



Inquiry and Report on the Purchase of Personal Computers by Enemalta Corporation

Report of the Auditor General

January 2009

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PROCUREMENT OF PERSONAL COMPUTERS BY ENEMALTA CORPORATION

EXECUTIVE SUMMARY

The Prime Minister in his former capacity as Minister responsible for finance requested the National Audit Office to conduct an inquiry into and report on the purchase of personal computers by Enemalta Corporation. Questions had been raised in the local media about the way the computers were procured. It was reported that a tender valued well over Lm20,000 was adjudicated departmentally and that part of the tender was awarded to a local company which was managed by the then serving Enemalta Corporation Chairman.

Terms of Reference

1. The inquiry followed the terms of reference as communicated in the letter of commission. In substance, these required NAO to establish whether, in the matter of the purchase of personal computers by Enemalta Corporation:
 - i. the relevant procurement procedures were complied with;
 - ii there was any involvement of the Corporation's then Chairman in the procurement process and whether this gives rise to a possible breach of ethics.

Procurement Regulations

2. An important point which had to be considered in this particular case was the correct applicability of laws and regulations concerning public procurement. By way of background information, in view of Malta's planned accession to the European Union and the consequent transposition of laws, a new set of regulations was to enter into force regulating public procurement procedures. However, in anticipation of this new legislation, on 1 January 2004, Legal Notice 70/96 was brought into effect on a temporary basis. Once the call for tenders by Enemalta Corporation to purchase a number of computers was made on 16 April 2004, the provisions of LN 70/96 (Procurement Regulations) prevailed.

Findings

Call for Tenders

3. A call for tenders was issued by Enemalta Corporation in April 2004 for the supply of personal computers with an estimated value of Lm15,000-Lm20,000, valid for a period of six months. The estimated quantity of computers required during the six month period was fifty (50) although an addendum to the Bill of Quantities stated that "this quantity is only

for estimation purposes and is by no means guaranteed. It can be over or above.” *[this should presumably read “over or under”]*. The insertion of such unsigned and undated clauses in the tender document is unacceptable.

Adjudication of Offers and Award of Tender

4. The fourteen offers received were evaluated by the Adjudication Board composed of Enemalta employees and the tender was eventually split between two tenderers. The selection of two separate bidders was reportedly made on the grounds that one of them supplied machines with a slightly higher specification.
5. An extension to the tender was subsequently approved and an additional ninety (90) PCs were procured. This was effected as the Corporation maintained that this was a period contract and not a departmental tender, therefore any amount of computers could be procured within the six month period covered by the tender. However, period contracts are, by definition, public contracts under the supervision and constant monitoring and surveillance of the Director General Contracts. It is not understood on what grounds Enemalta treated this case as a period contract.
6. Although only one (minimum) computer specification was requested in the tender document, Enemalta’s Adjudication Board decided to procure two different types of PCs - one for desktop use and another for power users. While this can be seen as making business sense i.e. procure higher-end machines (at an additional cost) for users who will benefit from faster machines, it was not in line with the tender’s specification which should have clearly specified what the Corporation really required; i.e. two different types of computers.
7. The tender document stated that the machines supplied should have a minimum of 4 PCI slots. The PC submitted by one of the tenderers only had 3 PCI slots, which therefore puts it below the minimum required specification. Enemalta stated that the requirement was not critical and was offset by having another peripheral (such as sound or network interface) on-board instead of occupying a PCI slot. While this reasoning may make technical sense, the tender document specifies 4 PCI slots and thus would have prevented other suppliers from bidding for the tender.
8. The tender document does not directly or indirectly exclude locally assembled computers. However, local assemblers were excluded in the adjudication report. The Corporation could not at the time substantiate the claim that locally assembled machines were less reliable.

Chairman’s Role

9. No evidence was found indicating directly or indirectly any involvement by the Corporation’s then Chairman at any stage of the process of ordering, adjudication or award of the Letters of Acceptance to the selected suppliers. The then Chairman’s consistent and repeated denial of any involvement at any stage of the purchasing process was confirmed by the Corporation’s procurement officials and by NAO when the various files and documents were examined.

Conclusions and Recommendations

10. The call for tenders for the supply of the 50 PCs was not preceded by an evaluation of the Corporation's actual requirements - neither by quantity nor by type of computers. Such requirements should have been duly established both for budgetary as well as tendering procedure purposes.
11. Procurement officers are expected to ensure that the estimated cost was within the Corporation's budget and to scrupulously follow the applicable Public Service (Procurement) Regulations.
12. No fraud was detected in the purchasing process of the 170 personal computers. At the same time, Enemalta Corporation could have registered some savings had a call for tenders - with clear specifications - been issued for such amount in the first place rather than initially ordering 80 PCs and two months later purchasing another lot of 90 PCs.
13. The case reviewed where a public corporation ends up spending around Lm62,000 on 170 machines (dealing concurrently with two suppliers) managed by a single contract whose ambit was not supposed to exceed Lm20,000 on 50 units and one supplier, not only reveals weaknesses in planning and control but a lack of coordination between the component Sections of the Corporation. More effective communication between the Procurement Section and other divisions within the Corporation should have been in place.

Ultimately it is only reasonable that taxpayers expect all entities funded out of public moneys to invariably ensure that expenditure policies, procedures and decisions meet high standards of probity and financial prudence that will withstand parliamentary and public scrutiny.

PROCUREMENT OF PERSONAL COMPUTERS BY ENEMALTA CORPORATION

INTRODUCTION

The Permanent Secretary, Ministry of Finance informed the Auditor General that the Prime Minister, in his capacity as Minister responsible for finance, had requested the National Audit Office (NAO), in terms of Section 9 of Cap. 396 of the Laws of Malta, to conduct an inquiry into the purchase of personal computers by Enemalta Corporation (*vide* Appendix I).

Questions had been raised in the local media about the way the computers were procured. It had been reported that a tender valued well over Lm20,000 was adjudicated departmentally by Enemalta Corporation. This was done despite provisions in the Public Service (Procurement) Regulations requiring tenders of this size and import to be published and conducted under the direct surveillance and control of the Director General Contracts, by public competitive bidding. Furthermore, part of the tender was awarded departmentally to a local company which was managed by the then serving Enemalta Corporation Chairman.

2. TERMS OF REFERENCE

The inquiry strictly followed the terms of reference as communicated by NAO to the Prime Minister on 3 January 2007 (*vide* Appendix II). In substance, NAO was to report on whether, in the matter of the purchase of personal computers by Enemalta Corporation:

- i. the relevant procurement procedures were complied with;
- ii there was any involvement of the Corporation's Chairman in the procurement process and whether this gives rise to a possible breach of ethics.

3. METHODOLOGY

The investigation was conducted in accordance with generally accepted practices, principles, norms, techniques, policies and guidelines applicable to National Audit Office inquiries, and the provisions of Act XVI of 1997. Where necessary, meetings and interviews were held with members and other officials on the Board of Management, staff of the Corporation, and other persons directly or indirectly involved in the matter. Interviews were held *viva voce* and recordings were kept. All relevant documentation and information required, on which NAO findings and conclusions are ultimately based, were made available to this Office.

NAO perused the relative tender documentation and the accompanying terms and conditions as stipulated in Forms TCEC 2-8, and the minuted proceedings of meetings held by Enemalta Board of Directors during period 1 April 2004 up to the date of issue of the last letter of acceptance. Any ensuing correspondence exchanged was viewed as and where necessary.

NAO engaged the services of professional advisers to assist this Office and to evaluate the more technical aspects of the investigation.

Regulations or Schedules to which reference is made in the course of the Report are generally produced in their entirety in Appendix III.

4. BACKGROUND

Enemalta Corporation is equipped with around two hundred (200) personal computers and an additional number of laptops. Practically every desk-bound officer or employee at the Corporation is supplied with a desktop terminal. Naturally, the degree of sophistication of these micros varies according to particular user needs and the uses they are actually put to; in actual fact technical personnel and other “knowledge workers” require more advanced machines, computing power and security features at their disposal to handle specialized software packages and applications efficiently, free of any networking or incompatibility problems.

During interviews held with Enemalta personnel it was stated that, at the time, the Corporation was in the course of processing a tender for the supply of financial and other software, namely, an information management package system that would provide for better networking, manageability and security. It is presumed the related studies were therefore in hand before embarking on such a project from the point of view of software. However, although the introduction of the new systems required a parallel and total overhaul of the existing hardware - which is the subject of this report - no proper plan seems to have been devised and presented with a view to investigating and identifying the Corporation’s real needs in that regard. This was the cause for the resulting variations between estimated requirements and the number of computers actually purchased.

A call for tenders for the supply of personal computers was issued by Enemalta Corporation on 16 April 2004. The estimated value of the tender was Lm15,000-Lm20,000 and was valid for a period of six months from the date of expiration of the period fixed for delivery (Clause 4 of E/E/T/4/2004). The estimated quantity of computers required during the six-month period was fifty (50), although an addendum to page 18 of the tender document stated that “this quantity is only for estimation purposes and is by no means guaranteed. It can be over or above.” [*this should presumably read ‘over or under’*]

By the closing date, fifteen tenders were received with twenty-four offers. Taking the average price tendered as a benchmark, the Corporation’s Adjudicating Committee classified a number of offers as high-priced and were eliminated. Other offers were eliminated as suppliers failed to comply with the 3-year warranty on parts and labour or

failed to comply with other requirements stipulated in the tender document. The remaining companies were classified into “locally assembled” and “international brands”. In the opinion of the Adjudicating Board, internationally branded PCs offered more reliability and local suppliers were therefore eliminated.

In view of the above, the Adjudicating Board recommended that:

- NEC PCs (FGL Information Technology Ltd, a subsidiary of the Forestals Group of Companies) are procured for office automation utilization given that they meet requirements and offer good performance and value; and
- Fujitsu Siemens PCs (Merlin Computers Ltd) are procured for engineering and high-end applications given that these offer enhanced performance and administrative utilities.

On 16 September 2004, the letter of acceptance was issued to FGL Information Technology Ltd for the supply of 50 PCs NEC P/Mate ML6 and 50 CRT LG Monitors 17” for a total value of Lm16,900 (inclusive of VAT). On the same date, another letter of acceptance was issued to Merlin Computers Ltd for the supply of 30 PCs Fujitsu Siemens W600 POWER and 30 CRT Monitors 17” B796-1 for a total cost of Lm11,640 (inclusive of VAT).

On 22 September 2004, FGL Information Technology Ltd requested to increase the price of monitors by Lm5 each, on account of the Eco-Contribution introduced by Government as from 1st September 2004, and which thus could not have been included in the original pricing when offer was submitted. The Corporation accepted the request.

An extension to tender was approved by Enemalta’s Tender Sub-Committee and, on 11 January 2005, suppliers were requested to provide - at the original price - additional computers and monitors, namely:

FGL Information Technology Ltd - 80 PCs and 80 monitors
Merlin Computers Ltd - 40 PCs and 40 monitors.

Of this second order, Merlin Computers Ltd delivered all the PCs while FGL Information Technology Ltd delivered only 50.

Questions and observations about the way the equipment was procured were first raised in the media in May 2005 where it was reported that a tender valued well over Lm20,000 was adjudicated departmentally by Enemalta Corporation despite provisions in the Public Service (Procurement) Regulations requiring tenders of this size and import to be published and conducted under the direct surveillance and control of the Director General Contracts, by public competitive bidding.

Furthermore, the media had observed that part of the tender was awarded departmentally to FGL Information Technology Ltd by the then serving Enemalta Corporation Chairman who, being at the same time the Managing Director of Forestals Group of Companies Ltd, had an undeclared interest in the matter. No wrongdoing on the part of anyone was, however, alleged.

A brief chronology of salient events discussed in this Report is included at Appendix IV.

4.1 Objectives

In outline, these were the aspects of the matter which this Office endeavoured to clarify:

- Was there active, direct or indirect involvement or participation by the then Chairman by trying to initiate, influence or manoeuvre anyone in the course of the procurement proceedings?
- Was the Chairman aware of a real or perceived conflict of interest in his regard in the matter?
- Did the Chairman disclose his real or perceived interest to the responsible Minister spontaneously in advance as codes of ethics would require one to do in similar circumstances?
- What motivated the Corporation to issue the tender internally instead of resorting to public contract?
- What weaknesses in the administrative system of the Corporation, if any, are exposed by this case, and how might these be addressed and resolved?

4.2 Procurement Regulations and Procedures

The legislation and related literature regulating procurement that was considered included:

- the Enemalta Act (Cap. 272) of the Laws of Malta;
- the Public Service (Procurement) Regulations which forms part of the subsidiary legislation under The Financial Administration and Audit Act (Cap. 174.02) - Legal Notice 70/96
- Legal Notice 388 of 2003 which substituted Legal Notice 70/96;
- *“Ir-Regolamenti dwar l-Akkwisti Pubblici ta’ Entitajiet li joperaw fis-settur ta’ l-Ilma, l-Energija, it-Transport u s-Servizzi Postali”* which came into force on 3 June 2005;
- the “Code of Ethics for Board Directors in the Public Sector” - a Management and Personnel Office (MPO) publication;
- the “Code of Ethics for Employees in the Public Sector” also issued by the MPO;
- relevant codes of practice, policy statements and memos internal to Enemalta Corporation and its governing Board concerning procedures regulating procurement and Adjudicating Boards and other committees;
- various relevant circulars and directives issued by the Director General Contracts.

4.2.1 Applicability of Procurement Legislation

An important point which had to be considered was the correct applicability of laws and regulations concerning public procurements in this particular case.

In view of Malta’s accession to the European Union on 1 May 2004 and the consequent re-alignment, harmonization and transposition of laws, a new regime of public procurement regulations was due to enter into force upon accession date. In anticipation of this new legislation, on 1 January 2004, Legal Notice 70/96 entered into a transitory and provisional phase lasting for four months. In view of the fact that the call for tenders

by Enemalta Corporation to purchase the computers in question was issued on 16 April 2004, the provisions of LN 70/96 (Procurement Regulations) prevailed.

4.3 Types of Procurement and Related Procedures

Regulation 11 of Legal Notice 70/96 makes a fundamental distinction between various types of procurement determined primarily by the cost factor involved, and further identified by the particular procedure that is prescribed. Procedures range from simple direct purchases from the open market, or after obtaining quotations, by departmental call for tenders, or after a public call for tenders by the Director General Contracts. For procurements costing up to Lm2,500 the procedure adopted is facultative and, for convenience, these are referred to here as Category A Contracts (Section 11a). For purchases costing over Lm2,500 but under Lm20,000 a departmental call for tenders is mandatory and these are referred to as Category B Contracts (Section 11b). Finally, for procurements costing over Lm20,000 a public call for tenders is mandatory, and this type of procurement is referred to in this Report as Category C Contracts (Section 11c).

5. GENERAL FINDINGS

With respect to part (i) of the Terms of Reference i.e. Extent of Compliance to Established Procurement Procedures:

5.1 A “Category B” tender was turned into a “Category C” tender after the issue of the Letter of Acceptance.

According to the initial estimate, the number of computers required during the six-month period covered by the tender was fifty (50). However, a clause added on page 18 of the tender document stated that “this quantity is for estimation purposes and is by no means guaranteed. It can be over or above” [*this should presumably read “over or under”*]. The insertion of such unsigned and undated clauses in the tender document cannot be accepted. As the Form stood (that is prior to the introduction of the ‘foreign’ clause), any quantities could in fact have been ordered, that is anything down to unit (1) quantity. And the upper limit could always be kept determined by the threshold as imposed by the Regulation under which the contract is governed, in this case Regulation 11.

By establishing the estimated number required at fifty (50) pieces, however - which number could then be (and indeed was) exceeded upwards - the added clause had the effect of potentially modifying the terms and conditions stipulated for the tender.

Two errors and their effects are identified here, namely:

- i. by quantifying its requirements the Corporation was now committed to purchase at least fifty (50) pieces which, given the other decision of selecting two separate instead of the conventionally accepted single successful tenderer, resulted in a commitment on the part of the Corporation to acquire at least a total of 100 machines; and

- ii. such commitment raises in consequence the cost of the contract to one that is in excess, and therefore in breach, of the threshold stipulated in the financial regulations for items that can be purchased internally by departmental tender.

The National Audit Office does not see any reason for the addendum to the standard terms and conditions of the tender document. In NAO's view, under no circumstances should the printed wording or text on prescribed tendering documents be altered.

5.1.2 Having one tender, one package, two sets of specifications, two concurrent contracts and two successful bidders constitutes a departure from the norm, namely the advantage of having one tender, one set of specifications, one package, one successful bidder and one contract.

TCEC Form 2 paragraph 3 speaks of "the successful tender" (singular). It is evident that the selection of two separate, successful tenderers, although not prohibited, is generally not envisaged in the terms and conditions governing the tender. The condition conferring the right on Enemalta to "*accept or reject wholly or in part ...*" does not mean accepting more than one bid which then infringe the other conditions of the contract.

Again, the Surety and Bank Guarantee referred to in and required under paragraph 8 of said Form TCEC 2 "*are to be furnished by successful tenderer on value of order in excess of Lm4,000*".

The selection of two successful bidders on one tender has a disadvantage also on the practical level. The selection of two separate bidders was apparently made on the grounds that one of them supplied machines with a slightly higher specification. This Office maintains that choosing two models within the same brand would arguably have made better business sense. For one, higher orders from the same supplier usually attract lower prices; moreover, the same brand would presumably have meant a lesser probability of encountering incompatibility problems and better means to solve them if such problems were to arise. Moreover, closer examination reveals that the difference in both specifications and price was quite marginal and it is highly improbable that reputable hi-tech suppliers, like the ones involved in this particular case, should find it difficult or be unable to offer and deliver models in a sufficiently broad and inclusive range to accommodate the whole spectrum of Enemalta's requirements. The Tender Sub-Committee did express similar doubts to the Adjudicating Board but these were somehow overruled.

5.1.3 Period Contract rules apply to large departmental contracts of a nature that is usually defined and administered exclusively by the Director General Contracts (Regulation 12).

An extension of the tender was subsequently approved and an additional ninety (90) PCs were procured. This was effected as the Corporation maintained that this was a period contract and not a departmental tender, therefore any amount of computers could be procured within the six-month period covered by the tender. However, period contracts

are, by definition, public contracts under the supervision and constant monitoring and surveillance of the Director General Contracts. It is not understood how Enemalta decided that this was to be treated as a period contract.

This is a case where strict separation of duties and responsibilities, particularly between the IT and the procurement staff, could have probably avoided such problems. It is understandable that the Chief Information Officer, as part of the set-up of the ICT Section, should be involved in drawing up the specifications which are essentially a compilation of technical data within his competence. And it is also legitimate for the ICT Section to initiate the tendering process by formally initiating a request. The other conditions of the contract, however, should have been compiled and managed without interference by the Procurement Section which ultimately is, by definition, responsible for managing the contract.

5.1.4 Variations (in excess of estimated cost) were, in effect, determined and approved departmentally.

The conditions on TCEC Form 2 also prohibit the alteration of any element in a tender after its award for at least a period of six months, that is, for the whole duration of the validity of the contract - and that applies to both parties.

Whether Enemalta's should have accepted FGL's claim for the inclusion of the Eco-Contribution to the price originally quoted and accepted on the tender form is a moot point. The documentation makes it clear that prices must be kept constant and unaltered during the whole six-month validity period of the contract. Indeed, if the PCs were in stock, then no Eco-Contribution would have been charged. Likewise were the PCs ordered at any time during the validity period of the contract such price increases could have been absorbed by the supplier in the same way that subsequent variations in price originating from overseas suppliers usually are. Enemalta does not appear to have made any independent verification as to whether these charges were actually incurred or not.

5.2 With respect to part (i) of the Terms of Reference i.e. Extent of Compliance to Established Procurement Procedures - Technical Aspects:

During this audit four technical issues were identified and discussed with Enemalta employees, namely:

5.2.1 Estimation of the Number of Personal Computers Required

Enemalta issued the tender for a six month period and indicated an estimated figure of fifty (50) PCs which were to be procured during these six months. The tender made it clear that the figure of 50 PCs was only an indication of quantities required.

Following discussions with Enemalta's Chief Information Officer (CIO) and its Network Administrator, it was established that Enemalta was in urgent need of procuring new PCs and no proper estimation exercise was carried out before issuing the tender. However,

the CIO stated that once the contract was in place, all new requests for PCs were vetted by IT personnel.

It must be noted that if the tender had indicated the actual figure of machines to be procured (i.e. 170 units) at the outset, then the Corporation might have been offered a better deal.

5.2.2 Procurement based on Two Specifications

The tender document asked for one (minimum) computer specification. However, Enemalta's Adjudication Board decided to procure two different types of PCs, namely:

- one for desktop use
- another for power users.

One cannot ignore the fact that only one specification was included in the original tender. Suppliers who might have been in a position to provide high-end machines would thus not have submitted them in their tender response.

When questioned about the above, Enemalta's Chief Information Officer stated that since he had just commenced his employment with the Corporation and due to the urgent need for new computers, a detailed requirement study could not be carried out before the issue of the tender.

5.2.3 Conformance to Minimum Specifications

The tender document stated that the machines supplied should have a minimum of 4 PCI slots. The NEC machine submitted by FGL Information Technology Ltd only had 3 PCI slots, which therefore puts it below the minimum required specification.

When questioned about the above the Network Administrator stated that the requirement was not critical and was offset by having another peripheral (such as sound or network interface) on-board instead of occupying a PCI slot.

While this reasoning may make technical sense, the tender document specifies 4 PCI slots and thus would have prevented other suppliers with similar machines (i.e. less slots but on-board peripherals) from bidding for the tender.

5.2.4 Exclusion of Local Assemblers

The tender document does not directly or indirectly exclude locally assembled computers. However, local assemblers were then excluded in the adjudication report and this was justified by the following claims:

- ***“Internationally branded PCs offer more professionalism and reliability.”***
This claim could not be substantiated as, prior to 2004, Enemalta had no mechanism to track amount of calls/incidents on desktop machines.

- ***“Leading international brands fulfill various certifications and are tested to guarantee full stability and quality. The electromagnetic compatibility is evaluated by interference immunity and suppression test...”***

If this was a requirement it should have been specified in the tender document.

- ***“Through past experience at the Computer Unit, locally assembled machines were always problematic. Some common problems that occurred included:***

HD failures;

PCs built with different components, hence compatibility problem;

Noisiness;

Very unstable performance mainly caused by unsigned drivers.”

This claim could not be substantiated as, prior to 2004, Enemalta had no mechanism to track amount of calls/incidents on desktop machines. Additionally, “locally assembled machines” is a broad term and past experiences with certain local suppliers should not impinge on other suppliers.

- ***“In our tender we stated that availability of parts must be of five years. It is very difficult for locally assembled PCs to ensure that the same part is available.”***

This claim could not be substantiated as, prior to 2004, Enemalta had no mechanism to track this kind of information.

It is possible that due to the volumes of machines sold, international manufactures may test their machines to a greater degree than local assemblers could do. However, the Corporation could not at the time substantiate the claims listed above and the tender document did not require standards (such as ISO) which could have been used to ensure the quality of the machines being procured.

6. GENERAL FINDINGS

With respect to part (ii) of the Terms of Reference, i.e. Possible Involvement by Chairman in the Procurement Procedure:

We have found it more logical, and therefore convenient, to split the second part of the terms of reference in its two underlying constituent parts. First, to establish the nature and the extent, if any, of the Chairman’s involvement; and second to establish, as far as this can be done, whether any such involvement in the various interpretations of this word constituted a breach of ethical conduct under published codes of ethics applicable to persons in similar positions.

It does not result to this Office that there has been any *a priori* evidence of wrongdoing on the part of the Chairman in this affair; he denies it categorically and, indeed, the articles in the media never alleged any; so we must assume that “involvement” as used in the terms of reference includes also the involvement of a Chairman who, being nominally responsible for the general direction on policy matters of a Corporation, cannot but be “involved” in all and every activity of the Corporation for which he imparts a general direction in matters of policy. We think it is prudent, proper and in keeping with equity

and fairness to register here this fine distinction. There are thus two aspects of involvement - an active and a passive one and in this report we have considered both.

Involvement beyond one's control is not to be confused with active premeditated involvement of the type that breaches ethical or professional standards. And when it comes to something like ethical behaviour, in our view, it is how someone acts or reacts, dissociates or associates himself that ultimately determines the outcome. The Chairman of Enemalta Corporation has consistently and repeatedly denied he had anything to do with procurement procedures directly or indirectly - and this statement was not contradicted by the procurement officers at Enemalta.

It may be true that the Chairman may have only disclosed his "interest" *post factum*, which may have been an oversight on his part, or he might not have been aware that the possibility of a conflict of interest existed or might have arisen. However, in our view, the gravity or seriousness in such cases is best weighed by the existence or otherwise of proofs of acts or omissions of material significance that directly put such matters in question.

Being in the chair with a possible conflict of interest is not itself proof of involvement as already stated. What is ultimately of fundamental importance in such cases is that such interests are never allowed to interfere with the fiduciary office held; that persons in fiduciary positions keep their undivided loyalty to their Minister in public matters as the overriding factor; and that they materially obtain no favour by reason of the power or influence attached to their office.

The National Audit Office has found no evidence suggesting or supporting any theory that the Chairman used his influence to subvert or obtain unfair or undue advantage for himself or other parties in this matter.

7. GENERAL FINDINGS

With respect to part (ii) of the Terms of Reference i.e. Ethical Considerations arising out of this Case:

7.1 **The advantages of public contracts over departmental contracts not sanctioned by Ministerial approval.**

One can have an idea of such advantages by referring to Regulation 5 which spells out the functions of the Director General Contracts and at Regulation 9 and the Sixth and Seventh Schedules of Legal Notice 70/96 which deal with particular characteristics of the Public Contracts Committees, the Special Committees and the Procurement Committees. They share one thing in common: the legislator's intent through comprehensive provisions to apply very stringent controls (most particularly the exclusion of insiders from Evaluating or Adjudicating Boards) in contracts costing in excess of Lm20,000 - irrespective of whether the contracts are publicly or departmentally executed. Such advantages include:

- i. wider publicity of tender at all the processing stages in real time;
- ii. lower price for same quality due to larger orders;
- iii. higher surveillance due to a more formal environment;
- iv. greater transparency: bids are opened and discussed in public, reasons and motivations are given in public, and there is access to an appeal procedure;
- v. less likelihood of conflicts of interest occurring therefore perceived as adhering more to professional ethics;
- vi. better protection for purchaser/procurer's interests and from public criticism;
- vii. greater pool of expertise available on tap;
- viii. mechanisms ensure that appointees on adjudication boards are free from conflicts of interest and seen to be such publicly; and in particular that they are never chosen from among insiders;
- ix. quality assurance procedures.

In pushing forward on its own and procuring the PCs internally, Enemalta Corporation demonstrated a certain lack of judgment and due consideration in the proper protection of the Corporation's projected external image. Even with the best of good intentions, things must not only be done in the right ethical manner, but equally important they must be seen to be done so in order to avoid ambiguities and polemics. Even if the people acted with the Corporation's best interests at heart, apart from breaching procurement regulations, albeit with no intention to defraud, the way the matter was conducted and handled helped arouse suspicions about possible ulterior motives rather than dispel them. But the mere fact that financial regulations were not observed is not to say that ethics were actually breached.

Beyond the published Code of Ethics, the Public Service (Procurement) Regulations (Legal Notice 70/96) itself lays emphasis on the avoidance of possible breaches of ethical behaviour, where conflicts of interest may exist, by incorporating certain provisions that affect officers carrying out specific functions under those Regulations. But in regard to possible conflicts of Chairpersons of public corporations the regulations are silent. Holders of these offices are subject to published Codes of Ethics published by the Office of the Prime Minister.

With regard to the question of ethics, NAO consulted the Code of Ethics for Board Directors in the Public Sector published by the Management and Personnel Office. In our view, situations involving conflicts of interest can relate to both ethics and accountability, so in the interests of objectivity, we had to limit our examination to what the relative published codes have to say about the duties and obligations relating to that subject, and to consider whether those guidelines were in fact observed or not.

In the first place "possibility of a breach" is not an actual breach. Possibilities are always there and can never be entirely excluded. The Chairman had to be aware at the time of the possibility of a conflict of interest arising. If he was, he would then have been ethically obliged under the Code of Ethics to disclose this to his Minister and not take part in any Board Meeting that deliberates on the matter. The act of disclosure is bringing the fact into public domain and signifying the intention not to act covertly. It proves one's loyalty and good intentions by standing aside and leaving it to others to judge whether one's situation was incompatible with his duties or not. This is usually followed in practice by actually refraining from participatory or decisional action in the matter. If Enemalta's Chairman knowingly did not disclose such a possibility and chaired meetings with exercising decisional powers in the matter, then such behaviour or

action would appear to have constituted a breach of the guidelines in the ethics code. However, this Office found no evidence - documentary or otherwise - on the basis of which one could legitimately conclude that these things really did happen.

8. CONCLUSIONS AND RECOMMENDATIONS

The established procedure for Category C contracts strictly admits no insiders to sit on Adjudication Boards, be these public or departmental (that is set up by written ministerial approval). The contract under review - which in effect amounts to a Category C contract - was in fact evaluated and adjudicated departmentally (set up without ministerial approval) by a Board composed entirely of insiders (i.e. Enemalta personnel).

There is no reason to believe, on the other hand, that procurement officers at Enemalta Corporation were unaware during the preparation of the tender document (and therefore well before the call) that the initial quantities on which the estimated cost of the tender was based would not have sufficed to cover the actual needs of the Corporation for new computers. The fact that they knew that the quantity could fall short of actual requirements is illustrated by the insertion of a special condition at page 18 of the tender documentation to the effect that quantities actually contracted for could be increased within a period of six months.

Enemalta seems to have been equally aware of the Public Service (Procurement) Regulation 11c which stipulated the limit (Lm20,000) in excess of which public procurement through the Director General Contracts would have to be resorted to.

A close reading of the Regulation reveals the intention of the legislator as consistently disallowing and prohibiting the adjudication of contracts by insiders when costs exceed Lm20,000 under any circumstances: and this evidently on the premise that involvement by insiders would be likely to raise doubts on their proper unhindered capacity to carry out their duties and act with the desired degree of freedom, objectivity and independence. This thesis is borne out by Regulation 11b proviso envisaging the establishment of procurement committees sanctioned by the Minister where the presence of insiders is expressly forbidden.

Even if procurement officers at Enemalta had chosen to apply to the Minister to keep the contract departmental, notwithstanding the fact that it exceeded the limit or threshold set for departmental contracts (something they could well do before the call was issued), the Minister would still have been obliged to appoint independent persons on a Special Adjudication Board (referred to in Regulation 11 and the Seventh Schedule as "Procurement Committees").

This Office notes that Enemalta Corporation did not ensure that all its procurement officers were sufficiently knowledgeable and well-versed with regard to regulations that limit their powers. In our view, this is a matter that should be given top priority and detailed and clear guidelines drawn up, published and distributed among procurement officers across the public sector instructing them about the importance of being vigilant in complying with laws and regulations governing the tendering process.

With regard to the question of planning, it appears extremely likely that Enemalta somehow suspected that the number of computers needed would have exceeded the initial order. Incidentally, this Office did not find any plans outlining the Corporation's requirements prior to the publication of the tender. To embark on activities of a certain scope and magnitude that are not exactly of a routine type calls for some preparatory work in an orderly fashion. In such cases, one expects the first move to consist of preliminary or exploratory internal scoping study followed by a motivated report which comes up with proposals and defines the type, number and distribution of computers required with realistic needs duly and reasonably quantified against financial implications. This Office did not find anything resembling this exercise on record. The fact that this is missing is indicative of lack of coordinated planning. One cannot go to tender without making such preliminary written plans in consultation with all those involved. Having the benefit of the report concerning one's material requirements, one would then consider how these fit the budget and the particular legal framework within which one must move. Problems are identified and solved accordingly before one proceeds and is therefore less prone to blunders and pitfalls.

8.1 Other Weaknesses identified in the Procurement System

This case exposes certain weaknesses in procurement practices at Enemalta Corporation, namely:

- i. The limits set by the Regulation 11 of the Public Service (Procurement) Regulations must be respected not simply for the sake of non-infringement *per se* but also with an eye on the reasons and principles which underpin them. To disturb the uniformity of the procedures is to stultify the controls the legislators wanted to ensure by incorporating these restraints; namely to obviate certain undesirable consequences that the legislators foresaw could otherwise happen or occur by non-observance. The whole point, after all, for Legal Notice 70/96 was "*to limit the powers of government departments and divisions*" and, by extension, of those public organizations where procurement is regulated thereby (Regulation 4).
- ii. The case reviewed where a public corporation ends up spending around Lm62,000 on 170 machines (dealing concurrently with two suppliers) managed by a single contract whose ambit was not supposed to exceed Lm20,000 on 50 units and one supplier, not only reveals weaknesses in planning and control but a lack of coordination between the component Sections of the Corporation.
- iii. This case has shown that contract managers are evidently still not sufficiently trained and cautioned by top management about overstepping the limits of a public entity's powers of procurement.
- iv. From interviews held it was quite evident that most of those concerned did not know their exact duties and this resulted in a lack of strategic planning: there does not seem to be the right corporate culture prevailing that envisages a marshalling of priorities drawn up and laid out for discussion in a business plan, with established reporting and responsibility lines. This shortcoming is especially evident where there seem to be two separate units with competing decisional powers: the administration officers and the technical side.

Ultimately it is only reasonable that taxpayers expect all entities making use of public funds to invariably ensure that expenditure policies, procedures and decisions meet high standards of probity and financial prudence that will withstand parliamentary and public scrutiny.

APPENDICES

MINISTERU GHALL-INVESTIMENT,
INDUSTRIJA U T-TEKNOLOGIJA
TA' L-INFORMAZZJONI

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Permanent Secretary

Ministry of Finance
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Il-Ministru

19 MAY 2005

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Prime Minister and Minister of Finance

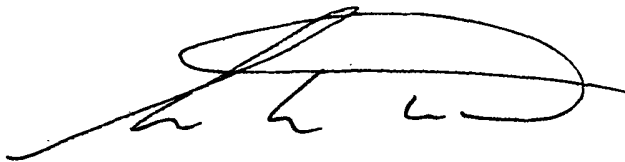
Re: Inquiry in accordance with Article 9 of the National Audit and National Audit Office Act

Reference is made to the article carried by It-Torca on Sunday 15th May 2005, wherein it was alleged that irregular practices took place in a tender issued by Enemalta for the supply of personal computers. The article also suggested that the Chairman of Enemalta Corporation had some form of involvement in the procurement process and was also in a conflict of interest situation.

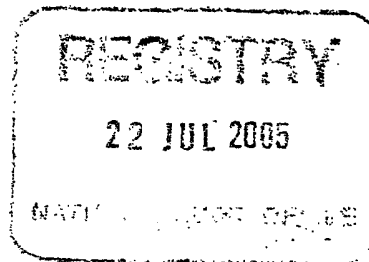
The attached declaration signed by Enemalta Chairman clearly rebuts the allegations made by It-Torca.

Nonetheless, both the Chairman of Enemalta Corporation and I, feel that since such declaration may not be enough as far as public perception is concerned and we therefore request that you consider directing the Auditor General to carry out an inquiry on the matter in accordance with Article 9 of the National Audit and Audit Office Act.

Full details and the relative documents can be obtained through the office of my Permanent Secretary, who will provide all the assistance and support that the Auditor General might require.



Austin Gatt



cc Permanent Secretary
Chairman, Enemalta Corporation

The Prime Minister



APPENDIX II

National Audit Office
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Floriana CMR 02
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Fax: (+356) 21220708
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Auditor General

Our Ref: NAO 28/2005
Your Ref:

30 January 2007

Hon. Dr. Lawrence Gonzi
Prime Minister and Minister of Finance

Tender issued by Enemalta Corporation for the supply of Personal Computers

Reference is made to the letter by the Minister for Investment, Industry and Information Technology dated 19 May, 2005 addressed to you regarding allegations of irregular practices in connection with a tender issued by Enemalta Corporation for the supply of personal computers.

In terms of Article 9(a) of the First Schedule of the Auditor General and National Audit Office Act 1997, this Office will report on:

- (i) whether the relevant procurement procedures have been complied with, and
- (ii) the involvement of the Enemalta Chairman in the procurement process and whether this gives rise to a possible breach of ethics.

J.G. Galea

EXTRACTS FROM PROCUREMENT REGULATIONS

1. LEGAL NOTICE 70 OF 1996

Regulation 11 of Procurement Procedures

11. Except where the Minister otherwise directs, the procedure for the procurement of equipment, stores, works or services shall be the following:

(a) (i) equipment, stores, works or services **costing not more than five hundred liri** may be procured departmentally either after obtaining quotations or direct from the open market at the discretion of the Head of Department taking into consideration the amount involved, the urgency attached to the procurement and restrictions of choice and availability;

(ii) equipment, stores, works or services **costing over five hundred liri but not more than one thousand liri** may be procured departmentally after obtaining quotations;

(iii) equipment, stores, works or services **costing over one thousand liri but not more than two thousand five hundred liri** may be procured departmentally after a call for tenders, or after obtaining quotations, or from the open market after taking into account the amount involved, the urgency attached to the procurement and restrictions of choice and availability, as may be approved by the Minister responsible for that department, or by the Parliamentary Secretary, the Permanent Secretary or the Head of Department as may be delegated by such Minister;

(iv) purchases of the same or closely similar material in different lots under subparagraphs (i), (ii) and (iii) during a period of six months shall not exceed a total value of ten thousand liri;

(b) equipment, stores, works or services **costing more than two thousand five hundred liri but not more than twenty thousand liri** shall be procured after a departmental call for tenders. Such tenders shall be opened by three senior officers of the department: Provided that the Minister, by written direction, may allow limits higher than twenty thousand liri in the case of particular departments and may authorize, as and when he deems appropriate, the setting up of Procurement Committees as provided for in the Seventh Schedule.

Provided further that the Minister may allow variations, penalties and remissions, in respect of such contracts, to be approved by the Minister charged with the responsibility for that department, who may delegate his authority to the Parliamentary Secretary, the Permanent Head, or the Head of Department:

Provided further that the Head of the Department shall publish in the Government Gazette all awards of such contracts, including variations outside the limit of the tender conditions, within four months after they are awarded;

- (c) equipment, stores, works or services **costing more than the limits set out or established under paragraph (b)** shall be procured after a public call for tenders issued by the Director.

2. FOURTH SCHEDULE (Regulation 5(2)(m))

Variation Orders

1. In all cases where approval for variations orders is required, it is to be sought from the Director before a commitment is made by the department or public organization with the contractor.
2. When requesting such an approval, the department or public organization shall present a document specifying the background to the cause of such a variation, the effect on the total cost of the tender and any effect on the recurrent expenditure that will ensue.
3. When granting or refusing such a request for variation, the Director shall specify his view as to whether such a variation could have been avoided and the procedure to be followed in the future by the department or public organization to avoid a recurrence.
4. The Director is to keep a full record of variation requests, including the name of the contractor involved and details of the documents specified in paragraphs 2 and 3.

3. FIFTH SCHEDULE (Regulation 8)

Members of the Contracts Committees

- (a) The Committees shall be composed of the Director of Contracts, who shall be, *ex-officio*, the Chairman of the Committees, and of four to ten members who appear to the Prime Minister to have the relevant qualifications or experience.
- (b) The Prime Minister shall also appoint persons from among the staff at the Department of Contracts to act as secretaries of the Committees as may be directed by the Director. The secretaries shall not be members of the Committees and may not vote thereat.
- (c) During the Chairman's absence or inability to act as Chairman, or during any vacancy in the office of the Chairman, the Minister may appoint an officer from among the most senior of officers at the Department of Contracts to act as Chairman of the Committees, to exercise all powers and perform all the functions of the Chairman.
- (d) A person shall be disqualified from being appointed to and from remaining a member of a Committee if he -

- (i) is a member of the House of Representatives; or
 - (ii) has such financial or other interest as is likely to prejudice the discharge of his functions as a member of the Contracts Committees.
- (e) A member of a Committee may resign his office by letter addressed to the Prime Minister.
- (f) A member of any Committee shall disclose the nature of his interest at the first meeting of the Committee after the relevant facts have come to his knowledge, such disclosure shall be recorded in the minutes of that meeting of the Committee and the member having an interest as aforesaid shall withdraw from any meetings at which such contract is discussed.

4. SIXTH SCHEDULE (Regulation 9)

Functions of the Contracts Committees

A Contracts Committee shall:

1. advise on all matters relating to public contracts, as well as on public procurement of materials, works and services on its own initiative or on specific issues relating to its functions which may from time to time be referred for its advice;
2. evaluate tenders submitted as well as reports and recommendations made thereon by the respective departments and public organizations and make definitive recommendations for the award of tenders ensuring that the best value for money at the lowest possible cost is attained. In this regard, due consideration shall be given to -
 - (i) the final cost including financing costs to Government or to the public service (procurement) organization, and
 - (ii) the impact of each offer on the recurrent expenditure of Government or the public organization;
3. report any irregularities that may be brought to its notice or that may be detected in the tendering process and make recommendations thereon to the Minister charged with responsibility for the department or public organization concerned;
4. deal with matters which, according to the contract, have to be referred to the Contracts Committee, and hear and determine disputes between departments or public organizations as the case may be, and contractors, arising out of public contracts; and
5. formally investigate complaints concerning public contracts and procurements and make recommendations thereon.

In such cases the Chairman of the Contracts Committee shall be empowered to call witnesses (who may be asked to confirm their testimony before a Commissioner for Oaths) and to engage non-Committee members to assist in the investigations.

5. SEVENTH SCHEDULE (Regulation 11 (b))

Procurements Committees

1. The Minister may authorize the setting up of Committees, to be as Procurements Committees, in respect of departmental tenders whose estimated value exceeds Lm20,000.
2. Each Procurements Committee shall be composed of the head of the department, or, in his absence, an officer appointed by the Minister from among the most senior of officials at the department effecting the purchase, who shall be, *ex-officio*, Chairman of the Committee, and of not less than four members appointed by the Minister, none of whom shall be performing duties at or members of the staff of the department effecting the purchase.
3. The provisions of regulations 6, 8(2), (3) and (4) and (14) and of the Fifth and Sixth Schedules shall apply *mutatis mutandis* to the setting up and the functions of each Procurements Committee, its Chairman and its members.

6. EIGHT SCHEDULE (Regulation 13)

Separate Packages in Tender Offer

The Director of Contracts shall, on all tenders with an estimated value of over Lm250,000 or, at his discretion, on tenders of a lower value -

1. direct that one of the tender conditions provides that bid offers shall only qualify for consideration provided they include in separate packages:
 - i. Guarantees required by the tender, duly executed; Adequate information and certifications regarding the tenderer; and Terms of delivery and execution.
 - ii. Technical specifications.
 - iii. Financial consideration including the price for schedule of the bills of quantity, financing arrangements and terms of payment.
2. In the process of adjudicating the tender, the packages for all tenders shall be opened in public and in the sequence enumerated above. When, at any stage, any tenderer fails to comply with the tender specifications, the remaining packages in his tender offer are to be discarded unopened.
3. Any discarded tender is to be given publicity in the Department of Contracts and the affected tenderer is to be informed of the decision within two working days of its publication.
4. A request for a review by the affected tenderer must reach the Director within three working days from the date of publication of the decision and such request must be accompanied by a deposit of 0.5% of the estimated tender value, which deposit shall only be refundable if the Director of Contracts finds in the tenderer's favour:

Provided that the deposit in no case be less than Lm250 or more than Lm25,000.

5. A review is to be effected by the Contracts Committee involved in the adjudicating process of the relevant tender before the next stage of the adjudication is started.

APPENDIX IV

A CHRONOLOGY OF KEY EVENTS LEADING TO THE ACQUISITION OF NEW PERSONAL COMPUTERS BY ENEMALTA CORPORATION

| Date | Action |
|-------------|--|
| 19/02/04 | Information Systems opens file for the Supply of Personal Computers and specifications are prepared. |
| 01/04/04 | First Request by Enemalta IT Section for the purchase of fifty (50) personal computers. |
| 16/04/04 | Tender is published. |
| 06/07/04 | Report by the Enemalta Tender Evaluation Committee (Adjudication Board). |
| 16/08/04 | Tender Sub-Committee approves Tender Evaluation Committee's recommendations. |
| 16/09/04 | First Letter of Acceptance issued by Enemalta to FGL Information Technology Ltd. |
| 16/09/04 | First Letter of Acceptance issued by Enemalta to Merlin Computers Ltd. |
| 22/09/04 | FGL Information Technology Ltd requests Enemalta's approval for the increased price of computer monitors by Lm5 to reflect Eco-Contribution. |
| 01/10/04 | Approval is given for this request. |
| 15/12/04 | Second request by Enemalta's Chief Information Officer for the purchase of an additional 120 personal computers. |
| 23/12/04 | Approval is given for this request. |
| 11/01/05 | Second Letter of Acceptance issued by Enemalta to FGL Information Technology Ltd. |
| 11/01/05 | Second Letter of Acceptance issued by Enemalta to Merlin Computers Ltd. |
| 15/05/05 | First article on the case appears in the media. |
| 19/05/05 | Letter by Minister Austin Gatt to Prime Minister attaching declaration by Chairman of Enemalta Corporation. |
| 22/05/05 | Second article on the case appears in the media. |
| 22/07/05 | Letter by the Permanent Secretary, Ministry of Finance informing Auditor General of the Prime Minister and Minister of Finance's directive, in terms of Section 9 of Cap. 396 of the Laws of Malta, to conduct an inquiry into the matter. |