the cause of such variations, the effect on the total cost of the tender and any effect on the recurrent expenditure that will ensue. Furthermore, contracting authorities are to explain what were the unforeseeable events that prevailed and specify whether such a variation could have been avoided. Heads of contracting authorities are to publish all variations approved by them in the Malta Government Gazette every six months.

Francis Attard
Director General (Contracts)

Document F.03– Contracts Circular No 18/2008 – Contracting Procedures (continued)

Check List for Tenders involving Civil Works

Kindly indicate which type of works is to be carried out (eg. Marine, road, etc).

.....

Please mark which preparatory works have been carried out.

Prior to the issuing of a tender one has to make sure that:

Marine / Dredging Works

- ❑ The proposed project is covered by a MEPA permit;
- ❑ Pricking at frequent intervals to determine the profile of the rock sea bed;
- ❑ Soundings at frequent intervals to determine the volume of the overburden is calculated with accuracy.

Road Works

1) Resurfacing of Existing Roads

- ❑ Core Drillings at frequent intervals;
- ❑ Contact with Enemalta Corporation to identify existing services and projected commitments for the next 20 years;
- ❑ Contact with Water Services Corporation to identify existing services and projected commitments for the next 20 years.

2) Construction of New Roads

- ❑ The projected road is covered by a MEPA permit;

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'F'

- Contact with Enemalta Corporation to identify existing services and projected commitments for the next 20 years;
- Contact with Water Services Corporation to identify existing services and projected commitments for the next 20 years;
- Expropriation of private land by Land Department and publication of President's declaration in the Malta Government Gazette;
- Core drillings at frequent intervals to establish the nature of the terrain prior to the design of the road.

Buildings.... Flats, Schools etc.

- The proposed buildings are covered by a MEPA permit;
- Private land has been expropriated or confirmation that the land is Government owned;
- Core drillings at frequent intervals prior to the design of the proposed building.

Tunnels, Galleries and Shafts

- The proposed buildings are covered by a MEPA permit;
- Core drillings at frequent intervals so that the nature of the terrain is determined with accuracy prior to establishing the best route for the tunnel or gallery.

Architect in charge of works _____

Official Position _____

Date _____

Signature _____

**Road construction projects partly financed through
Fifth Italo-Maltese Financial Protocol**

Appendix 'G'

**Document G.01 – List of Road Construction Projects of the
Fifth Italo-Maltese Financial Protocol**

LOT	Length/ final cost		Covering	Contractor(s)
1	7.4 km		<ul style="list-style-type: none"> • Targa Gap through Tal-Qlejja Junction to Mtarfa Junction • Tal-Qlejja to Zebbug 	ERGON (LOT 1) SIG (LOT 1A)
	Lm 4,700,180	LOT 1		
	<u>Lm 2,853,750</u>	LOT 1A		
	Lm 7,553,930	Total		
2	6.8 km		<ul style="list-style-type: none"> • Mtarfa Junction through Junction at De Rohan Gate, Zebbug to Junction to Siggiewi 	Fill. Basilotta (LOT 2) INTEGRA (LOT 2A)
	Lm 2,700,834	LOT 2		
	<u>Lm 2,040,653</u>	LOT 2A		
	Lm 4,741,487	Total		
3	5.2 km		<ul style="list-style-type: none"> • Junction to Siggiewi direction towards Qormi • Junction to Siggiewi direction towards Siggiewi • Luqa Road, Qormi to Junction at Cargo Air Terminal, Luqa 	Fill. Anastasi (LOT 3) Mattioli (LOT 3A)
	Lm 5,183,718	LOT 3		
	<u>Lm 1,325,158</u>	LOT 3A		
	Lm 6,508,876			
Total	19.4 km			
	Lm 18,804,293			

*Sources: Road lengths, coverage, contractors – ADT Presentation to PAC, March 2007
Project costs – NAO working papers (compiled from ADT FBoQs)*